

NOTIFICATION UNDER SECTIONS 49 AND 49A OF THE COMMUNICATIONS ACT 2003

NOTIFICATION OF PROPOSED CONSENT UNDER SECTIONS 49 AND 49A OF THE COMMUNICATIONS ACT 2003 AND CONDITIONS 4 AND 5, CONSENTING TO BT NOT PROVIDING CERTAIN NETWORK ACCESS ON A NON-DISCRIMINATORY BASIS INCLUDING ON AN EQUIVALENCE OF INPUTS BASIS IN THE SALISBURY AREA AND MILDENHALL AREA

NOTIFICATION OF PROPOSED DIRECTION UNDER SECTIONS 49 AND 49A OF THE COMMUNICATIONS ACT 2003 AND CONDITION 7B.8, DIRECTING TO DISAPPLY CONDITION 7B.5(A)(I) IN THE SALISBURY AREA

BACKGROUND

1. On 28 March 2018, following consultation, Ofcom published a statement entitled *“Wholesale Local Access Market Review: markets, market power determinations and remedies”* (**“WLA 2018 Statement”**)¹. That document sets out Ofcom’s decisions on its review of the WLA markets, by identifying markets, making certain market determinations and setting SMP conditions (including charge control conditions). At Annex 33 of that document, Ofcom published a notification under section 45 of the Act, containing its market identifications, market power determinations and setting of SMP conditions applied to BT (**“March 2018 Notification”**).
2. The obligations imposed on BT in the WLA market in the March Notification include a requirement to not unduly discriminate against a particular person or description of persons in relation to the provision of network access (SMP Condition 4), and an obligation to provide network access on an Equivalence of Inputs basis (SMP Condition 5). Moreover, at locations at which no GEA-FTTC services are available, SMP Condition 7B.5(a)(i) requires BT to charge the same price for FTTP 40/10 Voice and Data Rental as it charges for FTTC 40/10 Rental and MPF SML1 Rental.
3. The obligations under SMP Conditions 4 and 5 are imposed as requirements except in so far as Ofcom may from time to time otherwise consent in writing. The obligation under SMP Condition 7B.5 shall not apply to such extent as Ofcom may direct pursuant to Condition 7B.8.
4. On 17 June 2019, BT published a consultation on a copper network retirement trial, which included a proposal for BT to give notice that it will implement a policy of withdrawing new supply of wholesale access to its copper network, at locations where fibre is available, in the Salisbury Area from September 2020, and a Wholesale Line Rental (**“WLR”**) withdrawal trial, which included a proposal for BT to give notice that it will implement a policy of withdrawing WLR products and, where appropriate, MPF products in the Mildenhall Area from January 2020.

¹ Wholesale Local Access Market Review; markets, market power determinations and remedies, 28 March 2018, https://www.ofcom.org.uk/_data/assets/pdf_file/0020/112475/wla-statement-vol-1.pdf.

5. Following industry feedback, BT proposed to introduce a time-limited commercial offer in the Salisbury Area and the Mildenhall Area to drive Communications Providers engagement and to encourage early migration from the Specified Services to GEA-FTTP in the Salisbury Area, and to Single Order Copper-based services, SOGEA-FTTC and SOGFAST in the Mildenhall Area.
6. Therefore, on 25 November 2019, for end-users migrated from any of the Specified Services to any of the Target Services in the Salisbury or Mildenhall Areas, BT requested that Ofcom give certain regulatory consents to allow it to offer no increase in rental charges for 12 months for the closest available bandwidth products to the Specified Service. The Trial Offer is to be available between 1 February 2020 and 1 May 2021.

PROPOSED CONSENT

7. Having considered BT's requests of 25 November 2019 in all the circumstances, Ofcom proposes to give consent under SMP Conditions in the following terms:

"1. Ofcom consents to the requirement on the Dominant Provider under SMP Condition 4 to not unduly discriminate against a particular person, or description of persons, in relation to the provision of network access, and Condition 5 to provide network access to Third Parties on an Equivalence of Inputs basis, not applying to rental charges made by the Dominant Provider for any of the Target Services, including charges associated with providing the Target Services, for network access provided in respect of an end user located in the Salisbury Area or the Mildenhall Area for the duration of that end user's Contracted Period, where the Communications Provider supplying Specified Services to that end user has accepted the Trial Offer during the Trial Period in respect of that end user.

For the avoidance of doubt, save for the above, the requirement on the Dominant Provider under SMP Condition 4 to not unduly discriminate against a particular person, or description of persons, in relation to the provision of network access, and SMP Condition 5 to provide network access to Third Parties on an Equivalence of Inputs basis, continues to apply in respect of network access provided in respect of end users located in the Salisbury Area and the Mildenhall Area.

2. Ofcom directs pursuant to Condition 7B.8 that the requirement on the Dominant Provider under SMP Condition 7B.5(a)(i) to secure the charge made by it for FTTP 40/10 Voice and Data Rental is the same as the charge made by it for the sum of FTTC 40/10 Rental and MPF SML1 Rental, is disappplied in respect of an end user located in the Salisbury Area for the duration of that end user's Contracted Period, where the Communications Provider supplying Specified Services to that end user has accepted the Trial Offer during the Trial Period in respect of that end user."

