
Consent to BT for provision of access for proof-of-concept trial

Exemption under SMP Conditions 4.1 and 5.1, Volume
7 of WFTMR Statement 2021

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1. Explanatory notes

Introduction

- 1.1 BT Enterprise is proposing to create a proof-of-concept [redacted] network. The new network will ensure the resilience of [redacted].
- 1.2 The proposed network design would involve Openreach installing a limited number of dark fibre access circuits in the market for Leased Line Access in Area 2 (LL Access Area 2). Given that Openreach does not currently supply dark fibre in Area 2 and – beyond this proof of concept – does not propose to do so, BT has requested that Ofcom consent to the supply of these circuits under SMP Conditions 4.1 and 5.1 set out at Volume 7 of the Wholesale Fixed Telecoms Market Review 2021-26 (WFTMR)¹.

Our assessment

- 1.3 We understand that the proposal is based on BT Enterprise supplying, Openreach provided, dark fibre to a maximum of four [redacted] premises, potentially in LL Access Area 2. This proof-of-concept trial is scheduled to last for 18 months and BT Enterprise is currently not in a position to provide its own dark fibre (e.g. based on self-build using Physical Infrastructure Access – PIA).
- 1.4 If Openreach provides network access in the form of dark fibre in LL Access Area 2, then it is required to provide it to all access seekers on equivalent terms. BT has therefore asked for Ofcom’s consent under SMP Conditions 4.1 and 5.1 for this proof-of-concept trial on the following grounds:
 - a) The trial is small-scale (maximum of four premises)
 - b) The trial is limited duration (scheduled to be 18 months)
 - c) [redacted] the end user is keen to progress the trial rapidly
 - d) The trial is in the national interest
- 1.5 Given the nature of this trial and the circumstances surrounding it, we consider that it would be appropriate and proportionate to consent under SMP Conditions 4.1 and 5.1 for this proof-of-concept trial.
- 1.6 We have considered our decision to grant the consent against the tests set out in section 49(2) of the Communications Act 2003² (the “Act”) and we consider that it is:
 - a) objectively justifiable, in that it is small scale, of limited duration and in the national interest;

¹ Ofcom, March 2021. [Statement: Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26](#).

² [Communications Act 2003 \(legislation.gov.uk\)](#)

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- b) not unduly discriminatory, as BT is the only telecoms provider to be subject to SMP requirements in LL Access Area 2;
- c) proportionate, as the consent goes no further than is necessary to allow Openreach to participate in the proof-of-concept trial; and
- d) transparent, in that we are publishing the terms of the consent and explain our reasons for it.

1.7 The proof-of-concept trial involves the supply of dark fibre to a maximum of four sites for a limited duration. Consequently, our view is that our granting a consent is unlikely to have any significant impact on a market. We have therefore decided on this occasion to give the consent without the need for any consultation, as permitted by section 48A(1)(b) of the Act.

2. Consent

Consent under section 49 of the Communications Act 2003 and SMP services conditions 4.1 and 5.1 set out at Volume 7 of the WFTMR Statement

Background

- 2.1 On 18 March 2021, Ofcom published a statement entitled “Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26”³ (“WFTMR Statement”) as modified by the modification published on 31 March 2021. At Volume 7⁴ of the WFTMR Statement, Ofcom imposed no undue discrimination obligations on BT under SMP Conditions 4.1 to 4.8 and equivalence of inputs obligations under SMP Conditions 5.1 to 5.7 in certain markets in which BT was found to have significant market power under that statement, including in LL Access Areas 2.
- 2.2 As part of a proof-of-concept trial with [redacted] [the end user] (the “Proof-of-Concept Trial”), Openreach proposes to install a limited number of dark fibre access circuits in LL Access Area 2. Openreach does not currently provide dark fibre access in Area 2 and – other than for the proof-of-concept trial – does not intend to do so. It has therefore, requested Ofcom’s consent under SMP Conditions 4.1 and 5.1.

Decision to grant consent

- 2.3 SMP Condition 4.1 of Volume 7 of the WFTMR Statement provides that BT must not unduly discriminate against particular persons or against a particular description of persons, in relation to the provision of network access.
- 2.4 SMP Condition 5.1 at Volume 7 of the WFTMR Statement provides that except as Ofcom may from time to time otherwise consent in writing, BT must provide network access in accordance with SMP Conditions 1 and 2 (as applicable) on an Equivalence of Inputs basis.
- 2.5 Ofcom has decided to consent to the proof-of-concept trial pursuant to SMP Conditions 4.1 and 5.1 of Volume 7 of the WFTMR Statement. This consent shall take effect on the day it is published.
- 2.6 The effect of and reasons for the decision are set out in the accompanying explanatory statement.

For reasons explained in the statement accompanying this Notification, Ofcom has explained why its decision to grant the consent set out below is unlikely to have any significant impact on a

³ Ofcom, March 2021. [Statement: Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26](#).

⁴ Ofcom, March 2021. [2021 WFTMR Volume 7: Legal instruments](#).

market. Ofcom has therefore decided to grant the consent under this Notification without the need for any consultation, as permitted by section 48A(1)(b) of the Act.

Ofcom's duties and legal tests

- 2.7 Ofcom considers that the consent referred to in paragraph above complies with the requirements of section 49(2) of the Communications Act 2003 (the "Act") for the reasons set out in the accompanying explanatory statement.
- 2.8 In granting the consent referred to above, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act and the six requirements in section 4 of the Act. Ofcom has also had regard to the *Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services designated by the Secretary of State for Digital, Culture, Media and Sport for the purposes of section 2A of the Communications Act 2003 on 29 October 2019*⁵ in making the proposals referred to in this Notification.

