

OTA 2 Scheme

Memorandum of Understanding

26 March 2007

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OTA 2 Scheme

OTA 2 Memorandum of Understanding

To the OTA 2

OTA 2 Scheme

1. **This OTA 2 Memorandum of Understanding (the "Memorandum of Understanding") to the OTA 2 Scheme** is made the day of 2007 between British Telecommunications plc ("**BT**") and [*company name*] (together the "**Parties**").
2. **Whereas** the Parties:
 - 2.1 wish to join the OTA 2 Scheme ("**OTA 2 Scheme**") which is described in the Terms of Reference for the OTA 2 Scheme (*Annex 3*, the "**Terms of Reference**"); and
 - 2.2 approve and adopt the OTA 2 Appointment Rules (*Annex 2*).
3. **The Parties hereby agree that**, in consideration of the OTA 2 and each member of the OTA 2 Scheme mutually agreeing to be bound by the OTA 2 Scheme and the OTA 2 Appointment Rules (together the "**Rules**"), the Parties will:
 - 3.1 accept and adopt the Rules; and
 - 3.2 abide by the Rules,until such time as either Party withdraws from the OTA 2 Scheme or the OTA 2 Scheme is terminated.
4. To the extent that the Adjudication Scheme which commenced on 5 July 2004 (the "**Adjudication Scheme**"), and in relation to which the Parties entered into a Telecommunications Adjudication Scheme Agreement (the "**Adjudication Scheme Agreement**"), has not already been terminated in accordance with the Adjudication Scheme, the Parties hereby agree that the Adjudication Scheme Agreement be terminated with immediate effect.
5. This Memorandum of Understanding shall terminate on whichever is the earlier of:

- 5.1 the expiration of six months notice given by either Party to the other Party, to the OTA 2 and to Ofcom or such shorter notice period as may be agreed by the OTA 2 and Ofcom;
 - 5.2 the expiration of one months notice given by either Party to the other Party, to the OTA 2 and to Ofcom within one month following any change to the Rules or the Terms of Reference;
 - 5.3 the date of termination of the OTA 2 Scheme, for whatever reason, by Ofcom;
 - 5.5 31 December 2008 unless extended by unanimous agreement of the Parties; and
 - 5.6 if the Parties have not entered into any In-Scope Agreement and the non-BT Party has not been given written permission by the OTA 2 to continue within the OTA 2 Scheme.
6. This Memorandum of Understanding incorporates the Annexes to it, which form part of this Memorandum of Understanding for all purposes.
 7. The words and expressions used in this Memorandum of Understanding shall (except where the context otherwise requires) have the meanings set out in Annex 1.
 8. In this Memorandum of Understanding, unless the context otherwise requires, the singular shall include the plural and vice versa and any words importing the masculine gender shall include the feminine also.
 9. This Memorandum of Understanding may be varied:
 - 9.1 by written agreement of the Parties to it; or
 - 9.2 in relation to Annex 3 only, by Ofcom following consultation with the Scheme Members.
 10. This Memorandum of Understanding may be executed in any number of counterparts, and by the Parties on separate counterparts, but shall not be effective until each of the Parties has executed at least one counterpart.
 11. This Memorandum of Understanding is intended by the Parties to be legally binding.
 12. This Memorandum of Understanding will be governed under the Law of England and Wales and the Parties submit to the exclusive jurisdiction of the English courts.

Signed: _____

As an authorised signatory for
British Telecommunications plc

Name: _____

Position: _____

Signed: _____

As an authorised signatory for
[*company name*]

Name: _____

Position: _____

Annex 1:

OTA 2 Scheme

Definitions

"Act" means the Communications Act 2003, as it may be amended or re-enacted from time to time;

"Adjudication Scheme" has the meaning given to it in Clause 4 of the Memorandum of Understanding;

"Adjudication Scheme Agreement" has the meaning given to it in Clause 4 of the Memorandum of Understanding;

"BT" has the meaning given to it in Clause 1 of the Memorandum of Understanding;

"BT Undertakings" means the undertakings given by BT to Ofcom on 22 September 2005 pursuant to the Enterprise Act 2002, as amended from time to time;

"Communications Provider" means, unless the contrary intention appears:

- (i) a person who provides a Public Electronic Communications Network or provides an Public Electronic Communications Service; and
- (ii) notwithstanding that the lines of business of BT (e.g. openreach, retail and wholesale) are not separate legal entities, the lines of business of BT;

