

Annex 1

Modifications under sections 45(10)(e) and 48(1) of the Communications Act 2003 (the “Act”) of SMP conditions contained in Ofcom’s notification under sections 48 and 79 of the Act of 18 March 2021

Background

1. On 18 March 2021, Ofcom published a statement entitled “Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review 2021-2026” (the “WFTMR Statement”). The WFTMR Statement set out Ofcom’s conclusions on its review of wholesale fixed telecoms markets by identifying markets, making certain market power determinations and setting SMP services conditions (including charge control conditions) (“SMP conditions”). At Volume 7 of the WFTMR Statement Ofcom published (among other things) a notification under sections 48 and 79 of the Act made on 18 March 2021 (the “SMP Conditions Notification”) in which Ofcom identified the markets, made the market power determinations and set the SMP Conditions under section 45 of the Act as set out in Schedule 1 to that notification. These included SMP Conditions 12E, 12F and 12G.
2. Ofcom’s reasons for setting the SMP Conditions referred to above were contained in the WFTMR Statement.
3. A copy of the SMP Conditions Notification was sent to the Secretary of State in accordance with sections 48C(1) and 81(1) of the Act.
4. On 31 March 2021, Ofcom made a modification to the SMP conditions and Direction 4 of the Quality of Service Directions together with a statement explaining these changes.
5. Since publication of the WFTMR Statement and the subsequent modification, Ofcom has become aware of a small number of additional inadvertent inconsistencies between SMP Conditions 12E and 12G and the stated policy decided in the WFTMR Statement, and a cross referencing error in SMP Condition 12F.

Decision to modify certain SMP Conditions and QoS Direction 4

6. As a result, Ofcom considers it necessary to modify the SMP Conditions set in the SMP Conditions Notification referred to in paragraph 1 above to make specified corrections.

The modified SMP Conditions are set out in the Schedule to this notification. These modified SMP Conditions replace the corresponding SMP Conditions set out in the SMP Conditions Notification.

7. The modifications of the SMP Conditions referred to in paragraph 6 are made under powers set out in sections 45(10)(e) and 48(1) of the Act.
8. The modifications shall take effect from 16 July 2021. Section 4 of the Interpretation Act 1978 (c. 30) shall apply as if these modifications of the SMP Conditions were a commencement of an enactment by an Act of Parliament.

Ofcom's duties and legal tests

9. Ofcom considers that the modifications set out in this notification meet the tests contained in sections 47(2) of the Act in that they are objectively justifiable, not unduly discriminatory, proportionate and transparent.
10. Ofcom considers that these modifications will not have a significant impact on the relevant market (and other markets for any of the services, facilities, apparatus or directories in relation to which Ofcom have functions) and therefore the process in section 48A of the Act does not apply.
11. As required by section 86(4) of the Act, Ofcom is satisfied that there has not been any material change in the markets identified since each SMP Condition which Ofcom is modifying was set.
12. In making the decisions referred to in this notification, 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.
13. In making the decisions referred to in this notification, 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.
14. A copy of this notification has been sent to the Secretary of State under section 48C of the Act.

Interpretation

15. For the purpose of interpreting this notification:
 - a. except in so far as the context otherwise requires, words or expressions have the meaning assigned to them in paragraph 16 below, and otherwise any word or expression has the same meaning as it has in the Act;

- b. headings and titles shall be disregarded;
- c. expressions cognate with those referred to in this notification shall be construed accordingly; and
- d. the Interpretation Act 1978 shall apply as if this notification were an Act of Parliament.

16. In this notification:

- a. **“Act”** means the Communications Act 2003 (2003 c. 21);
- b. **“BT”** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
- c. **“Ofcom”** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (2002 c. 11); and
- d. **“SMP Conditions Notification”** means the notification described in paragraph 1(a) above.

17. Schedule 1 to this notification shall form part of this notification.

Signed

A handwritten signature in blue ink that reads "D. Clarkson." The signature is written in a cursive style with a large initial "D" and a period at the end.

