



**NOTICE UNDER SECTION 155(1)
OF THE ENTERPRISE ACT 2002
Easynet Response**

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Ofcom's Notice Under Section 155(1) Of The Enterprise Act 2002

Easynet's Response

Summary

- Easynet warmly welcomes Ofcom's proposal to accept the Undertakings in lieu of a reference under the Enterprise Act
- Ofcom continues to correctly identify LLU as the main building block of a competitive telecommunications market going forward
- The ASD should ensure equivalence for LLU operators
- Equivalence for LLU requires BT to use the standard LLU and associated products, including MPFs, SMPFs, colocation and backhaul products – specifically BES backhaul for BT's MSANs.
- Easynet is concerned that the words in the undertaking don't always reflect the full details or 'spirit' of what Ofcom have explained as their understandings of the Undertakings.
- Easynet would value a detailed commentary explaining the 'spirit' of the undertakings, preferably written by BT, or at least endorsed by them
- Easynet suggests a number of areas where clarification or improvement is needed. These are detailed later in this document
- Of particular concern is the potential for BT to offer MSAN access from the ASD at some point in the future as this undermines the transparency of EoI for LLU.
- In general however, Easynet supports the Ofcom proposal

Background

Easynet is a pan-European broadband network provider offering services to both business and residential customers. Easynet pioneered the provision of high quality, innovative business broadband services using LLU.

Easynet's LLU-based wholesale product, LLUstream™, allows Communications Providers to take advantage of Easynet's LLU infrastructure and gives them a real alternative to BT's Datastream and IPStream products.

Easynet's consumer ISP, UKOnline, offers the UK's lowest priced broadband at £9.99/month and was the first to offer an 8Mbit/s residential product. UKOnline has stated that it plans to add voice and video products to its portfolio in due course.

Easynet can therefore speak with authority on how LLU can allow operators to offer innovative, higher quality and lower priced products to the direct benefit of end users.

Easynet's response should be read in conjunction with the UKCTA response. Where they differ the Easynet response should be considered to represent Easynet's views.

Market Definition

Easynet supports Ofcom's analysis of the Market as set out in Section 3 and Annex D. In particular we are pleased that Ofcom has looked at the market as a chain of supply and has considered the impact of BT's vertically integrated structure on

downstream and upstream markets, rather than simply looking at individual markets in isolation.

Features Of The Markets Identified Which Prevent, Restrict Or Distort Competition

Easynet agrees with Ofcom's analysis and its conclusion that BT's vertically integrated structure and enduring market power provides it with incentives to engage in discriminatory behaviour through the various means described in section 4. Having been involved in LLU from its inception Easynet can confirm Ofcom's analysis as laid out in Annex I.

In particular we agree with Ofcom's conclusion that competition has been delayed and deterred by BT's behaviour with respect to LLU, with the result that BT has gained a significant first mover advantage in the market. It will have taken over 6 years for BT to deliver a fit for purpose solution from when it was first required to do so via an Oftel determination in 1999. This coupled with the margin uncertainty with respect to IPstream prices has made building LLU business cases more difficult than it otherwise should have been.

At the time of writing LLU has just less than 100K lines whereas BT has approaching 4 million broadband lines. This clearly demonstrates the disparity between these two products and the level of first mover advantage enjoyed by BT

The Appropriateness Of The Proposed Undertakings

Ofcom state clearly "We have no doubt that the scale of the problem is sufficient to justify Ofcom either in making a reference under Part 4 of the Enterprise Act 2002 or, as is proposed here, in accepting instead undertakings in lieu." The alternative to the Undertakings is therefore an Enterprise Act reference and it is against this background that the Undertakings should be measured.

Equivalence of Inputs

Easynet strongly supports the proposal that Equivalence of Inputs should apply to LLU (MPF and SMPF), Ethernet backhaul and IPStream. Easynet has persistently argued that LLU and associated products (including backhaul) should be the cornerstones of equivalence.

Ofcom state that LLU will not be viable in certain parts of the country, particularly rural areas, where there is a lack of customer density, and that IP-based bitstream will be the enduring economic bottleneck in these locations.