"Electronic Communications Network" has the meaning given to it in section 32 of the Act;

"Electronic Communications Service" has the meaning given to it in section 32 of the Act;

"Existing Industry Groups" means the WLR (Wholesale Line Rental) / CPS (Carrier Pre-selection) Commercial Group, and others as agreed from time to time;

"Formal Dispute Proceedings" means, in relation to any issue, the commencement of any court or arbitral proceedings or (as applicable) formal referral to Ofcom for dispute resolution;

"In-scope Agreement" means any agreement between BT and a Scheme Member for the delivery or supply of an In-Scope Product;

"In-scope Products" means, collectively, and as defined in the BT Undertakings:

- (i) Local Loop Unbundling (including, without limitation, Metallic Path Facility, Shared Metallic Path Facility, sub-loop unbundling and relevant support services, including, without limitation, air conditioning and power), Backhaul Extension Service and Wholesale Extension Backhaul Product;
- (ii) Wholesale Line Rental/ Carrier Pre-Selection;

- (iii) geographic number portability and broadband of both BT and other Communications Providers where migration impacts may occur; and
- (iv) others as necessary and reasonably agreed from time to time;

"Memorandum of Understanding" has the meaning given to it in Clause 1 of the Memorandum of Understanding;

"Ofcom" means the Office of Communications;

"openreach" means the openreach line of business of BT created pursuant to the BT Undertakings;

"OTA 2 Scheme" has the meaning given to it in Clause 2.1 of the Memorandum of Understanding;

"OTA 2" has the meaning given to it in paragraph 1.1 of Annex 2 (*OTA 2 Appointment Rules*);

"Parties" has the meaning given to it in Clause 1 of the Memorandum of Understanding;

"Principles" has the meaning given to it in paragraph 3.1 of Annex 3 (*Terms of Reference for the OTA 2 Scheme*);

"Public Electronic Communications Network" means an Electronic Communications Network provided wholly or mainly for the purpose of making Electronic Communications Services available to members of the public;

"Public Electronic Communications Service" means any Electronic Communications Service that is provided so as to be available for use by members of the public;

"Rules" has the meaning given to it in Clause 3 of the Memorandum of Understanding;

"Scheme Member" means a Communications Provider (including BT, and/or the lines of business of BT) who is a member of the OTA 2 Scheme;

"Scope" has the meaning given to it in paragraph 2.1 of Annex 3 (*Terms of Reference for the OTA 2 Scheme*); and

"Terms of Reference" has the meaning given to it in Clause 2.1 of the Memorandum of Understanding.

Annex 2:

OTA 2 Scheme

OTA 2 Appointment Rules

1. Selection for Appointment

- 1.1 The OTA 2 (the "**OTA 2**") shall be an individual appointed from time to time by Ofcom alone after:
 - 1.1.1 consultation by Ofcom with BT and other Communications Providers as regards selection criteria and nominations; and
 - 1.1.2 selection as having the necessary and appropriate experience, knowledge and skills to act as OTA 2 in accordance with the Rules,
to:
 - 1.1.3 hold office as the OTA 2 independent of Ofcom and Scheme Members on terms Ofcom considers appropriate; and
 - 1.1.4 operate the OTA 2 Scheme.

2. Required Terms of Appointment

- 2.1 The terms of office of the OTA 2 shall include terms as to:
 - 2.1.1 when the OTA 2 should assume office, and when the OTA 2 might cease to hold office, including upon the OTA 2 Scheme being discontinued;
 - 2.1.2 remuneration and other benefits;
 - 2.1.3 independent and external reporting;
 - 2.1.4 administrative support;
 - 2.1.5 the taking of independent legal or other advice when necessary or appropriate;
 - 2.1.6 accommodation within Ofcom's premises or elsewhere;
 - 2.1.7 process for disclosing any conflict of interest;
 - 2.1.8 reimbursement of proper and reasonable disbursements and expenses; and
 - 2.1.9 any other relevant matter.