8. The proposed consent applies from 1 February 2020 to 1 May 2021 or, where an end user's Contracted Period ends after 1 May 2011, until the end of that end user's Contracted Period.

9. The effect of, and Ofcom's reasons for making, these proposals are set out in the accompanying explanatory consultation document.

OFCOM'S DUTIES AND LEGAL TESTS

10. Ofcom is satisfied that the proposed consent satisfies the tests set out in section 49(2) of the Act in that it is: objectively justifiable in relation to the networks, services and facilities to which it relates; not such as to discriminate unduly against particular persons or against a particular description of persons; proportionate to what it is intended to achieve; and in relation to what it is intended to achieve, transparent.
11. In making the proposals referred to in this notification, 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 European Community recommendation for harmonisation in section 4A of the Act and any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by the Body of European Regulators for Electronic Communications (BEREC) pursuant to Article 3(3) of Regulation (EC) No 1211/2009.

MAKING REPRESENTATIONS

12. Representations may be made to Ofcom about any of the proposals set out in this notification and the accompanying consultation document by no later by 6 January 2020.
13. Copies of this notification and the accompanying consultation have been sent to the Secretary of State in accordance with section 49C of the Communications Act 2003.

INTERPRETATION

14. For the purpose of interpreting this notification –
 - a. except in so far as the context otherwise requires, words and expressions shall have the meaning assigned to them in paragraph 15 below, and otherwise any word or expression shall have the same meaning as it has in the March 2018 Notification and 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 (c.30) shall apply as if this notification were an Act of Parliament.

15. In this notification

“Act” means the Communications Act 2003 (c.21);

“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;
“Contracted Period”	means the term of 12 months, which commences from the date that the Communication Provider supplying services to an end user located in the Salisbury Area or Mildenhall Area accepts the Trial Offer during the Trial Period in respect of that end user. The Contracted Period may extend beyond the Trial Period;
“Dominant Provider”	means BT;
“FTTP”	means Fibre-to-the-Premises, an Electronic Communications Network consisting of optical fibre extending from the local access node to the customer’s premises;
“GEA”	means Generic Ethernet Access, the BT non-physical wholesale services providing wholesale access to higher speed broadband products;
“GEA (FTTC)”	means BT’s product consisting of the provision of GEA services via its FTTC network;
“GEA (FTTP)”	means BT’s product consisting in the provision of GEA services via its FTTP network;
“GEA (G.fast)”	means BT’s product consisting of the provision of GEA services via its G.fast network;
“G.fast”	means the communications technology of that name, designed to support very high bandwidth connections over short distances on a copper access network;
“March 2018 Notification”	means the notification described in paragraph 1 above;
“Mildenhall Area”	means the geographic area in Mildenhall, Suffolk, which is served by the telephone exchange represented by the exchange code ‘EAMIL’
“Salisbury Area”	means the geographic area in Salisbury, Wiltshire, which is served by the telephone exchange represented by the exchange code ‘STSALIS’;

“SOGEA”	means BT’s product consisting of the provision of a GEA service as a ‘standalone service’ without an MPF or WLR product;
“Specified Services”	<p>means:</p> <p>in relation to the Salisbury Area: WLR, SMPF, MPF, GEA (FTTC) 40/2 Mbit/s, GEA (FTTC) 40/10 Mbit/s, GEA (FTTC) 55/10 Mbit/s, GEA (FTTC) 80/20 Mbit/s, GEA (G.fast) 160/30 Mbit/s and GEA (G.fast) 330/50 Mbit/s; and</p> <p>in relation to the Mildenhall Area: WLR, SMPF, MPF, GEA (FTTC) 40/2 Mbit/s, GEA (FTTC) 40/10 Mbit/s, GEA (FTTC) 55/10 Mbit/s, GEA (FTTC) 80/20 Mbit/s, GEA (G.fast) 160/30 Mbit/s, GEA (G.fast) 330/50 Mbit/s, SOGEA 40/10 Mbit/s, SOGEA 55/10 Mbit/s, SOGEA 80/20 Mbit/s;</p>
“Target Services”	<p>means in relation to the Mildenhall Area: SOGEA 40/10 Mbit/s, SOGEA 55/10 Mbit/s, SOGEA 80/20 Mbit/s, SOGEA 160/30 Mbit/s, SOGEA 330/50 Mbit/s and SOGEA Voice Access, and in relation to the Salisbury Area: Generic Ethernet Access (FTTP) 40/10 Mbit/s, Generic Ethernet Access (FTTP) 55/10 Mbit/s, Generic Ethernet Access (FTTP) 80/20 Mbit/s, Generic Ethernet Access (FTTP) 160/30 Mbit/s, Generic Ethernet Access (FTTP) 330/50 Mbit/s, Generic Ethernet Access (FTTP) 40/10 Mbit/s and Generic Ethernet Access (FTTP) Voice Access;</p>
“Trial Offer”	[definition to refer to the notification of BT’s commercial offer not to increase the rental charges for 12 months for end users migrated to the closest available bandwidth products in the Salisbury Area and the Mildenhall Area];
“Trial Period”	means the period during which the Trial Offer will be available, that is from 1 February 2020 to 1 May 2021;
“WLA”	means wholesale local access;
“WLA 2018 Statement”	means the statement described in paragraph 1 above; and
“WLR”	has the meaning given to it in paragraph 4 above.