



Exponential-e Ltd is a fixed-line telecommunications company with a focus on delivering highly innovative services, based on Next Generation Network architecture, to medium and large enterprises. We have a metropolitan area network in London, including the proposed CELA region, and a UK national network. We do not possess infrastructure of our own and are wholesale purchasers from BT and other operators.

## **Introduction**

Exponential-e has read the Business Communications Market Review and we have responded to your questions in detail below.

One general comment we would like Ofcom to look at for all of these reviews is the level of work that they are likely to cause for telecommunications companies. We have seen a number of consultations being published in the last few months each of which require significant resource to read, consider and comment. Whilst this is challenging for all companies, as regulatory resource is rarely extensive, it is particularly onerous for smaller companies such as Exponential-e. We would ask that Ofcom find ways to better programme the publication of consultations in line with the level of resource that the market actors can provide and to improve quality, reduce size and simplify the structure of consultation documents.

## **Response to Detailed Questions**

Q1 – Do stakeholders agree with our proposed retail market definition? In particular, do you agree that separate markets continue to exist for traditional interface and alternative interface retail leased lines?

Q2 – Do stakeholders believe that there is evidence that might support an alternative view?

Broadly we agree with Ofcom's conclusions but disagree in two respects:

1. The failure to include Ethernet in the First Mile copper line services.
2. That there is no chain of substitution from TI to AI services.

We consider that the failure to include the 'Ethernet over Copper' service which will enter the market in the next few months, given BT Wholesale's declared plans,

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represents a flaw in the market definition. We would ask that it be included in the appropriate category as we consider that it would exist in a chain of substitution with SDSL, indeed it is our opinion that it is likely that it will wholly replace SDSL and to a substantial extent replace 2Mbps (E1) PPC. This is particularly of concern as it may make your regulatory remedies for SDSL null and void.

We believe that if a business grade service wrap is provided for the 'Ethernet over Copper' service it will be able to act as a substitute for SDH based leased lines under a SSNIP. This would suggest that the demarcation between AI and TI services, which we argue below is already less than clear, could rapidly decrease within the term of this market review.

It may be that Ofcom has drawn a conclusion that if a significant business market exists for the 'Ethernet over Copper' service then either the CP's will self-provide via unbundled local loop or the xDSL LLU Operators will be drawn to offer services to this market because the cost of entry, when they already have presence at a significant number of exchanges, would be sufficiently low. It would however be wrong to draw this conclusion for the following reasons:

1. Business users of Ethernet over Copper services are looking for national coverage and although the LLU Operators are present in some key areas they would leave a substantial proportion of the UK un-served. This means that the only provider that is able to offer national coverage is BT. This is evidenced by the fact that BT has a 90% market share for existing business grade ADSL services.
2. The LLU Operators are currently focused on the domestic consumer market and it would involve substantial cost and process change to enable them to enter the business market with its requirement for a more sophisticated service wrap, rapid support and fault finding.
3. The LLU Operators are focused on delivering their domestic consumer services via an xDSL technology. Ethernet over Copper is an entirely different technical offering which would not benefit from any sharing of the existing xDSL infrastructure or technology skills. It would therefore distort the strategic focus of these companies and they are highly unlikely to enter this market as it could reduce their success in their current strategy.
4. The broad national coverage required by business users means that a CP serving a business user will initially only receive a small number of orders for many of the regional exchanges. This level of orders would be too small to justify self-provision of Ethernet over Copper via an unbundled local loop. The only provider who would see sufficient aggregate volume to justify the provision of service to these regional sites is BT. If the CP's were able to support those initial orders via an Equivalence of Input BT wholesale offering then the likelihood is that over time sufficient orders will establish in many locations to justify a subsequent unbundling by the CP, stimulating deeper competition.

However the current plans from BT do not show an intention to provide a wholesale service on a national basis, which would replicate one of the original failures of the SDSL service. We are concerned that if the product is not offered at a competitive price point on an Equivalence of Input basis then the service will fail to achieve its market potential, again replicating one of the failings of the SDSL service in the previous review period. We would therefore ask that a wholesale variant is provided nationally on an Equivalence of Input basis through Openreach with reasonable, cost

oriented and price controlled terms, because it has the potential to stimulate the provision of a nationally available alternative to low bandwidth TILAP services and potentially a road to the creation of a competitive retail market at this level.

We agree that currently AI services do not appear to effectively work to limit price changes in TI service but believe that a clear trend exists for customers to move from TI to AI services. The SSNIP test condition uses a small price change to establish substitution and we would accept that such a change is unlikely in its own right to cause substitution from TI to AI services, currently, because of the high switch over costs. However our experience is that customers are moving from TI to AI services in increasing numbers but are evaluating the benefits of switching when set against existing depreciation of capital equipment and any costs in terminating current contracts. AI services are rapidly maturing to offer all of the quality of service features required to replicate or improve upon TI type services and during the time of this market review we expect to see a significantly improving the benefit side for this decision. We would therefore ask that Ofcom specifically notes this dynamic in its analysis so that due regard is taken when judging the effects of any proposed market remedies to ensure that they do not create artificial market substitution effects that may benefit one or other technology.