- 2.2 The OTA 2 will be appointed to office by Ofcom under a suitable contract for services.
- 2.3 The contract for services will set out the responsibilities and functions of the OTA 2 under the OTA 2 Scheme and shall include, without limitation, provisions that:
 - 2.3.1 the OTA 2 shall submit periodic reports to Ofcom and the Scheme Members and publish periodic reports;
 - 2.3.2 the OTA 2 shall not be employed by or act as consultant or contractor to Ofcom or any Communications Provider while holding office as OTA 2;
 - 2.3.3 the OTA 2 shall not have any direct financial interest in any Communications Provider while holding office as OTA 2;
 - 2.3.4 the OTA 2 shall immediately declare any direct or indirect financial or other interest the OTA 2 knows he has in any facilitation;
 - 2.3.5 in respect of any information imparted to the OTA 2 in confidence by Ofcom or by any Scheme Member, the OTA 2 shall keep that information confidential so long as it remains confidential, even after ceasing to hold office as OTA 2;
 - 2.3.6 within the period of at least six months immediately after ceasing for any reason to hold office as OTA 2, the OTA 2 shall not be employed by or act as consultant or contractor to any Communications Provider without Ofcom's prior written consent;
 - 2.3.7 the contract for services can be terminated by Ofcom in a number of specified circumstances; and
 - 2.3.8 the OTA 2 shall carry out his duties as OTA 2 in accordance with the Rules.

3. Costs

- 3.1 The costs incurred in relation to the OTA 2 shall be the subject of a budget which is set or amended from time to time by Ofcom.
- 3.2 The costs of OTA 2 will be paid for by Ofcom. Ofcom will reclaim 50% of the cost of the OTA 2 from BT. The Parties acknowledge that BT may include the costs paid by BT of OTA 2 in its regulated cost-base and may recover such costs via product or service charges charged to all Communications Providers (including BT's downstream lines of business) to the extent consistent with regulatory rules.

Annex 3:

OTA 2 Scheme

Terms of Reference for the OTA 2 Scheme

1. Background

- 1.1 The vision for the OTA 2 Scheme is that:
 - 1.1.1 the OTA 2 will champion end user issues;
 - 1.1.2 Communications Providers will benefit from a competitive telecommunications infrastructure based on openreach products that has no operational barriers to success;
 - 1.1.3 there will be implementation (as quickly as is reasonably possible) of new product functionality, features and services relating to In-scope Products that will be seamlessly introduced;
 - 1.1.4 migrations between broadband and narrowband products of both BT and other Communications Providers will be seamless, timely and with minimal interruption to service for end users;
 - 1.1.5 dips in operational quality performance of In-scope Products provided by openreach will be unusual and will be proactively managed by openreach to ensure the least impact on Communications Providers and end users; and
 - 1.1.6 participation by Communications Providers in the OTA 2 Scheme will be widespread and representative.
- 1.2 The objective of the facilitation role is to create and maintain an environment in which Communications Providers who have entered into the OTA 2 Scheme quickly reach substantial agreement on how new and enhanced product functionality and / or processes for In-scope Products are to be delivered, thereby improving implementation and reducing the possibility of Formal Dispute Proceedings in circumstances where there are industry wide implications.
- 1.3 In order for facilitation to be successful, the OTA 2 and the Scheme Members will need to work effectively together. The respective roles and responsibilities for the OTA 2 and the Scheme Members are outlined in paragraph 8 of this Annex 3 below.
- 1.4 The OTA 2 will publish regular progress updates and summaries of his work and the status of the issues within the Scope (as defined in paragraph 2 below).

2. Scope of the OTA 2

2.1 The OTA 2 will, in the exercise of facilitation, assist Scheme Members to reach agreement on and, where necessary, make non-binding recommendations on appropriate product functionality, process specifications, change management, implementation plans and monitoring activities for In-scope Products to maintain appropriately industrialised products and processes including, where new functionality for In-scope Products is introduced, ensuring that such new functionality is reasonably fit for the purpose it is intended to fulfil. These will relate to improvements to existing In-scope Products and In-scope Product processes. The Scope of the OTA 2 (the "**Scope**") will include a role in setting specifications and plans. The extent of that role is set out below:

2.1.1 **Product functionality** - which refers to the definition, specification (including timing of availability) and functionality of In-scope Products and associated facilities and activities necessary for In-scope Products, including (but not limited to) the publication of key performance indicators and progress against plans;

2.1.2 **Process specification** - which refers to the specification and availability of the processes involved through the life-cycle of relevant In-scope Products and other process specification which will also include facilitating the agreement of reasonable quality levels, service level agreements and service level guarantees (and liquidated damages in these);

2.1.3 **Change management** - which refers to on-going modifications, enhancements and improvements of products and processes;

2.1.4 **Implementation plans** - which refers to the implementation of new and changed In-scope Products and processes and will include, inter alia, the project plans, timescales and reasonable resourcing required to delivery these products and processes; and

2.1.5 **Monitoring activities** - which refers to necessary on-going activities to monitor implementation of non-binding recommendations of the OTA 2 – will include, inter alia, the use of appropriate key performance indicators where relevant.

