Request from BT for exemption from the Undertakings under the Enterprise Act 2002 for certain high bandwidth access services

UKCTA Response to Ofcom

Submitted to Ofcom: 5th July 2011

1. Introduction

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com. UKCTA welcomes the opportunity to respond to this consultation.

The views expressed by UKCTA in this response do not necessarily reflect the views of KCOM Group and Virgin Media, particularly in relation passive infrastructure. Virgin Media will be submitting its own response.

Overview

UKCTA considers that it is inappropriate for BT to be granted an exemption from the Undertakings to supply certain fibre based access services to CPs on an EOI basis. The emergence of access products above 1Gbps is currently undergoing its early growth stage and whilst UKCTA members wish to see some flexibility from BT in supplying products in this growth market, removing BT's obligation to supply such products on an EOI basis would be seen as a detrimental step in the UK marketplace.

The main worry is not that BT will completely withdraw supply of these high bandwidth products but more that granting an exemption from the Undertakings will allow BT to commence supply on a discriminatory manner with the most likely beneficiaries being BT Lines of Business who could command the most attractive terms.

The prevention of forms of discrimination (including volume discounts) is one of the primary axioms of EOI and UKCTA members are becoming increasingly concerned that BT is starting to re-interpret EOI along the lines of pricing or delivery timescales only required to be equivalent with other orders for the same volumes delivered in the same circumstances to the same locations.

In its recent response to the BCMR Call for Inputs Consultation, UKCTA argued that the access fibre itself was the bottleneck asset and should be treated as such regardless of the speed or technology of any particular product built by BT using the bottleneck asset until underlying infrastructure remedies are in existence[1].

Finally, UKCTA asserts that it is inappropriate to pre-empt the forthcoming BCMR in this manner as it could allow BT Lines of Business to potentially gain an almost unassailable market dominance in emerging key areas such as high bandwidth cloud connectivity by leveraging its existing underlying fibre assets.

Detailed Responses

In this section we follow the numbering scheme of the Request for Exemption consultation document issued on 31st May 2011.

1.3 The ability for Openreach to be able to negotiate prices and contractual terms on an individual basis could allow BT to supply high bandwidth products built on the nation's underlying bottleneck fibre asset on terms that favour its own Lines of Business (due to their scale) and as such, the full benefits of increased competition could be constrained.

2.7 UKCTA observes that the exclusion of high bandwidth backhaul services seems to correlate with our position as documented in our response to the BCMR Call for Input, that there are context dependant markets[2] that merit additional scrutiny for the purposes of ascertaining SMP.

However, the proposed exclusion of certain backhaul services from the exemption request may prove ineffective as Openreach will be able to offer other, exempted business connectivity products - such as Optical Spectrum Services (OSS) - as substitutes to certain elements of backhaul.

Further, it seems inconsistent to argue that the case for the supply of high bandwidth services for "backhaul" purposes on a continuing EOI basis has been made and yet the use of, say, OSA for higher and more flexible bandwidth for backhaul is not? If, for example Openreach were to create a Local Access version of OSA that it could supply on discriminatory terms to BT Wholesale or Global Services to stimulate connectivity to Cloud Data Centres, this could have a major anti-competitive effect on the UK marketplace.

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[1] UKCTA intends to debate the viability of applying dark fibre and/or PIA remedies and their effect on the business connectivity market as part of its full input to the next BCMR.

[2] Relevant examples of "*context dependant markets*" would be using 10Gbps connectivity into business premises from BT Exchanges or links between BT Exchanges.

3.3 UKCTA refutes Openreach's argument that it cannot compete effectively under EOI. By simply lowering prices of high bandwidth services or developing new products with lower underlying costs leading to lower prices, Openreach already have many competitive tools at their disposal which combined with its exclusive use of the underlying duct and fibre assets, should enable it to compete in the marketplace.

3.4 Without robust and confirmed data from a Section 135 information request, the competition referred to here is most likely to be on a long-haul basis where some national CPs have invested in WDM infrastructure. If we refocused the competitive landscape to access networks into business premises, things might look very different with BT holding SMP on the underlying ducting and fibre assets.

Comparing multiple high bandwidth channels on CPs long-haul networks should in no way compare to Openreach's ability to build competitive products under EOI for the access market.

3.5 UKCTA members cannot understand Openreach's apparent inability to offer more choice to its customers due to the restrictions of EOI? If this is the case, CPs would wish to engage in a consultation discussing how more choice could be inserted into EOI supply across the board and not simply restricted to high-bandwidth products.