Different operators will have differing opinions on which areas are viable and which aren't according to their own business model. This is therefore a highly sensitive issue which requires thorough analysis. Easynet welcomes Ofcom's decision to address these issues in more detail through the WBA market review.

Related to this is the cost of the bitstream product (at the metronode and MSAN) which Ofcom suggests could be 'cost based' if found to be SMP (NGN consultation

paragraph 3.49). This is of prime concern if such pricing is available in areas where LLU is viable. Ofcom should consult fully on the cost basis for the future Datastream successor product, where these costs apply, and how LLU can compete with a cost-based bitstream product (by mandating cost orientation only in certain locations for example). Easynet expects these issues to be discussed in detail in the WBA market review.

Access Services Division (ASD)

Easynet supports the principle of the ASD. The ASD, as a division run at arms length to the rest of BT and committed to Equivalence of Input for its products, has the potential to address many of the issues associated with BT's vertically integration.

As stated in our response to the previous phase of the consultation, Easynet believes LLU should be an input to WLR in order to provide transparency and allow LLU operators the ability to compete with WLR when offering voice services. It is for this reason that we believe that WLR should be sold from BTWS rather than ASD. WLR sold from the ASD 'hides' the internal LLU transaction with the result that it is not possible to ascertain whether WLR is using the standard LLU product.

Section 3.1.3 makes the point that BT will not be required to use MPF as an input to WLR, but this statement isn't explained elsewhere in the document. Easynet understands that in the short term there will be a few anomalies such as WLR not being built on LLU, but hopes that over time these will be removed. It would be helpful if Ofcom could explain in its final statement whether WLR will eventually be required to use LLU as an input (when it is provisioned using 21CN for example) and how it will decide which part of BT will sell this product and in what timescales.

Easynet notes that Ofcom point to a number of developments in both the BES and WES product lines. We look forward to working with BT on the design of these products and hope they are made available in as short a timescale as possible. To this end, target delivery dates would be beneficial.

Network, Organisational and Strategic Integration

Easynet fully supports the partitioning of BT's network with only the physical layer assets of the backhaul and access network in the ASD and the transmission layer and core network assets in BTW. The organisational structure of the ASD reinforces the separation of the ASD assets and gives a good deal of comfort that EoI for LLU will become a reality.

It will still be the case that BTW will be the ASD's biggest customer, potentially giving BTW more influence and certainly more scale. The ASD goes some way to address this, and even if BT were broken up following an Enterprise Act referral this would still be case.

Easynet are concerned that the ASD, BTWS and BTS all have the ability to develop products which allow them to compete further downstream. For example, ASD could add transmission equipment to its access lines to create a future IPstream product. There is an argument that BT Group would never allow the ASD to compete with BTRetail, but this may be an incorrect assumption. All parts of BT, including the ASD, will now be incentivised to maximise their own unit's revenue and act independently from each other. As today, business units will wish to maximise their revenue by selling higher revenue products in preference to lower cost-orientated

ones. If ASD were allowed to add transmission elements to its own products to offer downstream products this would undermine the principle of equivalence. Likewise, BTWS shouldn't be able to produce products which compete further downstream otherwise it faces adverse incentives.

Easynet believes each business unit of BT should not be able to develop its own products beyond its core business area.

If BT are unable to agree to these principles then it should be stated that BT are not able to 'cross-sell' products and operators will have to have multiple account managers, each working for different parts of BT selling their own product portfolios. This is preferable to the situation where BT is uncontrolled in reselling its own products across divisional boundaries which could undermine the whole settlement by removing the transparency that Ofcom has worked hard to ensure.

Further to this, and to allow greater transparency, Easynet strongly recommends Ofcom mandate BT to indicate for each product the following information:

- Which business area 'owns' the product
- Which business area carries out the principle Product Management function
- Which principle assets are used to produce the product and where they sit.
- How sales staff are incentivised to sell the product in different parts of BT

This will assist operators and Ofcom in understanding the incentives and corporate dynamics involved in each products and will also aid transparency in the case of a dispute.

