



Waiver of BT's price notification requirements for charges in relation to the transfer and migration of legacy Ethernet services to new Ethernet services

Explanatory Statement and Consent to affect the operation of BT's price notification requirement

Statement

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Section 1

Consent to waive a notice period

Introduction

- 1.1 On 23 March 2012 Ofcom published the consultation document and Notification entitled 'Waiver of BT's price notification requirements for charges in relation to the transfer and migration of legacy Ethernet services to new Ethernet services - Notification of a proposal to give consent to a shorter price notification period in a specific case'¹ (the 'March 2012 Waiver Consultation'). In that document we proposed to give consent to a waiver of the price notification requirements in relation to the transfer and migration charges from BT's legacy Ethernet services (specifically Wholesale Extension Services (WES), Wholesale End-to-End Service (WEES) and Backhaul Extension Service (BES)) to BT's new Ethernet services (specifically Ethernet Access Direct (EAD), which would allow BT (i.e. Openreach) to introduce a pricing offer in advance of the normal 90 days' written notice period. We invited comments on BT's request and our proposal by 30 March 2012. This document sets out our decision to agree to BT's request and contains the formal Consent to do so set out at Annex 1.
- 1.2 Significant Market Power (SMP) services condition HH6 - Requirement to notify charges and terms and conditions ('Condition HH6') was imposed on BT by Ofcom's 2008 statement *Business Connectivity Market Review - Review of the retail leased lines, wholesale symmetric broadband origination and wholesale trunk segments markets*² (the '2008 Business Connectivity Market Review'). In particular, SMP Condition HH6.2 requires BT to give not less than 90 days' notice of any amendment to the charges, terms and conditions for alternative interface symmetric broadband origination services with a bandwidth capacity up to and including one gigabit per second (referred to in this document as "Ethernet services"), before any such amendment comes into effect. The EAD services which are the subject of BT's request are subject to that SMP Condition.
- 1.3 In the remainder of this document we refer to Openreach instead of BT, as this is the operating division within BT responsible for supplying wholesale Ethernet services.
- 1.4 On 15 March 2012 Openreach requested that Ofcom consent to a waiver of the notification period referred to above to enable it to give effect to a price change earlier than 90 days. Openreach had previously published the document titled "ETH009/12 Technology migration from WES WEES BES to EAD launch pricing"³ which sets out details of the offer and Access Charge Change Notice OR269 ('ACCN OR269').⁴

¹ <http://stakeholders.ofcom.org.uk/consultations/ethernet-waiver/>

² <http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr08/summary/bcmr08.pdf>

³

<http://www.openreach.co.uk/orpg/home/updates/briefings/ethernet-services-briefings/ethernet-services-briefings/articles/eth00912.do>

⁴

<http://www.openreach.co.uk/orpg/home/products/pricing/notificationDetails.do?data=ThQLPOgdo8c%2FpcQINXj7BV0AzMfOC1w%2B7d4ELMHNgDelwvvJorPpbmh0YRgwBhkkImbMkfEWW9Hg%0AS5od5xPk5mMrG2JXeytL6pFJZpTLM42nMTEF%2BKjWmexJt5mYlgMVVCBTHUk%2FAkGGPXhiPyrwQ%3D%3D>

1.5 The document "ETH009/12 Technology migration from WES WEES BES to EAD launch pricing" sets out the details of Openreach's offer to its wholesale customers. The scheme consists of three elements. Firstly, a reduction in the connection charge ranging from 25% to 50% where customers chose to migrate their legacy Ethernet service to a new Ethernet service. Secondly, as part of migrating their service customers would be required to upgrade the bandwidth of the service.⁵ Thirdly, Openreach would not raise early termination charges for cancellation of the legacy Ethernet service, should these be applicable.