David Clarkson

Telecoms Competition Director, Ofcom

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

15 July 2021

Schedule 1 Modifications to the SMP Conditions in Schedule 1 to the SMP Conditions Notification

Modifications to SMP Conditions

Annex to Condition 12E

Section 3

Meaning of “Miscellaneous Ancillary Services”

For the purposes of Condition 12E, the expression “Miscellaneous Ancillary Services” shall be construed as including all services specified in Section 3 of this Annex and all termination charges which are imposed under a contract between the Dominant Provider and a Third Party, subject to such changes as Ofcom may direct from time to time, following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

Ethernet Access Direct (EAD)¹

Migration charges²

Ancillary services:

- Managed migration options
- Cancellation charges
- Termination charges
- EAD Modify Shift Circuit Charges

Ethernet Backhaul Direct (EBD)³

Migration charges⁴

Ancillary services:

- Upgrade charges
- Cancellation Charges

¹ Openreach, *Price List, Ethernet Access Direct (EAD) including EAD Enable*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=5uW5cDedIGJkun%2FLo2I67PEgpNm%2BtShF6YESRcCqrDFZ6rNZujnCs99NbIKJZPD9hXYmiiH6wrCQm97GZMyQ%3D%3D> [accessed on 9 March 2021].

² Only applies to rentals without an associated migration charge.

³ Openreach, *Price List, Ethernet Backhaul Direct*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=F6GFzqfhDSmh7Oyv8Xw%2Bt6ZkEknUEHFW9O1w%2FCiItaVZ6rNZujnCs99NbIKJZPD9hXYmiiH6wrCQm97GZMyQ%3D%3D> [accessed on 9 March 2021].

⁴ Only applies to rentals without an associated migration charge.

- Shift charges
- Service Features charges

Wholesale Extension Service (WES) & Wholesale End-to-End Extension Service (WEES)⁵

Migration charges

Ancillary services:

- Upgrade charges
- Re-grade charges
- Additional charges
- Cancellation Charges
- Circuit Shift Charges

Backhaul Network Services (BNS)⁶

Ancillary services:

- Upgrade charges
- Additional charges
- Cancellation Charges

Openreach Network Backhaul Services (ONBS)⁷

Cancellation charges

Backhaul Extension Service (BES)⁸

Migration charges

Ancillary services:

- Additional charges

⁵ Openreach, *Price List, Wholesale Extension Service & Wholesale End to end Extension Service*, <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=TG6A8jbarofqgfNi%2BYxJT%2BWX9RC8ygO7YK%2FGFXHQOKYIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D> [accessed on 9 March 2021].

⁶ Openreach, *Price List, Backhaul Network Services (BNS)*, <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=to6u3F12FmH4GL92i3NosYRiskeI2ZrKBXGHf8sPBYwIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D> [accessed on 9 March 2021].

⁷ Openreach, *Price List, Openreach Network Backhaul Services*, <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=Rdc2f4wj9k%2Fplcoq3gDRhrww6STLWGzW%2FOBqqNvfllIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D> [accessed on 9 March 2021].

⁸ Openreach, *Price List, Backhaul Extension Service (BES)*, <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=Gb5DIOWDeWrdrvLSdpeomsa0DzFBxAUIONmfpe3%2FG3G4IMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D> [accessed on 9 March 2021].

- Upgrade Charges
- Circuit Shift charges
- Cancellation charges

Optical Spectrum Access (OSA)⁹

Upgrade charges

Cancellation charges

Shift charges

Service reconfiguration charges

Abortive Visit charges

Amend Order Request charges

Optical Assist charges

Optical Spectrum Extended Access (OSEA)¹⁰

Cancellation charges

Shift charges

Service reconfiguration charges

Optical Spectrum Access Filter Connect (OSA Filter Connect)¹¹

Upgrade charges

Cancellation charges

Abortive Visit charges

Optical Spectrum Extended Access Filter Connect (OSEA Filter Connect)¹²

⁹ Openreach, *Price List, Optical Spectrum Access*,

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Wk%2B2hSVL2knF5F0Ve%2F1N8yijl4DelvXU8bqZRwL0sgJZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D>
[accessed on 9 March 2021].