A final example here is to consider which part of BT could sell a WLR/CPS bundle. Whichever part of the business does sell this should sell the standard WLR or CPS product from the other division rather than being able to develop its own variant.

Another factor to consider is how sales staff are incentivised to sell different products. For example, if a BTWS salesman sells an ASD product alongside a BTWS and BTS product, he should receive more commission for his own upstream product than for the downstream products he is selling on behalf of other parts of BT. If this is not the case the divisional split will not act as an adequate incentive on the various divisions to optimise their own product sets.

Likewise it is worth considering how BTRetail sales staff are incentivised and whether there are adverse incentives here too.

Finally it is also worth considering whether there should be some specific exclusions limiting the commercial activities of the ASD to only those products directly related to their core product set. For example, ASD will clearly sell essential LLU inputs such as copper lines, collocation space and backhaul, but should be prevented from selling downstream products which compete with LLU such as Datastream and IPstream (and their successors). As stated above, in order to ensure equivalence and the correct incentives it's better for other operators to suffer the inconvenience of multiple BT account managers that to lose the benefits of the divisional separation.

If ASD is permitted to sell downstream products from other parts of BT (eg ASD could resell the BTWS Datastream), it should not be able to offer its own variant, add any other value to it or charge lower prices. It would simply resell the downstream products in the same way any other operator could resell BT's products. The

question of commission and how any profit in the product is allocated will still need to be decided however.

New Management Arrangements

The Undertaking state that there will be at least two product management teams in BTW, one for SMP products and another for non-SMP but important products, with some products transferred from BTR to BTW. As suggested above, BT should indicate which products fit in to which Product Management group.

There is some confusion over whether there is a third product management function within BTW which deals with non-BTWS and non-BTS products.

It is recognised that Chinese walls built in this way are less secure than full organisational splits (as per the ASD). Easynet is more relaxed about this split than some of its competitors since we believe that the fundamental building block of networks in most areas is LLU. Since LLU is being provided at arms length by the ASD, the structure of the product management group within BTW is of less concern in LLU areas. The structure is still relevant however, as Easynet competes directly against BTWS and BTS products through its LLUstream product. BT should not be able to have an unfair advantage compared to other operators.

However, in areas where LLU is not viable and the IP-bitstream product is the enduring economic bottleneck (see above) then it is clear that the separation of the product management teams within BT is vital to the competitive environment. Ofcom needs to ensure that the right checks and balances are put in place to adequately enforce the 'soft line' between the different product managers. This will ultimately fall to the EAB to monitor so they must be satisfied such arrangements are policeable.

Easynet is pleased to see that BT are already organising their product management along the lines described in the undertakings.

Next Generation Networks

Ofcom have identified a number of areas where BT can leverage its upstream market power and vertical integration to the detriment of competition.

Easynet is concerned that any form of MSAN access or interconnect has the potential to undermine LLU investment in the same geographical area. Ofcom's 'unbundling' of 21CN elements impacts LLU operators business cases as in marginal areas it may be cheaper to use BT's MSAN related product than to do LLU themselves. Ultimately this leads to a reduction in choice of broadband platform for customers and a lack of innovation in the access layer.

Easynet's biggest concern with BT's 21CN is related to Broadband Dialtone. There are two issues related to Broadband Dialtone – provisioning time and the incremental cost of broadband.

Provisioning Time

Easynet warmly welcomes Ofcom's explicit statements that LLU operators will not be disadvantaged compared to BT regarding the provisioning and switching customers.

Incremental Cost of Broadband

BT initially justified the cost of the 21CN to the market by explaining the cost savings it will provide compared to existing legacy networks which are reaching the end of

their operational life. It offered additional benefits, but the main message presented to investors was one of payback through cost-saving.

Therefore, BT can justify the expense of the MSAN and the migration to the new platform solely on the back of cost savings for their traditional voice services. Once the customer is migrated on to the MSAN there is little or no additional cost in enabling broadband on that line. In effect their broadband services can be provided for approaching zero incremental cost.

This benefit results from BT's dominance in call origination, which is being leveraged in to an adjacent market.