2.2 For the avoidance of doubt, charge setting and policy development will not be included in the Scope of the OTA 2, but will remain matters for Ofcom.

3. The Facilitation Rules

- 3.1 In making recommendations on issues within the Scope, the OTA 2 will work on the basis of the principles outlined in paragraphs 3.2 and 3.3 below and, will act in an independent, fair objective and reasonable manner (the "**Principles**").
- 3.2 The objective for the OTA 2 is to help ensure the delivery (as soon as is reasonably possible) of new and /or enhanced product functionality for In-scope Products and processes which:
 - 3.2.1 are in the best interests of end users;
 - 3.2.2 are, and remain, fit for purpose and appropriately industrialised; and
 - 3.2.3 support broad take-up of In-scope Products.
- 3.3 The OTA 2 shall, where relevant, take account of, *inter alia*:
 - 3.3.1 reasonable resource constraints (including training requirements) of Scheme Members and the ability of Scheme Members to increase resources, although the OTA 2 is able to recommend reasonable increases in resources;
 - 3.3.2 efficiently-incurred and reasonable costs, and the need to avoid wasteful expenditure by Scheme Members;
 - 3.3.3 likely future demand levels and forecasts;
 - 3.3.4 reasonable cost recovery and reasonable profit;
 - 3.3.5 the policy context as set by Ofcom and regulatory rules (including any relevant Ofcom guidelines, the BT Undertakings, regulatory conditions and competition law) in relation to In-scope Products and other relevant products and such policy / regulatory rules as are amended from time to time;
 - 3.3.6 existing product / processes;
 - 3.3.7 existing end users;
 - 3.3.8 network security and network integrity;
 - 3.3.9 the activities and recommendations of other related groups such as the Network Interoperability Consultative Committee and Billing Industry Forum; and
 - 3.3.10 where relevant, Ofcom's statutory duties.
- 3.4 The OTA 2 may also consult other Communications Providers, as he sees fit and may as appropriate take account of their views.

- 3.5 The objective of the facilitation role is to create and maintain an environment in which the Scheme Members may quickly reach substantial agreement on the specification of enhanced product functionality/processes and how new and enhanced product functionality/processes are to be implemented, thereby accelerating implementation within reasonable timescales and reducing the possibility of Formal Dispute Proceedings in circumstances where there are industry wide implications.
- 3.6 Facilitation by the OTA 2 shall comprise the OTA 2 undertaking the following activities:
- 3.6.1 working with the Scheme Members to agree the working approaches between the Scheme Members, including (without limitation) the role of different groups including Existing Industry Groups, the membership and empowerment of different groups and reporting between Scheme Members and Existing Industry Groups;
 - 3.6.2 facilitating working groups;
 - 3.6.3 facilitating the sharing of appropriate information between Scheme Members, subject to compliance with the BT Undertakings and all relevant regulatory and competition law obligations;
 - 3.6.4 maintaining close dialogue with each of the Scheme Members to understand their individual concerns, constraints, capabilities and issues;
 - 3.6.5 working with the non-BT Scheme Members to understand and prioritise their demands and requirements and presenting consensus (if possible) of their requirements to BT;
 - 3.6.6 if necessary, setting the priorities of non-BT Scheme Members to present to BT;
 - 3.6.7 helping the Scheme Members to agree appropriate product / process definitions and specifications;
 - 3.6.8 helping the Scheme Members to resolve potential disagreements between themselves rapidly prior to initiating Formal Dispute Proceedings;
 - 3.6.9 where agreement on matters within the Scope is not forthcoming between Scheme Members, rapidly making clear non-binding recommendations based on his judgement and available evidence; and
 - 3.6.10 monitoring implementation of non-binding recommendations of the OTA 2.

- 3.7 Recommendations made in this role are non-binding on the Scheme Members but, by signing the Memorandum of Understanding, the Scheme Members are indicating their willingness to cooperate in facilitation in good faith and their commitment to attempt to resolve issues through facilitation.