1.6 Table 1 shows the products in scope of the offer and the charges that will apply.

Table 1 – WES/WEES/BES to EAD Transfer and Migration Charges

Feature	Note	Operative Date	Connection Charge Per Circuit £Exc VAT
From	To		
WES/WEES 10 Unmanaged	EAD 100	10/05/2012	£1463.00
WES/WEES 10 Unmanaged	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
WES/WEES 10 Managed	EAD 100	10/05/2012	£1463.00
WES/WEES 10 Managed	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
WES/WEES 10 LA	EAD 100 LA	10/05/2012	£1463.00
WES/WEES 10 LA	EAD 1000 LA (standard or 60 month minimum period)	10/05/2012	£1500.00
WES/WEES 10 LR	EAD 100	10/05/2012	£1463.00
WES/WEES 10 LR	EAD 100 LA	10/05/2012	£1463.00
WES/WEES 10 LR	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
WES/WEES 10 LR	EAD 1000 LA (standard or 60 month minimum period)	10/05/2012	£1500.00
WES/WEES 100	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
WES/WEES 100 Resilience Option 1	EAD 1000 Resilience Option 1 (Standard or 60 month minimum period)	10/05/2012	£3750.00
WES/WEES 100 LA	EAD 1000 LA (standard or 60 month minimum period)	10/05/2012	£1500.00
WES/WEES 155	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
WES/WEES 622	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
BES/BES Daisy Chain 10	EAD 100	10/05/2012	£1463.00
BES/BES Daisy Chain 10	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
BES/BES Daisy Chain 100	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
BES/BES Daisy Chain 155	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00
BES/BES Daisy Chain 622	EAD 1000 (standard or 60 month minimum period)	10/05/2012	£1998.00

1.7 Openreach notified Ofcom that it wished to bring forward the date on which the offer period starts from 10 May 2012 to 10 April 2012. To do this, Openreach needs

⁵ For example, a WES10 (a 10Mbt/s service) to an EAD100 (a 100Mbt/s service).

Ofcom to consent to a reduction in the notification period set out in the SMP services conditions referred to above.

Openreach wishes to bring forward the Offer Period

- 1.8 Openreach has explained that it wishes to provide an incentive to CPs to migrate from its legacy Ethernet services that were withdrawn from new supply on 1 June 2011 and will no longer be supported after June 2015. Openreach is also keen to bring the benefits of this price reduction to its customers as early as possible given the current economic climate.

The March 2012 Waiver Consultation

- 1.9 In the March 2012 Waiver Consultation we explained that we considered the shortening of the notice period from 90 to 60 days would be likely to bring forward any benefits of the scheme to wholesale purchasers of Ethernet services and possibly to end users, if price reductions were passed on to consumers. We noted that the shorter notification period could be useful to CPs, as it would allow them to benefit from the offer earlier than would otherwise have been the case. We therefore proposed granting consent in this case to enable Openreach to introduce the offer earlier than it would otherwise be able to do.
- 1.10 We sought comments on the proposal to waive the notification period by 30 March 2012.

Respondents' views

- 1.11 We received 4 responses to the March 2012 Waiver Consultation. A list of the respondents is at Annex 2.
- 1.12 In its response, MBNL expressed support for Ofcom's proposal and indicated that it believed the offer would have a significantly positive impact on the market. MBNL explained that any actions that reduced costs and brought forward the timeline to facilitate such migrations would be good for wholesale customers as well as the retail customer base. As MBNL's response contained confidential business information, it requested that we do not publish its full response.
- 1.13 Verizon disagreed with Ofcom's proposal and considered that such waivers should only be granted where there were clearly demonstrable benefits to BT's wholesale customers and/or end users. Verizon believed that the proposed discounts on connection charges did not form a compelling proposition for existing customers of legacy Ethernet services as they would be forced to pay increased rental charges for the bandwidth upgrade that forms part of the offer. Verizon considered that the effect of the offer would be to increase network costs and therefore potentially increase prices in downstream markets.
- 1.14 Verizon also indicated that customers who wished to retain low bandwidth Ethernet services would see no benefit from the offer and that the migration from legacy to new Ethernet services would inconvenience users and cause disruption to services. Verizon stated that it did not support the withdrawal of the WES service and suggested that BT should bear the cost of migration and compensate CPs for any downtime.

- 1.15 In its response BTWholesale expressed support for Ofcom's proposal and highlighted that CPs were under pressure to deliver higher bandwidth at lower cost. BTWholesale considered that in the absence of migration being offered by Openreach, legacy services would have to be terminated and new services ordered, leading to potential disruption of services for end users. The upgrade would provide significant bandwidth/cost benefits and performance enhancements.
- 1.16 Whilst Cable & Wireless Worldwide (C&WW) accepted that migration would be required at some point over the next few years it disagreed with Ofcom's proposal. C&WW indicated that the offer only applied to service upgrades and not to like-for-like services nor to changes in service e.g. WES to EAD LA⁶. C&WW considered that both they and other CP's had invested heavily in handover points to optimise their network costs in order to utilise local access products. This offer did nothing to support this investment.
- 1.17 C&WW expressed concern that BT appeared to be promoting this offer with excessive haste and suggested that this may be to favour its own downstream businesses. It further suggested that if Ofcom were to grant the notification waiver, we should require BT to provide a report, at some future point in time, which clearly sets out the CP and BT downstream circuits that have benefited from bringing forward the offer.
- 1.18 C&WW questioned whether the granting of the consent would be consistent with Ofcom's statutory duties.