BT should not be able to recover all the migration costs solely from its voice product line. There are two scenarios here; one where the customer has broadband installed before they are migrated to 21CN, and the other where the customer doesn't currently have broadband installed but may in the future. BT should not be able to recover all its migration costs from its legacy voice products and thus put itself at an advantage compared to new entrants, especially those offering broadband products, otherwise BT will have a strong advantage going forward picking up the mass-market / late adopter customers.

Furthermore Ofcom should consider whether there is any way of extending such benefits to other operators, by adjusting migration charges to take account of BT's own mass migration plans when calculating average migration costs.

Wholesale Products Prior to Retail Products

Easynet strongly supports the principle that BT must provide adequate wholesale products before it launches new retail products. These wholesale products must be made available long enough in advance to allow operators time to build their own retail products – ie simultaneous retail and wholesale product launch is not acceptable.

Ofcom should provide separate guidance on what this provision actually means in terms of timing and process. If it is to be decided on a case by case basis, Ofcom should explain their approach and give some hypothetical examples.

Finally, Ofcom should be aware of BT's ability to 'soft pre-launch' products through forward looking statements in press releases pointing to new products or price changes a number of months ahead. There have been many examples of BT behaving in this way. Such announcements have the effect of chilling the market for competitors and could be used by BT as a way of getting round any requirements for wholesale products to be available before retail products are actually launched.

No Foreclosure of Unbundled Network Access

Ofcom explain in 5.48 that BT will have to bear the costs, at its expense, of any redesign of the network required to provide products which other communication providers are likely to require – specifically SMP products and their successors.

Easynet supports this principle, though notes that the words in the Undertakings (paragraphs 11.1-11.4) allow BT significant get-out to this requirement. Simply by consulting and finding no current demand for a product it appears BT can wriggle out of such requirements. The incentive on BT is therefore to either inadequately consult

or consult in such a way that operators fail to appreciate the significance of the product.

As read, the Undertakings remove the requirement for BT to re-engineer their network, at their own cost, to support a future SMP product if they have already consulted on it in the past (11.4). This fails to take account of changing market requirements, or indeed BT's future SMP position with respect to certain products.

Equality of Access Board

Easynet welcomes the establishment of the EAB and the associated EAO. Ofcom needs to work very closely with the EAB to ensure its Terms of Reference and membership fully reflect its main function which is to police the Undertakings.

Ultimately BT needs to commit to producing a newly invigorated culture of compliance throughout its organisation from the Senior Management in the Head Offices down to the man-in-the-van on the street.

Ofcom's Conclusion

As stated above, Easynet supports Ofcom's proposal to accept BT's undertakings. As explained in the introduction to this response, Easynet would like further clarity in some areas and further action in others. These would ensure the Undertakings are workable in practice. On balance however the Undertakings appear a pragmatic solution at this time.

THE UNDERTAKINGS

As stated above, there are some areas in the Undertakings where further details need to be added to the Undertakings themselves, and/or explained in a detailed commentary text accompanying the final Undertakings. This commentary would ideally be written by either BT or Ofcom and supported by both parties. It would act as a guidance note to the main document and would be referred to in the case of any suspected breach.

General

It is not completely clear how the broadband product set fits together. It is clear that LLU will be sold by the ASD and will feed in to the future bitstream product (the Datastream successor under 21CN). It is also clear that BT Retail will buy the same standard IPstream product as other operators. What is not clear in the Undertakings is whether the future IPstream product will have to be based on the future Datastream product, or whether this IPstream product can purchase LLU directly.

It is understood that the principle is that downstream parts of BT must buy the 'most complete' input available from its own upstream business as possible, but this isn't brought out in the wording of the Undertakings. In fact, as suggested earlier, there may be real incentives on BT to load downstream products in to upstream businesses.

Following on from this, it is not completely clear from the Undertakings what the various sections of BT can and cannot buy and sell. For example, in the product stack above, where the future Datastream is in the BTWS and IPstream is in BTS,

will BTS be able to purchase LLU directly to build products or will it have to buy inputs from BTWS ?

