



Consent to a waiver of BT's price notification requirement for wholesale business analogue exchange line services connection charges

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Section 1

Request to waive a notice period

Introduction

- 1.1 On 10 August 2009, we published the consultation document and Notification entitled *Waiver of BT's price notification requirement for wholesale business analogue exchange line services connection charges*¹ ('the August document') in which we stated that we proposed to give consent to a waiver request from BT in relation to SMP services condition AA6(a).
- 1.2 SMP services condition AA6(a) was imposed on BT (hereafter we refer to Openreach which runs BT Group's local access network) following Ofcom's *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*². Condition AA6(a).2(a) requires Openreach to give not less than 90 days' notice before changing charges for wholesale line rental ('WLR') services, including the charge for the installation of a new wholesale business analogue exchange line.
- 1.3 On 8 July 2009, Openreach requested that Ofcom consent to a waiver of the notification period referred to above to enable it to give effect to a temporary price change earlier than 90 days, as set out in Access Charge Change Notice OR133 ('ACCN OR133'), issued on 24 July 2009.³
- 1.4 In ACCN OR133, Openreach set out a scheme available to its wholesale customers, offering a rebate against the standard connection charge for a proportion of new WLR premium analogue exchange line connections made during the Offer Period⁴. The number of new connections made during the Offer Period would be measured against new connections made in the 12 calendar weeks to 19 June 2009 (the 'Background Count') and the rebate would apply to those orders above the average number of new customer connections.

Growth during Offer Period	Connection Discount	Connection Charge for all WLR Premium Analogue lines above 'Background Count' (excluding VAT)
Average Background Count or Less	0%	£88.00
Greater than Average background Count	50%	£44.00

¹ see http://www.ofcom.org.uk/consult/condocs/waiverbt/waiver_condoc.pdf

² see

http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

³ see

<http://www.openreach.co.uk/orpg/pricing/notificationDetails.do?data=1R7dW5Udt2o%2B0%2B657sp8ij2r8JQd%2BZkkcqQXTfrEbr17phKFnzZGAs4YuwfZ736b>

⁴ The Offer Period is presently set to last from 24 October 2009 to 26 February 2010.

- 1.5 Openreach stated that rebates would be credited to Communications Providers' ('CPs') relevant bills within 60 calendar days of the end of the Offer Period. Openreach wishes, however, to bring forward the date on which the Offer Period starts to 5 September 2009 or as soon as possible thereafter. To do this, Openreach needs Ofcom to consent to a reduction in the notification period of 90 days as set out in SMP services condition AA6(a).2(a).
- 1.6 We may consent to a reduction in the notification period referred to under paragraph AA6(a).1 which states that:
- "Except in so far as the Director may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below."

Openreach wishes to bring forward the Offer Period

- 1.7 Openreach explained that it wished to bring the benefits of this pricing incentive scheme to its customers as early as possible given the current economic climate; the fact that price reductions will benefit all CPs who purchase WLR premium analogue lines; and that the structure of the discount is intended to make it attractive and possible for all service providers, irrespective of size, to benefit.

The August document

- 1.8 The August document explained that we considered that the proposed waiver of the notification period appeared to be justified and appropriate in this case and, furthermore, that the proposed price changes, when implemented, would be likely to be of benefit to Openreach's wholesale customers and consumers more generally.
- 1.9 We sought comments on the proposal to waive the notification period by 24 August 2009. The consultation period was shortened because consulting for a longer period would delay the introduction of the new charges which we considered would be of benefit to Openreach's wholesale customers and consumers.

Respondents' views

- 1.10 We received two responses to the consultation from KCOM and the TalkTalk Group. KCOM agreed with Ofcom's proposal to consent to the waiver request, stating that *'price changes are likely to be beneficial to Openreach business wholesale customers and indirectly to end users'*.
- 1.11 While TalkTalk Group broadly agreed with Ofcom's proposal to consent to the waiver, it expressed a wider concern with the proposed discount contained in Openreach's ACCN and other recent ACCNs. TalkTalk Group notes that a criterion for granting consent is that *'it should not discriminate'*. It agrees that there is no discrimination between WLR customers in this instance, but its concerns relate to the relationship with MPF. It states *'MPF is relevant since it is used to compete in the same downstream market as WLR (i.e. retail line rental) and could be used to compete directly against WLR'*. TalkTalk Group also raised a question about how this price reduction (on business/premium only) will work when there is a single product (WLR core product) as proposed in the WLR charge control consultation and how Openreach will be able to distinguish between different types of lines.

Ofcom's response

- 1.12 The August document did not specifically assess whether the effect of the new charges in this particular case could or would be unduly discriminatory since a request to waive a notification period is merely a means by which a new charge can be introduced earlier than required by an SMP services condition. In considering such a request, we may take into account, among other things, the likely overall effect of the new charges on downstream customers and consumers. However, in the absence of clear evidence that the new charges would have an adverse effect, it is not appropriate or proportionate for Ofcom to carry out a thorough assessment of the effect of the charge change in each case. Where the charge variation applies equally to all customers and its effect overall will be to introduce lower charges, we may reasonably assume that they are more likely than not to be beneficial to wholesale customers and consumers. It should be noted that in introducing the new charges Openreach remains subject to SMP services condition on Network Access (AA2).
- 1.13 With regards to TalkTalk Group's comments regarding the '*discriminatory impact of these price changes*', we confirm that these concerns fall outside the scope of the waiver consent process where the key question is whether a shorter notification period should be agreed to.
- 1.14 Therefore, we consider that the new charges will likely bring benefits to wholesale customers and consumers and these should be brought to the market at the earliest opportunity.
- 1.15 In relation to TalkTalk Group's query about how Openreach will distinguish whether lines are business or residential for the purposes of carrying through this price reduction over the offer period should the proposals in Ofcom's WLR charge control consultation for a single core product be adopted as proposed, we expect that Openreach will have a solution that enables it to accurately determine how the rebate should apply.
- 1.16 It should be noted that we have chosen to waive the notification period in this particular case having received a request to do so. This does not change more generally the requirements of SMP services condition AA6(a).