**Q3 – Do Stakeholders agree with our proposed approach to geographic market definition?**

Yes in general but as we will argue below there may be a requirement to carry out a more granular analysis on an area before making a final determination to verify that postcode level views are not averaging out areas of competitive lock out.

**Q4 – Do stakeholders agree with our proposed retail geographic market definition?**

Yes

**Q5 – Do stakeholders agree with our proposed wholesale product market definitions? In particular do you agree with Ofcom that i) as separate market now exists for high bandwidth AISBOs, and ii) the very high bandwidth TISBO market now includes circuits at bandwidths above 140/155 Mbps?**

Yes subject to inclusion of business grade Ethernet over Copper services as discussed above.

- i) Yes this is true from our experience
- ii) This is not a market we compete in so we will not comment

**Q6 – Do stakeholders agree with our proposed wholesale geographic market definitions? In particular do you agree with Ofcom that a separate market now exists in the UK for high bandwidth TISBO's in the Central and East London Area (CELA).**

We broadly agree with geographic definitions however we are concerned about CELA definition of 3 operators within 250m of business because it does not necessarily

demonstrate sustainable actual competition; merely the technical possibility of some competition.

The definition is subject to the assumption that a radial distance of 250m from customer site to POP makes it possible to provide a reasonably competitive alternative circuit. However we do not believe that this is a reasonable assumption because:

1. The cost is determined by the actual route taken and that is affected by the obstacles (rivers, railways, buildings) and details of the arrangement of streets which results in widely varying costs for similar radial distances.
2. The Central London area is a complex urban zone which frequently causes long planning delays even for simple digs. Installation time is as much a factor in making a competitive offer to a business customer as cost. Significantly longer installation times would make a circuit uncompetitive in many cases.

In other EU countries this construction works factor is not so significant due to duct sharing. We can see that in the event of Ofcom determining that dark fibre unbundling should take place then the competitive position in CELA could be re-assessed – a clear argument in favour of dark fibre unbundling.

Our experience of the current level of competition in CELA leads us to believe that the review methodology is not sufficiently granular to give real confidence on the determination of no SMP. In practice we usually see either Colt or BT is present in any particular building are best able to provide. An alternative quote from the other provider is only occasionally competitive.

We would suggest that in this particular area the lack of granularity in using the postcode model is averaging out significant areas of competitive lock out and that a more granular analysis is appropriate before making a final determination.

**Q7 – Do stakeholders agree with our proposed approach to SMP assessment?**

Yes

**Q8 - Do stakeholders agree with our assessment of SMP in the retail low bandwidth market in the UK excluding Hull area? In particular do you agree with our assessment that regulation in this market is still required for the time being?**

Yes to both.

**Q9 – Do stakeholders agree with our assessment of SMP in wholesale TISBO markets in the UK excluding the Hull area?**

Generally we agree but we are concerned with the CELA definition. In practice we do not see a significant level of wholesale competition in this area with our planning decisions being based on who already has access in a particular location. The cost and time to install a second provider circuit into a building is usually so great that it is not viable to propose a solution with any other operator than the incumbent

infrastructure owner. We do get requirements to provide using an alternative provider but these are almost always driven by business continuity imperatives that mean a customer is willing to accept the very high cost and lengthy delays of initial circuit install. Even in these cases the market is so clearly a Colt/BT duopoly that the decision is usually straight forwardly to provide the other one of the two operators. As such our experience does not really support a truly competitive market in CELA.

We are also concerned about the effect of an unregulated market for a small geographic region in TISBO alongside a regulated national market for AISBO. We earlier commented that the definition of the product market should take care with the substitution behaviour of the market between AI and TI services. We believe that there is a risk of arbitrage between a national market in AISBO and a unique regulation in CELA TISBO which may cause market distortion.

The unregulated market TI services provided by both Colt and BT are clearly sunk assets which are expected to have a short life before being replaced by BT's and Colt's AI services. This is self-evident from these two providers' investment roadmaps that are currently published and in the public arena. It is quite possible that the TI competition in CELA could achieve very low cost points that are intended to slow substitution by AI services until these providers have fully launched their AI services. This could create a market distortion because other AI providers might not be able to compete so effectively using underlying, regulated, wholesale inputs which may prevent the competitive flexibility needed to meet such a market challenge.