It must be assumed that BT have to buy their own wholesale products where they exist otherwise they will run two variants of inputs and there is no incentives to make the version they don't buy as good as the one they do buy.

The worry is that BT merge their Datastream and IPstream products in to a single product which removes the intermediary bitstream market, or that ASD and/or BTW (BTWS/BTS) builds its own separate bitstream product directly using LLU. Both of these would have the effect of removing any incentives on them to run an effective Datastream product under 21CN.

BT have stated that a new version of IPstream will be built on the new Datastream product. If this is going to happen in practice then BT should be happy to have this principle included in the Undertakings.

As another example, the Undertakings state in paragraph 5.18 that SMP products which are based on access assets can be product managed, sold and supported through parts of BT other than the ASD if they stop being SMP. Again it would be helpful to have some more clarity, perhaps with worked hypothetical examples, to explain how this transfer of functions will work.

Timescales for implementation

Easynet would like to have seen quicker timescales for the implementation of EoI RFS and IBMC but understands this would not have been practical. Easynet is happy to accept the dates put forward as long as there is a strong commitment on BT to deliver against them. The compensation for late delivery goes some way to provide incentives on BT to deliver against such targets, although the financial figure itself may be too low to adequately reflect the harm caused to operators businesses as a result of any delays.

Easynet would have liked the compensation to have applied to all timescales for all systems and products, but as it is written it only applies to the RFS date for LLU and WLR. There should be similar incentives to ensure EoI applies to the new backhaul products and IPstream by the agreed deadlines.

Ofcom should particularly consider timescales for disaggregation of the various Management Information Systems, which are essential to true independence of the separate divisions

It's also important that the correct part of BT pays the compensation. Easynet believes that it should be the downstream product line (ie Datastream and IPstream) which should pay the penalties for missing the LLU EoI deadlines rather than ASD as it is BTW who benefit from the current regime by not having to buy the standard LLU product.

More generally, costs will need to be recovered for the implementation of the Undertakings (eg implementing Equivalence and the structural changes). These costs should not be borne by other operators, but BT alone as they are the ones who have benefited from their previous practices and gained first mover advantage (as detailed in the TSR annexes). Where BT has to recover costs they should not be able to pass these costs on to other operators. Instead Ofcom should make it clear

that these, and any other costs which result from future non-compliance, should be borne by BT's shareholders.

Postcode Address Matching

It's worth pointing out that the address file required by operators is BT's internal address file rather than the Post Office postcode address file. It's the inconsistencies in the BT address database rather than the Post Office postcode address file (which operators have access to anyway) which is key. Clarification of this wording is required to ensure the right address file is being provided.

Easynet is aware that BT are doing a considerable amount of work in this area and are looking forward to seeing real improvements in Address Matching going forward.

Migration

As Ofcom have identified, applying EoI to migration is important. So much so that it would be useful if Ofcom could provide a commentary on what, and when, migration products should apply, perhaps with a few worked examples, to remove any chance of this requirement being misinterpreted.

Reference Offers

It is important that operators can understand what inputs BT are supplying to itself. It is unclear how this will apply to Datastream however, as this product is not, as far as we are aware, used as an input for IPstream, or BTstream (BT's internal version of IPstream). What would be of more interest is understanding the inputs which apply to those specific products, both today and under 21CN.

Details of which products fall in to which areas and use which assets should also fall within the scope of the Reference Offers.

MSAN Network Access In the ASD

Easynet continues to have concerns regarding MSAN access products in the ASD. Such products have the potential to undermine LLU and remove the incentives to provide EoI for MPF and SMPF.

Placing MSAN access inside the ASD 'hides' the external LLU transaction which is fundamental to the incentives on BT to provide EoI for LLU. Any 'internal reference offer' or special dealing undermines this fundamental principle.

Easynet notes that Ofcom will have the final say on whether a new MSAN Network Access product should be provided by the ASD and urges Ofcom to consult thoroughly on this and consider the impact on other operators before making any decision.

ASD Human Assets

Easynet has some concern about the 'rough edges' which will occur as a result of separating field engineers and design/planning/implementation/in-life service management staff who are only concerned with access and backhaul networks from those who deal with core network activities. Easynet strongly supports the principle of separating engineers between those involved in core and those involved in access, but recognises BT will face a number of challenges in making this a reality due to their currently integrated nature.