¹⁰ Openreach, *Price List, Optical Spectrum Extended Access*,

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Wk%2B2hSVL2knF5F0Ve%2F1N8yijl4DelvXU8bqZRwL0sgJZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D>
3D [accessed on 9 March 2021].

¹¹ Openreach, *Price List, Optical Spectrum Access*,

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Wk%2B2hSVL2knF5F0Ve%2F1N8yijl4DelvXU8bqZRwL0sgJZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D>
[accessed on 9 March 2021].

¹² Openreach, *Price List, Optical Spectrum Extended Access*,

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Wk%2B2hSVL2knF5F0Ve%2F1N8yijl4DelvXU8bqZRwL0sgJZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D>

Upgrade charges
Cancellation charges
Abortive Visit charges

Condition 12F – Controls on Accommodation Services, Overlapping Accommodation Services and Cablelink Services

12F.8 For the purposes of Condition 12F.7, the Percentage Change shall be calculated by employing the formula in Condition 12E.2, except that references to an “individual service falling within the Baskets” shall be treated as references to an individual service falling within the Cablelink Services Basket subject to Condition 12F.

(IEC, IEC BT+1, IEC BT+2, LLA Area 2, LLA Area 3)

Condition 12G – Controls on the Direct ECC Services Basket and Contractor ECC Services

12G.12 For the purposes of complying with Condition 12G.10, the ECC Balancing Charge for new connections for the ECC Services shall be calculated by employing the following formula (which applies to the Prior Year):

(IEC, IEC BT+1, IEC BT+2, LLA Area 2, LLA Area 3)

$$B = \frac{\sum_{k=1}^C \sum_{i=1}^n p_{i,k} q_{i,k} - TR}{C}$$

Where

B is the ECC Balancing Charge;

C is the number of new EAD, EAD LA and Dark Fibre Access connections in the Prior Year;

[knF5F0Ve%2F1N8%2BzJs9AuBR97In%2B8uxoSog9Z6rNZujnCs99NbIKJZPD9hXYmiiH6wrCQm97GZMyQ%3D%3D](#) [accessed on 9 March 2021].

k is a number from 1 to C for each new EAD, EAD LA or Dark Fibre

Access connection;

n is the number of the ECC Services provided by the Dominant Provider,

i is a number from 1 to n for each of the n individual ECC Service;

$p_{i,k}$ is the charge of the ECC Service i that was in effect at the time of new EAD, EAD LA or Dark Fibre Access connection k ;

$q_{i,k}$ is the volume of the individual ECC Service i that was sold as part of new EAD, EAD LA or Dark Fibre Access connection k ;

TR is the revenue generated from new connections for the ECC Services above the Relevant Year's exemption threshold ET_t in the Prior Year;

$$TR = \sum_{k=1}^C \delta_k \left[\sum_{i=1}^n p_{i,k} q_{i,k} - ET_t \right]$$

Where δ_k is a binary variable for each new EAD, EAD LA or Dark Fibre Access connection k , given by the following formula:

$$\delta_k = \begin{cases} 1 & \text{if } \sum_{i=1}^n p_{i,k} q_{i,k} > ET_t \\ 0 & \text{if } \sum_{i=1}^n p_{i,k} q_{i,k} \leq ET_t \end{cases}$$

Where ET_t is £2,819.60 in the First Relevant Year.

In each of the Second Relevant Year to the Fifth Relevant Year, ET_t must be calculated by employing the following formula:

$$ET_2 = £2,819.60 (1 + CPI_2)$$

$$ET_3 = £2,819.60 (1 + CPI_2)(1 + CPI_3)$$

$$ET_4 = \text{£}2,819.60 (1 + CPI_2)(1 + CPI_3)(1 + CPI_4)$$

$$ET_5 = \text{£}2,819.60 (1 + CPI_2)(1 + CPI_3)(1 + CPI_4)(1 + CPI_5)$$