Copies of this consent and the accompanying explanatory statement have been sent to the Secretary of State in accordance with section 49C of the Act.

Interpretation

- 2.9 Except as otherwise defined, words or expressions used shall have the same meaning as they have been ascribed in the notification and SMP services conditions set out in Volume 7 of the WFTMR Statement. Otherwise any word or expression shall have the same meaning as it has in the Act.



David Clarkson

Director of Telecoms Competition, Ofcom

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

Monday, 17 April 2023

⁵ Department for Culture, Media and Sport, October 2019. [Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services](#). See also Ofcom, November 2019. [Letter from Katie Pettifer to James Heath, 25 November 2019](#).

A1. Letter from BT requesting consent

A1.1 We received the following letter from BT on 1 March 2023, requesting consent for provision of access for a proof-of-concept trial:

Letter addressed to Ofcom's Director of Telecoms Competition

We spoke on 4 January about a BT Enterprise proposal to create a proof-of-concept [REDACTED]. The new network will ensure the resilience of [REDACTED].

The proposed network design would involve Openreach installing a limited number of dark fibre access circuits outside the footprint where it is currently mandated to supply. We do not wish regulation to unnecessarily delay or limit a project that is important for the UK's wider resilience so we're seeking your view on proceeding without creating unintended regulatory consequences. I have set out below some additional background on the project, the rationale for the proposed network design and answers to the questions you posed in our meeting.

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[REDACTED] project

[REDACTED] wishes to connect a small [REDACTED] across the UK to create a high-performance [REDACTED] network, which will increase the resilience of [REDACTED]. This will help mitigate potential risks associated with [REDACTED]. [REDACTED] approached BT to carry out the proof-of-concept trial as we are the [REDACTED] partner and have experience of the specialised [REDACTED] equipment that will be used.

In summary, BT's proposed solution is:

- a small number of dark fibre connections between [REDACTED] premises at a secure BT site, and potentially other classified sites (maximum four sites in total)
- hosting the [REDACTED]'s equipment to light these fibres at these BT sites
- BT Enterprise providing end-to-end management of the network

If the trial is successful, we understand [REDACTED]. This letter only concerns the regulatory consequences of BT's involvement in the trial. [REDACTED].

Use of Openreach dark fibre

BT proposes to use dark fibre for this project rather than active circuits because only dark fibre meets the highly specific requirements of the customer's [REDACTED] network.

The connection between the [REDACTED] relies exclusively on the high-speed transmission of light and will not use any IP-based signalling. Active optical or high-capacity circuits that transmit IP signals are not suitable for maintaining the accuracy required by [REDACTED]. Nanosecond delays caused by the overheads associated with IP-based signals (e.g. 'packetisation') and active optical equipment could result in timing errors.

Dark fibre can be spliced directly onto the specialist [3<] equipment to connect the [3<] network sites. The transmission of light over this high specificity equipment, which will be procured by [3<] specifically for this proof of concept, will maintain the [3<] signal.

Dark fibre also meets the customer's security requirement that they install and light their own equipment. The customer's preference is that BT uses Openreach dark fibre for the trial because Openreach has extensive experience of meeting the needs of customers requiring high levels of security and confidentiality. For these reasons [3<] also prefers to deal only with BT Group at this early stage rather than relying on external suppliers.

[3<] cannot procure dark fibre directly from Openreach as [3<] is not a Communications Provider, and they want a fully managed network which Openreach is not set up to provide.

Regulatory considerations

Given the benefits for UK resilience we are keen to work with [3<] but we want to make sure you are aware of the regulatory questions raised by the provision of Openreach dark fibre to downstream BT outside Area 3. Specifically, we wish to avoid a precedent for wider regulated access to dark fibre and be clear that the provision of Dark Fibre for the [3<] network would not interfere with Openreach's commitment that it treats all customers equally.

The proposal is for a very limited commercial dark fibre installation, for the purposes of a trial that is clearly in the national interest, and which will have no impact on the wider market. We consider that it therefore need not create a precedent for the commercial provision of dark fibre more widely, nor interfere with Openreach's commitment that it treats all customers equally.

Precedent for wider regulated access to dark fibre

The locations [3<] wishes to connect are not in the footprint of Openreach's regulated dark fibre access products. The concern we have is that, because of SMP regulation, there is a risk that we would be required in practice to offer the service more broadly than for the [3<] network, for example, being required to offer it for delivery of corporate leased lines. Such an eventuality would be commercially very unattractive to us, and we would not proceed with the idea if we consider this remains a significant risk.

We also wish to avoid potentially creating any perceived precedent for wider regulated access to dark fibre: we consider that Openreach supplying dark fibre for this purpose on a very limited scale should not set a precedent in relation to wider Openreach provision of dark fibre outside Area 3. Such a regulatory requirement was considered and dismissed in the WFTMR.

Equal Treatment exemption

This would be a limited provision of a service specifically to meet the [3<]'s objectives. In providing dark fibre exclusively to BT Enterprise in these areas there is a risk Openreach is seen not to treat all its customers equally.

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We have separately agreed exemptions from Equal Treatment on other matters but given the sensitivity of the issue, the national interest and the very small scale of the trial, we consider a more public discussion on agreeing an exemption from the Commitments would be inappropriate.

I would be grateful if you could address these regulatory questions in your response or provide your views on these matters. [3<] is keen to progress with this project rapidly, and we are keen to be able to support a project of such national interest.

Please let me know if you have any questions about the technical aspects of the service or the proof of concept more generally.