We would therefore ask that Ofcom makes a proper assessment of the various competitive scenarios that this unbalanced regulation of TI and AI services may bring about and either modify its determination regarding TI in CELA or ensure that a flexible regulatory framework is put in place for AI services to ensure that a rapid response is possible in the event of this type of market distortion occurring.

**Q10 – Do stakeholders agree with our assessment of SMP in wholesale AISBO markets in the UK excluding the Hull area?**

Yes

**Q11 – Do stakeholders agree with our assessment of SMP in the wholesale trunk segments market?**

Yes

**Q12 – Do stakeholders agree with our assessment of SMP in the retail low bandwidth market in the Hull area?**

Yes

**Q13 – Do stakeholders agree with our assessment of SMP in wholesale TISBO markets in the Hull area?**

Yes

**Q14 – Do stakeholders agree with our assessment of SMP in wholesale AISBO markets in the Hull area?**

Yes

**Q15 – for those markets where we have found no SMP and propose to deregulate, do you agree with Ofcom that the evidence supports the finding of no SMP?**

Yes in general but with the exceptions that we have already discussed earlier.

**Q16 – Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale TISBO markets in the UK excluding the Hull area?**

We are concerned that the obligations to provide access and to not unduly discriminate will not be sufficient to remove the bottleneck on technical space because in some key locations we see that, even when efficiently used, there is too little space available. However many locations with technical space also provide significant levels of office space that may be converted to technical space or these locations may have the potential to be developed into a larger building and we would want the regulation to ensure that these options were required to be examined for potential to expand technical space.

We believe that it is essential that the regulatory obligations clearly require BT to make all reasonable commercial endeavours to build such additional technical space. Where they believe it is not commercially reasonable to expand the space they must publish their assessment and give the reasons for any decision.

We welcome the offer of a separate consultation on ECC's and other service charges as these are the cause of many complaints from our customers who would like to see a better service approach.

**Q 17 – Do Stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale low bandwidth AISBO market in the UK excluding the Hull area?**

Whilst in most respects we agree we have a number of concerns.

As we have argued earlier we would wish to see Ethernet over Copper brought in to the scope of the review and the subsequent remedies. In particular we would like to see a clear requirement for the current SMP low bandwidth AISBO providers to offer an Ethernet over Copper service throughout the UK under equivalence of input on a cost oriented and charge controlled basis. Without this obligation we believe that the regulatory remedies could be bypassed and become ineffective as Ethernet in the First Mile services will effectively substitute low bandwidth TI services such as SDSL and 2Mbps (E1) PPC.

We welcome Ofcom's commitment to provide a consultation on the Project Orchid services however we are concerned that no firm date for the consultation has been given. We would urge that this be given high priority and that a firm commitment on the date for consultation and final determination be published. We believe it is essential that Ofcom rapidly gives the industry certainty about the regulatory treatment of aggregated backhaul rings (Project Orchid). The failure to provide a proper treatment of this capability will potentially inhibit the depth of retail competition because it will result in inefficient backhaul network use by Openreach with a consequently high wholesale input cost being passed on to CP's. Further more the ring architecture of the Project Orchid approach has the potential to bring a smoother glide path from bundled wholesale circuits e.g. WES to unbundled equivalents e.g. WES LA by allowing the backhaul cost to be shared between all of the unbundled exchanges on the ring. This could enable effective competition through unbundled services in regions outside of the main urban areas and therefore reduce the poverty of consumer choice in these currently underserved regions.

Your assessment that the issue of Quality of Service may be left with the SLA/SLG consultation is not appropriate. That consultation was conducted in order to remedy the inadequacy of compensation levels for the existing service level measures provided by Openreach for WES and BES. However the regulatory concern going forward is not just to preserve and make meaningful the existing measures but to ensure that the correct measures are provided in the first place to guarantee adequate quality of service. For example, current WES and BES services do not provide an availability level for service, only a time to fix in the event of failure. However consumer businesses in light of their own needs, good practice standards, industry regulations, public policy (including civil disaster planning) and even legal requirements are demanding the guarantee of availability. CP's clearly are disadvantaged when required to provide this because no such availability measure is provided to them by Openreach.

We would therefore ask that Ofcom review its position to include a requirement to provide measures and associated guarantees that reflect the most important quality of performance aspects of any given service. We believe that this properly reflects Ofcom's duty to the UK business consumers.

We are concerned at the degree to which Ofcom has relied upon the undertakings to provide a competitive downstream market. Whilst we don't disagree with the value that the undertakings have provided through the EOI provision of services our experience has shown that the SMP of Openreach in this area still shows itself in the form of inflexible negotiating of contracts and terms as evidenced by the recent action by CP's to resort to an Ofcom adjudication in regard to SLA/SLGs. This position is directly caused by Openreach having SMP because they know that we have no alternative but to accept their terms as there are no other significant alternatives.