Statutory requirements to be met before giving a consent

- 1.17 Section 49 of the Communications Act 2003 ('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 satisfy itself that the criteria set out in section 49(2) are satisfied, namely the giving of a consent is:
- i) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - ii) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - iii) proportionate to what it is intended to achieve; and
 - iv) in relation to what it is intended to achieve, transparent.

- 1.18 We consider that the criteria set out in section 49(2) of the Act are satisfied for the following reasons and therefore consider that we should consent to this waiver request.
- 1.19 Firstly, we consider that granting this waiver is objectively justifiable as the price reductions could benefit any of Openreach's wholesale customers who purchase business analogue exchange lines. We also consider that it is likely to benefit consumers generally as the rebate is intended to give wholesale customers incentives to expand their customer base and this would be best achieved if the rebates were passed on to CPs' business customers who could then pass on the benefits to consumers through lower prices. Openreach explained that it would like to bring the benefits of this pricing incentive scheme to its customers at the earliest possible opportunity, and considers that this is particularly important given the present economic conditions.
- 1.20 Secondly, for the purposes of section 49(2), we do not consider that granting this waiver would discriminate unduly against particular persons or against a particular description of persons as price reductions could benefit any of Openreach's wholesale customers who purchase business analogue exchange lines. The structure of the discount is intended to make it attractive to all its wholesale customers and possible for all of them (irrespective of size) to benefit. Also, this would not unfairly favour BT's downstream activities to a material extent given that the rebate is intended to benefit all WLR service providers who succeed in extending their business customer base by installing a greater number of business lines in comparison to the Background Count period.
- 1.21 Finally, we also considered that granting the consent in this case is proportionate and transparent. Requiring Openreach to meet the requirements of SMP services condition AA6(a) in this particular case would delay the rebates being passed onto wholesale customers and would not therefore achieve corresponding retail price reductions within the shortest time. The granting of consent in this case will therefore achieve Ofcom's aim of ensuring that price reductions may be passed on to customers at the earliest opportunity and is considered proportionate in this case. The consultation explained why we are proposing to grant the waiver and this document, having taken account of responses to the consultation, confirms our initial proposal and therefore meets the requirement for Ofcom's actions in this area to be transparent.
- 1.22 Also, we consider that the granting of this waiver request would be consistent with our obligations under sections 3 and 4 of the Act in that it would further the interests of consumers and encourage retail level price competition on connection prices by enabling Openreach to introduce the rebates at an earlier stage and therefore result in general benefits to consumers at the earliest possible opportunity.
- 1.23 Ofcom cannot give a consent under section 49 of the Act unless we have published a notification:
- i) stating that there is a proposal to give, modify or withdraw it;
 - ii) identifying the person whose proposal it is;
 - iii) setting out the direction, approval or consent to which the proposal relates;
 - iv) setting out the effect of the direction, approval or consent or of its proposed modification or withdrawal;

- v) giving reasons for the making of the proposal; and
 - vi) specifying the period within which representations may be made about the proposal to the person whose proposal it is.
- 1.24 Section 49(5) of the Act requires that the period for making representations must be one month after the day of the publication of the notification unless there are exceptional circumstances, in which case a shorter notification period may be used so long as it is reasonable in the circumstances. A shorter notification period can only be given where the notification is not one that is required to be sent to the European Commission ("the Commission") under section 50(4) of the Act.
- 1.25 The August document constituted the notification that we are required to give under Section 49 of the Act and in it we set out why we were consulting for a shorter period.
- 1.26 We also stated that we did not consider that the notification was one that would need to be sent to the Commission under section 50(4) of the Act as we did not consider that there would be an effect on trade between Member States resulting from the proposals in this case. This remains the case.

Next steps

- 1.27 Openreach intends to issue a replacement ACCN stating when the scheme set out in ACCN OR133 will take effect.

Annex 1

Consent

Consent under SMP services condition AA6(a) imposed on BT as a result of the analysis of the wholesale business analogue exchange line services 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 Notification on 28 November 2003 in accordance with section 79 of the Communications Act 2003 ('the Act') that BT has significant market power in the market for wholesale business analogue exchange line services in the UK except the Hull Area and imposed certain SMP services conditions on BT, including Condition AA6(a);
2. This Consent concerns matters to which Condition AA6(a) 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 10 August 2009, OFCOM published a notification of the proposed Consent in accordance with section 49 of the Act and sent copies of the notification to the Secretary of State; and
6. OFCOM has considered every representation about the proposed Consent duly made to it.

NOW, therefore, in accordance with section 49 of the Act and pursuant to Condition AA6(a), OFCOM gives the following Consent:

7. For the purposes of complying with its obligations under Condition AA6(a), 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 OR133 issued on 24 July 2009 which relates to the installation of new wholesale business analogue exchange line services.

8. 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 British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;
 - (d) **"Consent"** means this notification proposing to give consent to BT for a waiver of its required notice period as set out in paragraph 7;
 - (c) **"Hull Area"** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc (now KCOM);
 - (d) **"Notification"** means the notification referred to in paragraph 1; and
 - (e) **"OFCOM"** means the Office of Communications.
9. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 8 above and otherwise any word or expression shall have the same meaning as it has in the Notification as appropriate.
10. 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.
11. 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

27 August 2009