
Consent to waiver of notification periods for changes to Openreach network access charges, terms and conditions

Changes proposed by Openreach for offers in response
to Covid-19

STATEMENT

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1. Overview

- 1.1 In response to the Covid-19 pandemic, Openreach is proposing to make changes to the way it offers certain wholesale products to Communications Providers (CPs) – including introducing two offers which entail changes to its terms, conditions and prices.
- 1.2 Under Significant Market Power (SMP) conditions imposed as part of the 2018 Wholesale Local Access Market Review (2018 WLAMR) and the 2019 Business Connectivity Market Review (2019 BCMR), Openreach is required to give prior notice for a specified period (either not less than 28 days or not less than 90 days) before implementing such changes. Openreach has asked Ofcom for consent to its proposals to make changes to its terms, conditions and charges without complying with this notification period.
- 1.3 This statement sets out Ofcom’s decision to consent to Openreach waiving the notification periods for its proposals.

What we have decided – in brief:

- We have decided to consent to Openreach waiving the notification periods that would otherwise apply to the changes it is making to its terms, conditions and charges for its EAD 100, EAD 1000 and SOGEA products.
- The first of these offers allows customers purchasing EAD100 and EAD1000 products to pause the start of their service for up to 90 days, deferring connection and rental charges. The second offer provides a rebate to customers purchasing SOGEA products for a part of the installation service Openreach may not be able to provide in the current situation.
- We have considered this decision against tests set out in section 49(2) of the Communications Act 2003 (“the Act”) and are satisfied that it is: objectively justifiable; not unduly discriminatory; proportionate; and transparent.
- The waiver of the notification periods that would normally apply will ensure the benefits of these offers are fully realised in a timely manner in response to the current situation.

Openreach offers

- 1.4 On 12 May 2020 Openreach wrote to Ofcom providing detail of two proposed offers and requesting that Ofcom consent to a waiver of the required notification periods.¹ A summary of these offers is set out below.

Allowing EAD customers to pause the start of their service for 90 days

- 1.5 Customers who have purchased EAD 100 and EAD 1000 products from Openreach will be offered the option of pausing the start of their service for up to 90 days from the date of

¹ See Openreach letter to Dave Clarkson, dated 12 May 2020 and published alongside this statement: [https://www.ofcom.org.uk/_data/assets/pdf_file/0035/195695/request-for-notification-waivers-openreach.pdf]

their connection being installed. Openreach will defer the connection charge and rental charges will be suspended. Once the customer is ready to consume the service, or after 90 days, whichever is sooner, Openreach will charge the connection fee and begin rental charges (“the EAD Pause Offer”).

- 1.6 Many offices are currently empty due to the Covid-19 pandemic and therefore will not be making use of their connections. Openreach has said that the proposed change will give CPs flexibility to delay the start date of their service until the end-user is able to use it. Openreach noted this offer will also allow it to avoid a backlog of provision work once lockdown restrictions start to be lifted.
- 1.7 Openreach has informed Ofcom that this offer will be made available until the end of June 2020, although it is open to extending this depending on the circumstances at that time.
- 1.8 Openreach noted that a minimum notification period of 28 days would apply under Condition 6 of its SMP obligations imposed in the 2019 BCMR. Openreach said that waiving the notice period and allowing for a prompt implementation of the offer will maximise the benefit of the offer more quickly, which is required in the current time given the COVID-19 crisis.
- 1.9 Openreach states it has discussed the nature of this offer bilaterally with a number of CPs of differing sizes that it considers could make use of it and that all have responded positively. Openreach has also discussed this offer with the OTA2.

Rebating the cost of Managed Install service for the provision of SOGEA products

- 1.10 Openreach is still installing new line Single Order Generic Ethernet Access (SOGEA) products. However, due to health and safety concerns regarding engineers working in the end-user environment, it is not always performing in-house tasks, a service known as “Managed Install”. Openreach is proposing to rebate the cost of this service, using the price of a similar product which can be self-installed, as a proxy for the rebated amount.
- 1.11 Openreach has told Ofcom that the offer will be made available until it is able to return to working in the end-user premises, where it can deliver the Managed Install service.
- 1.12 Openreach considers that this offer is effectively a price discount versus normal terms and so a minimum notification period of 28 days would apply under Condition 9 of the 2018 WLAMR. Openreach has suggested that waiving the notice period and allowing for a prompt implementation of the offer will maximise the benefit of the offer more quickly, which is required in the current time given the Covid-19 crisis.
- 1.13 Openreach stated it discussed the nature of this offer with CPs and OTA2 at a specially convened Copper and Fibre Products Commercial Group call on 6 May 2020.