4. Constitution

- 4.1 The OTA 2 is an individual who shall undertake his role in accordance with this Memorandum of Understanding. The OTA 2 will be responsible for undertaking facilitation, including (without limitation) making non-binding recommendations.
- 4.2 The OTA 2 may suggest to the Scheme Members that they might wish to form appropriate groups. This shall not prevent any Scheme Members forming groups that they wish outside of the OTA 2 Scheme.

5. Selection

- 5.1 The OTA 2 will be selected for his expertise, knowledge and understanding of the relevant In-scope Products / process issues, as well as for his ability to act effectively as a facilitator.
- 5.2 Ofcom may appoint a replacement or stand-in OTA 2 as necessary on the same basis as outlined in paragraph 5.1.

6. Information gathering

- 6.1 The OTA 2 may request and obtain information from the Scheme Members relevant for his consideration of the issues. This may be in the form of, *inter alia*, a formal written submission, disclosure of documents or attendance to give oral submissions.
- 6.2 The Scheme Members will provide such information as the OTA 2 reasonably requests in reasonable time but will not be obliged to provide information they regard as confidential or which is legally privileged. Scheme Members agree that they will not unreasonably withhold information.
- 6.3 The OTA 2 may request any Scheme Member to submit confidential information to the OTA 2 where the OTA 2 believes that it would help in facilitation but for the avoidance of doubt no Scheme Member shall be obliged to provide such information. If confidential information is provided to the OTA 2, the OTA 2 shall, at the providing Scheme Member's request, destroy or return such confidential information when it is no longer required for the purpose for which it was provided.

6.4 The Scheme Members expect that Ofcom will provide relevant information in its possession to the OTA 2 to the extent that it is consistent with Ofcom's statutory obligations.

6.5 The OTA 2 will keep all confidential information received from any Scheme Member or Ofcom confidential from any other Scheme Member and Ofcom.

7. Existing arrangements

All Scheme Members to the Memorandum of Understanding are still required to comply with all relevant contractual, regulatory and competition law obligations. The OTA 2 Scheme does not prejudice any other legal rights.

8. Roles and Responsibilities

8.1 The success of the OTA 2 Scheme will depend on senior commitment to the Principles and objectives of the OTA 2 Scheme and to ensuring its effective operation.

Ofcom

8.2 To help ensure the success of the OTA 2 Scheme, the Scheme Members will expect Ofcom to:

8.2.1 provide full and visible support to the OTA2 Scheme and the OTA 2;

8.2.2 provide confidential and bi-lateral advice to the OTA 2;

8.2.3 identify issues for resolution and/or facilitation by the OTA 2; and

8.2.4 provide proactive and constructive guidance.

Scheme Members

8.3 To help ensure the success of the OTA 2 Scheme, Scheme Members will be expected to:

8.3.1 maintain appropriate senior management level involvement as reasonably required by the OTA 2;

8.3.2 provide appropriate access for the OTA 2 to empowered management as required;

8.3.3 ensure that there is clear unambiguous ownership and leadership of significant issues with any In-scope Products and between products and processes for In-scope Products;

8.3.4 ensure that the OTA 2 Scheme and the intent of the OTA 2 Scheme is well understood and adopted by relevant staff;

- 8.3.5 ensure that participants in various groups have the necessary level of skills, expertise and empowerment to take decisions;
- 8.3.6 ensure that relevant staff are made available in a timely fashion;
- 8.3.7 ensure continuity of staff involved where reasonably possible;
- 8.3.8 provide full and relevant information, including without limitation responses to enquiries by the OTA 2, (subject to confidentiality and legal privilege) in a timely fashion;
- 8.3.9 take due care to verify the accuracy of information;
- 8.3.10 act in a professional, responsive manner and use all reasonable commercial endeavours to help the OTA 2 meet his objectives in facilitation;
- 8.3.11 formally announce their participation in and commitment to the OTA 2 Scheme;
- 8.3.12 bring all issues that have industry wide impact in relation to In-scope Products to the OTA 2:
 - (i) in a timely fashion; and
 - (ii) for facilitation;
- 8.3.13 provide accurate performance reports to the OTA 2, such performance reports to be in the form as reasonably required by the OTA 2 from time to time;
- 8.3.14 demonstrate full and constructive support of the OTA 2 Scheme and the OTA 2; and
- 8.3.15 work collaboratively with one another.