Backhaul Principles

Easynet strongly welcomes the provisions for improved, fit for purpose backhaul and collocation products. To ensure EoI BTW should be required to use these both these products (backhaul and collocation) for its 21CN infrastructure, and be required to publish an implementation timetable. Specifically this means BTW should use the standard collocation products to house its MSANs and use BES to connect its MSANs to its core nodes. Only by buying all the same inputs as LLU operators will BT have the correct incentives to make the complete LLU product portfolio operationally equivalent.

ASD Structure and Management

This is discussed in more detail in the UKCTA response.

BT Wholesale Management and Structure

As stated earlier, Easynet has some concerns over the lesser degree of separation that exists between BTWS and BTS. This is more of a concern in areas where LLU is not viable and therefore operators are reliant upon BTWS products as the enduring economic bottleneck access.

Easynet has some concerns over how product management independence can be proven and policed, and how the different divisions interoperate, particularly with reference to the broadband product stack.

That said, in the context of the larger undertaking, Easynet is willing to accept this is an appropriate solution.

It's also worth considering whether more descriptive names or better abbreviations can be given to the various parts of BTW as there are TMAWSSN (too many acronyms with similar sounding names).

Material Differences

Easynet would value some further explanation and examples of the types of differences that would be deemed material, and those that would be deemed trivial as described in Paragraph 8.3, and the appeals process which is to be followed if operators disagree with the categorisation.

Codes of Practice

CoPs for each area of BT is a good idea. It is assumed that these CoPs will require Ofcom approval, and would be available for other operators to inspect. It would also be useful to have CoPs for BT Retail and BT Global Services to explain their position with respect to the Undertakings. For example, BT Retail need to be aware they will no longer be able to buy special products and therefore shouldn't ask for them !

NGN – No Foreclosure of Network Access

As discussed above, this section allows BT the ability to wriggle out of requirements to fund, at its own expense, any changes required to its network to correct any designed in foreclosure, if it has previously consulted on the product. This places incentives on BT to mis-consult, and does not take in to account changing industry requirements and BT's future SMP position. The consultation is relevant to *when and if* the wholesale product is required at a particular time and should not remove any potential future requirement for such a product.

NGN – Efficient Design Principle

Easynet strongly welcomes the principle of efficient design.

NGN – Eol for SMP products

Easynet welcomes the assumption of Eol for SMP products or those products which are likely to be determined as SMP. Ofcom have given two criteria as to how BT can conclude whether a product will likely be determined to have SMP in future. Whilst this might be obvious in some situations it will be possible for BT to produce products which are not direct replacements to existing products and are therefore borderline successors. Ofcom will have to make a decision on this prior to the product being launched for both Eol and Wholesale before Retail product launch.

Ofcom should also explain what 'reasonably practical' means and give some theoretical examples.

NGN – No Retail Services Launched Without Associated Wholesale Inputs

Easynet would welcome some clarification over the phrase 'sufficiently in advance'. This section also requires Ofcom to state whether a product is likely to be SMP in the future. Difficulties with this are explained above.

It will be particularly difficult to ascertain whether a product is a successor product before it is launched and therefore whether an appropriate wholesale product should have been produced.

Again, more detailed guidance in a commentary document would be useful here.

NGN – Industry Group and Dispute Adjudicator

Easynet supports any move which can speed the resolution of genuine industry complaints. Both of these initiatives have the potential to assist in this area.

NGN – Compensation Arrangements

Easynet supports BT making compensation payments to operators to reimburse them for changes required to their networks, particular where these involve physical assets which cannot be redeployed, such as fibre dug to existing exchange locations.

Current compensation activity is centred around DLE removal. BT needs to ensure that similar compensation arrangements are in place for trunk exchanges and should also take in to account other operators who are impacted by re-arrangements. Easynet for example offers a considerable amount of Third Party CSI interconnect for other operators and needs to be compensated for the change to this business going forward.

[ends]