Openreach's regulatory obligations

SMP Condition 6 of the 2019 BCMR

- 1.14 In the 2019 BCMR, Ofcom defined product markets for contemporary interface (CI) wholesale leased lines services, which are connections over fibre, typically using an Ethernet interface. We defined a market for CI Access services, which are the connections to end-user business sites (such as office buildings or mobile base stations). We concluded that BT has SMP in CI Access services in each of the geographic markets we identified across the UK, except in the Central London Area (CLA) and the Hull Area. We imposed on BT a number of SMP conditions designed to address our competition concerns in relation to CI Access services. These include SMP Condition 6: Notification of charges and terms and conditions.
- 1.15 The relevant parts of SMP Condition 6 are:
- 1.16 6.1 *Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider shall publish charges, terms and conditions and comply with the requirements set out in this Condition.*
- 1.17 6.2 *Where it proposes an Access Charge Change, the Dominant Provider shall send to every person with which it has entered into an Access Agreement pursuant to Conditions 1 and 2 (as applicable), an Access Charge Change Notice.*
- 1.18 6.4 *An Access Charge Change Notice must:*
- (a) in the case of an Access Charge Change involving new network access, be sent not less than 28 days before any such amendment comes into effect.²*
- 1.19 Openreach's EAD Pause Offer is a change of the terms and conditions to new network access falling within SMP Condition 6.4(a). Such a change therefore requires the publication of an Access Charge Change Notice no less than 28 days before any such amendment comes into effect, unless Ofcom consents otherwise.

SMP Condition 9 of the 2018 WLAMR

- 1.20 In the 2018 WLAMR, we defined a product market for the supply of wholesale local access (WLA) at a fixed location. We concluded that BT has SMP in the WLA market in the UK excluding the Hull Area. We imposed on BT a number of SMP conditions designed to address our competition concerns in relation to WLA. These include SMP Condition 9: Notification of charges and terms and conditions.
- 1.21 The relevant parts of SMP Condition 9 are:

² https://www.ofcom.org.uk/_data/assets/pdf_file/0026/154592/annex-26-legal-instruments.pdf (page 80)

9.1 *Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider must publish charges, terms and conditions and act in the manner set out in this Condition.*

9.2 *Where it proposes a WLA Access Change, the Dominant Provider must send to every person with whom it has entered into an Access Agreement pursuant to Condition 1 or Conditions 1 and 2 (as the case may be), a WLA Access Change Notice.*

9.4 *A WLA Access Change Notice must:*

(a) in the case of a WLA Access Change involving new network access, be sent not less than 28 days before any such amendment comes into effect;³

1.22 Openreach's offer rebating the cost of Managed Install service for the provision of SOGEA products is a WLA Access Change involving new network access (in that it is providing the SOGEA product without a Managed Install service). Such an amendment therefore requires Openreach to send to the customers with which it has an access agreement a WLA Access Change Notice no less than 28 days before any such amendment comes into effect under SMP Condition 9 of the 2018 WLAMR ("the WLA Notification Period"), unless Ofcom consents otherwise.

Legal tests

1.23 We have considered our decision to grant consent to a waiver of the notification periods for these access changes against the tests set out in section 49(2) of the Communications Act 2003 (the "Act") and are satisfied that it is:

- a) objectively justifiable. The current Covid-19 pandemic is an unprecedented time for the UK, and keeping communications going has never been more important. Ofcom has said that the priority for our sectors through the coming months is to maintain support for consumers and businesses.⁴ Openreach's revised terms are responsive to the changed circumstances in which Openreach customers may find themselves as a result of the pandemic, providing them with (i) the benefit of flexibility and (ii) reduced charges for an altered service. They are also aimed at helping Openreach manage workflows. The waiver of the notification periods that would normally apply will ensure these benefits are fully realised in a timely manner in response to the current situation;
- b) not unduly discriminatory, in that the offers will be available to all Openreach customers for the relevant products without delay;
- c) proportionate, in that the waiver of the notification periods is necessary to ensure that Openreach is able to adjust the terms, conditions and charges for these products swiftly in response to the changing needs of its customers as a result of the pandemic; and

³ https://www.ofcom.org.uk/_data/assets/pdf_file/0024/112488/wla-statement-annex-33.pdf (page 117)

⁴ <https://www.ofcom.org.uk/about-ofcom/policies-and-guidelines/coronavirus-information>

d) transparent, in that we have set out the products to which Openreach's offers will apply and the reasons why the implementation of the offers is urgent so that the notification periods should be waived.