4.13 Openreach states that it has requests for more flexible pricing and contractual terms from CPs other than BT's own downstream divisions and whilst this may be correct (and evidence provided), UKCTA asserts that the interpretation of these requests has been misrepresented. Simply asking for more flexible pricing and terms only indicates that CPs were calling for such flexibility due to the inadequacy of Openreach's current contractual terms and was in no way meant to represent the call for these products to be supplied without EOI's protection from discrimination.

CPs look forward to Openreach offering the kind of flexibility mentioned here in the next round of contractual negotiations for all Openreach supplied products.

4.17 As stated before, it is not UKCTA members' principle fear that Openreach would stop supplying non BT CPs with high bandwidth products, but more that they would be able to discriminate heavily towards BT Lines of Business due to their sheer scale and the combined future volumes that they could commit to in order to command maximum discounts.

4.19 It should be noted that, with the withdrawal of various WES, BES and WEES products at the 1Gbps and below market, the substitution of EAD has blurred the distinction of use of some Openreach products as for just Access or Backhaul. It should also be noted that the use of 10Gbps EBD is restricted to Openreach's current EBD chain deployment and the use of OSA and OSEA for backhaul purposes both between BT exchanges and into CP PoPs or cloud data centres needs to be carefully considered.

4.21 BT retains a significant advantage of the exclusive use of its ducts and fibre to use in the creation of competitive High Bandwidth services.

It would appear that the Openreach developed Concept to Market (C2M) process, its EMP system and new *Strategic Stack* may have inadvertently become a bit of an anchor chain that slows down its ability to bring innovative new products to market. Industry would be keener to engage with Openreach in order to help streamline the EOI systems, contracts and processes rather than grant exemptions that also remove fundamental safeguards.

If as a result of this requested exemption BT Lines of Business end up gaining a competitive advantage in the High Bandwidth marketplace, end-customer harm is likely to result in the long term.

Annex 4 bullet points on page 22

UKCTA comments on each of the following bullet points from BT's exemption request as documented in Annex 4 of the consultation document as follows:

•*Ability to pass through vendor discounts where available*

The ability for Openreach to be able to discriminate as to who gets any available vendor funding is worrying.

- *Ability to offer flexible payment terms to meet customer needs: pre-payment capability, front-end loaded payment profile, spread connection payment profile, bespoke payment profile.*

UKCTA would welcome discussions on how these kinds of flexible options might also be applied to EOI products obviating the need to make high-bandwidth exempt from EOI.

- *Geographic pricing capability*

Openreach have already created geographically based special offers such as the current 1Gbps zero install for London, Birmingham and Manchester.

• *The ability to have discounts based on the totality of their deals i.e. across end customers*

Due to their scale, this has the potential to benefit BT Lines of Business the most.

• *The ability to order off a pool contract*

This has the potential of moving CPs back to the days when LES circuits were provided out of BT Wholesale where BT's own Line of Business could simply opt for the maximum possible pool contract discount and flexibility leaving Industry without any means of checking the validity of the operation of such contracts internally within BT.

• *Quoted prices that are closer to offered prices after survey e.g. lower Excess Construction Charges (ECCs), more reliable distance charges etc.*

UKCTA members cannot understand how lower ECCs and more reliable distance charges are the consequence of an exemption from EOI? This should be an across-the-board objective for Openreach.

• *Flexibility with regard to terms and conditions including longer and shorter contractual lead-times, project management and coordination of delivery, refine circuit design to optimise latency and resilience etc*

Refining circuit designs to optimise latency and resilience should be another across-the-board objective for Openreach and Openreach's Project Services product is already an option if required

• *Sharing co-location costs (e.g. in Data Centres)*

Again, this should be an across-the-board objective for Openreach when bringing circuits into Data Centres.

• *Flexibility to offer specialised interfaces e.g. Fibre channel*

How does EOI inhibit the introduction of specialised interfaces?

• *Deals on resilience solutions*

Again options for resilience solutions should be an across-the-board objective and not restricted to non-EOI products.

Conclusion

UKCTA members wish to confirm their opposition to Ofcom granting BT an exemption from their Undertakings for High Bandwidth products.

UKCTA takes the view that Openreach's High Bandwidth services are exclusively built using duct and fibre bottleneck assets into business premises, where BT clearly retains SMP.

UKCTA believes that this contentious matter is best addressed via the already commenced BCMR project and that, in the interim, BT should supply high bandwidth products under full EOI and without any possibility of applying any forms of discriminatory terms or pricing.

UKCTA would welcome further discussions with Ofcom and Openreach to discuss how levels of flexibility can be introduced into Openreach pricing and contracts, without having to remove the safety net obligation of EOI and more importantly without introducing an ability for BT to discriminate in favour of itself in the supply of these vital high bandwidth services.

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