We are concerned about Ofcom's proposed removal mandatory transparency obligations. Due to the lack of equal power to negotiate BT may not be incentivised to offer good notice periods particularly in areas where the principle early entrants providing a downstream product will be CP's rather than BT Retail. Dispute resolution mechanisms such as CMM do exist for contracts but as they have not been used we lack confidence that they will of themselves be sufficient to prevent SMP affecting the outcome. We believe that a different remedy should be proposed.

We support the imposition of charge controls to incentivise efficient development of AISBO however as we have earlier explained the nature of the relationship between TISBO and AISBO in the CELA region will require carefully judged pricing and ability to rapidly change pricing to counter possible market distortion.

We welcome the consultation on charge control for AISBO and would like to raise the issue of double recovery created by the recent changes to Openreach Ethernet pricing and ask that the appropriateness of this be specifically addressed in that consultation.

**Q18 – Do Stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale trunk market?**

Generally we agree however we would seek early clarification about the status of Project Orchid, access backhaul and 'trunk like' elements of the NGN architecture so that we can have certainty about the regulatory treatment for the future products that will eventually replace SDH backhaul and trunk elements. The industry requires certainty on wavelength and dark fibre as well as various aggregated packet transport services. Without such certainty investment and product developments that will benefit the business consumer will be delayed.

**Q19 – Do stakeholders agree with Ofcom's assessment about the appropriate regulatory option and our proposed remedies for the retail low bandwidth traditional interface market in the UK? In particular, do you think that Ofcom should accept BT's proposed voluntary undertakings that it will continue to supply new analogue and sub-2Mbit/s retail circuits until 2011 or earlier if, subject to industry agreement and consent by Ofcom, the underlying platform is closed at an earlier date; that it will not increase its prices for analogue services more quickly than the rate of inflation (RPI-0%) for a period two years following the publication of the LLMR statement i.e. from 2008 to 2010; and that it will commit to a further two-year cap, the level of which would be agreed with Ofcom prior to 2011?**

Yes but with reservations about a 4 year sunset clause that is dependant on the lack of a market review. We would request that Ofcom includes a process prior to the execution of the sunset clause where a notice is sent to interested parties and they are given an opportunity to make a case for a stand-alone review if there is no market review before the sunset happens.

**Q20 – Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale TISBO markets in the Hull area? In particular, do you think Ofcom should accept KCOM's proposed voluntary undertaking not to increase the prices of its wholesale TISBO services by more than RPI+0% over the next four years?**

Yes

**Q21 – Do Stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale AISBO markets in the Hull area?**

Yes but we would prefer Ofcom to maintain at least a specific regulatory statement requiring that in addition to cost orientation model the output pricing should be in line with the BT benchmark pricing.

**Q22 – Should Ofcom investigate further the case for introducing a dark fibre remedy by undertaking a market review of the relevant market? If such a review were to be undertaken, is it likely that BT or any other CP would be found to have SMP in that market? And if SMP were to be found, what would the pros and cons of requiring the dominant provider to make dark fibre in the access network available to third parties?**

We believe that Ofcom should further investigate the case for introducing a fibre remedy. However we would particularly emphasise caution to prevent a false outcome from any such investigation in particular the definition of dark fibre should be clearly understood first to prevent a distorted picture being presented.

The presence of access fibre is a fundamental to the ability to provide TISBO and AISBO services and the current market review has found that SMP does exist in those markets. It would be illogical for there not to be SMP in the access fibre possessed by those operators. If that were the case then it would suggest that the competitors in the market were not being constrained by the high cost of creating duplicate infrastructure because they actually already possessed such duplicate infrastructure. This would be contrary to every market assessment done in the UK to date.

In the event that a dark fibre remedy was mandated we believe that the outcome would be very significantly positive. CP's are currently restricted in the level of innovation they are able to provide in services to their business consumer because they are in the main underpinned by the wholesale access service provided by the SMP Company. They only have limited, if any, self-provided access because of the high cost and long provisioning delays providing a fibre in replacement of an existing fibre service from the SMP Company. If they had the option to lease fibre access then they would have the opportunity to increase the competitiveness of their service in terms of price, quality of service, range of service options and speed of innovation. This would benefit the business consumer and enable a more competitive market that would potentially be able to operate with significantly lighter regulation.

We believe that a fibre access remedy would also lead to significant investment in fibre services in the UK. We see clear evidence to support this in France where more restrictive infrastructure unbundling – duct access – has stimulated one of the highest levels of telecoms investment in providing services over fibre in the EU. The duct sharing solution is limited because it still leaves a very significant barrier to entry due to the high cost of laying new fibre, which has meant the investment so far has been focused on high density urban areas. It is noteworthy that the two major alternative network operators in France are now asking that the regulator consider

unbundled access fibre remedies to allow this investment in competitive service offerings to continue on a nationwide basis.