Our response

- 1.19 We have considered all of the responses provided to the March 2012 Waiver Consultation.
- 1.20 Firstly, it is important to note that Ofcom is not consulting on the contents of the offer itself but on Openreach's request to bring forward the offer from 90 days to 60 days. In granting the consent in this document, we make no comment on the compatibility of the substance of the offer with the relevant regulation.
- 1.21 Verizon expressed the view that whilst the offer would reduce connection charges for migration from legacy services, the requirement to upgrade to a higher bandwidth product would mean an increase in rental prices. Whilst this appears to be the case, at present CPs are not being forced to migrate to new Ethernet services and can remain on legacy Ethernet services. There is therefore no obligation for CPs to incur higher costs at the present time. Should BT wish to withdraw support for the legacy service, we would assess whether BT remained compliant with its SMP obligations at that time. In our view, there is therefore no indication that CPs will be forced to increase costs as a result of the shortening of the notice period. Rather, those CPs that wish to benefit from reduced migration costs will be able to do so at an earlier time. It remains a matter for individual CPs to consider whether the ongoing cost of the new products is justified for their businesses and we do not consider that the shortening of the notice period alone affects this decision.
- 1.22 We are not suggesting any changes to the more general requirements of SMP service conditions HH6.2. Moreover, our current practice is to consider all such waiver requests on a case-by-case basis. Any future request will be assessed

⁶ WES has two local ends and a main link, whereas EAD LA has only a single local end.

individually on its merits in accordance with the statutory criteria in section 49 of the Communications Act 2003 (the Act).

- 1.23 We address the points raised by C&WW below by reference to the statutory requirements of the Act.

Statutory requirements to be met before giving a consent

- 1.24 Section 49 of the Act applies where Ofcom proposes to grant a consent which affects the operation of a condition made under section 45 of the Act (including SMP services conditions). In order to give such consent, Ofcom must first satisfy itself that the criteria set out in section 49(2) are satisfied, namely that the giving of a consent:

- i) is objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- ii) is not such as to discriminate unduly against particular persons or against a particular description of persons;
- iii) is proportionate to what it is intended to achieve; and
- iv) is transparent, in relation to what it is intended to achieve.

- 1.25 We consider that the criteria set out in section 49(2) of the Act are satisfied for the following reasons and therefore have proceeded to grant the consent to a shorter notice period in this case.

The waiver is objectively justifiable

- 1.26 We consider that granting a consent to a shorter notice period in this case is objectively justifiable since this would enable any benefits of the offer to be experienced earlier by CPs and also by end-users to the extent that the price reductions are used to enhance retail competition. Bringing forward the start of the offer in this case may also assist in encouraging earlier migration from legacy Ethernet services which are no longer available for new supply and will no longer be supported after June 2015. We note the disagreement of both C&WW and Verizon with this view, in particular C&WW's concern that BT downstream may benefit disproportionately from the offer. However, as set out in paragraph 1.21 above, there is no obligation on CP's to take up the offer at this time and therefore no obligation to incur additional costs. CPs remain able to continue to receive legacy products and this is unaffected by a reduction in the notice period for Openreach's migration offer.

The waiver is not unduly discriminatory

- 1.27 We do not consider that the granting of a consent to a shorter notice period in this case would discriminate unduly against particular persons or against a particular description of persons. In relation to the offer itself, we note that SMP conditions HH2.1 imposes obligations on Openreach not to unduly discriminate in the provision of Ethernet services, and that undue discrimination would exist if Openreach unfairly favoured to a material extent BT's downstream activities so as to place other CPs at a competitive disadvantage. In relation to the shorter notification period, Openreach has confirmed that the offer was notified to all CPs at the same time in line with its SMP obligations. Neither Verizon nor C&WW has indicated how BT's downstream operations would benefit from the shortening of the notice period to any greater degree than any other CP.

- 1.28 In light of the above, we do not consider in this case that BT's downstream operations would be favoured to a material extent by a shortening of the price notification period. Consequently, we do not consider it appropriate to require BT to report on the level of take-up by CPs and BT's downstream operations. BT remains subject to the non-discrimination obligation contained in SMP Condition HH2 and we consider that this should ensure that all CPs are treated equally in this case.