1.24 Taking account of the relatively short period of the notification periods that are being waived, we do not consider that the granting of this consent will have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which we have functions under Section 1 of the Act. We have therefore decided not to carry out a domestic consultation. We also consider that the granting of this consent is not of EU significance as in Ofcom's opinion it would not affect trade between Member States.

1.25 We have therefore decided to consent to Openreach waiving the notification periods that would otherwise apply to the changes it is making to its terms, conditions and charges for its EAD 100, EAD 1000 and SOGEA products.

1.26 The full text of Ofcom's consent can be found at Annex 1.

A1. Consent

Consent under section 49 of the Communications Act 2003 and SMP services condition 9 set out at Annex 33 to the 2018 WLAMR Statement and SMP services condition 6 set out at Schedule 3 of Annex 26 to the 2019 BCMR Statement

- A1.1 On 28 March 2018, Ofcom published a statement entitled “Whole Local Access Market Review” (‘2018 WLAMR Statement’). At Annex 33 to that statement, Ofcom imposed SMP conditions on BT in respect of network access in the wholesale local access market, where BT had been found to have significant market power. These SMP conditions were modified by a modification issued on 22 May 2018 (together ‘the WLA Conditions’)
- A1.2 Condition 9.1 of the WLA Conditions requires BT to comply with the requirements of Condition 9 except in so far as Ofcom may consent in writing.
- A1.3 Condition 9.2 of the WLA Conditions requires BT to send a notice to its customers with which it has an access agreement if it is proposing to make any amendment to its charges, terms and conditions on which it provides network access. Where the amendment involves new network access, condition 9.4(a) of the WLA Conditions requires BT to send the notice not less than 28 days before the amendment takes effect.
- A1.4 On 28 June 2019, Ofcom published a statement entitled “Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets” (‘2019 BCMR Statement’). At Schedule 3 of Annex 26 to that statement, Ofcom imposed SMP conditions on BT in respect of network access in markets for connections to end-user business sites, where BT had been found to have significant market power (the ‘BCMR Conditions’).
- A1.5 Condition 6.1 of the BCMR Conditions requires BT to comply with the requirements of Condition 6 except in so far as Ofcom may consent in writing.
- A1.6 Condition 6.2 of the BCMR Conditions requires BT to send a notice to its customers with which it has an access agreement if it is proposing to make any amendment to its charges, terms and conditions on which it provides network access. Condition 6.4 of the BCMR Conditions requires BT to send the notice not less than 28 days before the amendment takes effect, where the amendment involves new network access.
- A1.7 On 12 May 2020 BT requested that Ofcom consent to a waiver of the notification period that applies under condition 9.4 of the WLA Conditions in respect of amendments that it is proposing to make to the charges, terms and conditions on which it provides new line Single Order Generic Ethernet Access products.
- A1.8 On 12 May 2020 BT requested that Ofcom consent to a waiver of the notification period that applies under condition 6.4 of the BCMR Conditions in respect of amendments that it is proposing to make to the charges, terms and conditions on which it provides EAD 100 and EAD 1000 products.

Decision to grant consent

- A1.9 Ofcom has decided to consent to BT's requests set out in paragraphs A1.7 and A1.8 above. These consents shall take effect on the day they are published.
- A1.10 The effect of and reasons for granting the consents are set out in the accompanying explanatory statement.

Ofcom's duties and legal tests

- A1.11 Ofcom considers that the consents referred to in paragraph A1.9 comply with the requirements of section 49(2) of the Communications Act 2003 (the "Act").
- A1.12 In granting the consents referred to in paragraph A1.9, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act, the six community requirements in section 4 of the Act and the duty to take account of all applicable recommendations for harmonisation issued by the European Union in section 4A of the Act.

Interpretation

- A1.13 Except as otherwise defined, words or expressions used shall have the same meaning as they have been ascribed in the SMP services conditions set out in Annex 33 to the 2018 WLAMR Statement and Schedule 3 of Annex 26 to the 2019 BCMR Statement. Otherwise any word or expression shall have the same meaning as it has in the Act.



Brian Potterill

Director, Competition Group, Ofcom

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

21 May 2020