The waiver is proportionate

- 1.29 We believe that our consent to shorten the notice period is proportionate in this case. Our proposal was intended to ensure that any benefits of the offer to wholesale purchasers of Ethernet services and to end users could be brought forward. In particular, we noted that the shorter notification period could be of use to CPs that want to migrate legacy Ethernet services to new Ethernet services and require additional bandwidth to meet the requirements of their customers.
- 1.30 We consider that the shorter notification period will not cause any material disadvantage to CPs and that there are no less restrictive measures which would achieve this aim. We are therefore satisfied that our decision to grant a waiver in this case is proportionate to the objective it is intended to achieve.

The waiver is transparent in relation to what it is intended to achieve

- 1.31 We believe that consent is transparent in relation to what it is intended to achieve. The March 2012 Waiver Consultation set out why we intended to grant a consent in this case and the terms and conditions of the offer have been communicated to all CPs via ACCN OR269 at the same time. This document, having taken account of the responses to the consultation, confirms our initial proposal and therefore meets the requirement of transparency.

The waiver is consistent with Ofcom's general duties

- 1.32 We consider that the granting of this consent would be consistent with Ofcom's obligations under section 3 and 4 of the Communications Act in that it would further the interests of consumers and encourage retail competition by making the offer available at an earlier date.

Ofcom has consulted on its proposals

- 1.33 Section 49A of the Act obliges Ofcom to publish a notification whenever it proposes to give a consent for the purposes of a SMP condition set under section 45 of the Act where that proposal would, in Ofcom's opinion, have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which Ofcom has functions under Part 2 Chapter 1 of the Act.
- 1.34 The March 2012 Waiver Consultation explained the basis upon which we were consulting and constituted a notification under section 49A(3) of the Act.
- 1.35 We also explained the effect of section 47A(7) of the Act, which provides that a proposal does not need to be notified to the European Commission, BEREC and other Member States' regulatory authorities before it is given effect, if the proposal is not of 'EU significance'. We explained that we did not consider the proposal to be of EU significance because, in our opinion, it would not affect trade between Member States. We remain of that view.

- 1.36 We have therefore decided to consent to waive the relevant price notification requirement in this case. The consent under SMP service condition HH6.2 is published at Annex 1 of this document and is effective from the date of publication of this Statement.

Annex 1

Consent under SMP service condition HH6.2

Consent pursuant to SMP services condition HH6.2 imposed on BT as a result of the analysis of wholesale alternative interface symmetric broadband origination market in which BT has been found to have significant market power

BACKGROUND:

1. As a result of a market analysis carried out by OFCOM, OFCOM issued a Statement on 8 December 2008 in accordance with section 79 of the Act that BT has significant market power in the market for wholesale alternative interface symmetric broadband origination services up to and including one gigabit per second, in the UK except the Hull area and imposed certain SMP services conditions on BT, including Condition HH6.2;
2. This Consent concerns matters to which Condition HH6.2 relates;
3. For the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM is satisfied that, in accordance with Section 49(2) of the Act, this Consent is:
 - (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (c) proportionate to what it is intended to achieve; and
 - (d) in relation to what it is intended to achieve, transparent.
4. For the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
5. On 23 March 2012, OFCOM published a notification of the proposed Consent in accordance with section 49A of the Act;
6. OFCOM has considered every representation about the proposed Consent duly made to it; and

CONSENT

NOW, therefore, in accordance with section 49 of the Act and pursuant to Condition HH6.2, OFCOM gives the following Consent:

1. For the purposes of complying with its obligations under Condition HH6.2, OFCOM consents that BT shall not be obliged to give 90 days' notice in respect of the proposed price changes set out in Access Charge Change

Notice OR269 issued on 9 February 2012 which relates to the transfer migration charge for Ethernet services.

2. For the purposes of interpreting this Consent, the following definitions shall apply:
 - (a) “**Act**” means the Communications Act 2003
 - (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; and
 - (c) “**OFCOM**” means the Office of Communications.
3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 above.
4. For the purpose of interpreting this Consent:
 - (a) headings and titles shall be disregarded; and
 - (b) the Interpretation Act 1978 shall apply as if this Consent were an Act of Parliament.
5. This Consent shall take effect on the day it is published.

Marina Gibbs
Competition Policy Director

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

23 March 2012

Annex 2

List of respondents to consultation

A2.1 We received four responses from the following communication providers:

- BT
- MBNL
- Verizon
- Cable & Wireless Worldwide