



Waiver of BT's price notification requirement for wholesale residential analogue exchange line services

Notification of a proposal to give consent to a
shorter price notification period in a specific case

Consultation

Publication date:

23 April 2009

Closing Date for Responses:

30 April 2009

Contents

Section		Page
1	Request to waiver a notice period	1
Annex		Page
1	Responding to this consultation	6
2	Ofcom's consultation principles	8
3	Consultation response cover sheet	9
4	Draft Notification – proposed consent	11

Section 1

Request to waiver a notice period

Introduction

- 1.1 SMP services Condition AA6(a) was imposed on BT (hereafter we refer to Openreach as they run the BT Group local access network) following Ofcom's *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*¹. Condition AA6(a).2(a) requires Openreach to give not less than ninety days' notice before changing charges for wholesale line rental ('WLR') services including the charge for the installation of a new residential analogue exchange line. On 9 April 2009, however, 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 set out in Customer briefing reference WLR019/09² and Access Charge Change Notice OR120 both of which were issued on 3 April 2009.
- 1.2 The briefing referred to announced that Openreach were introducing a scheme which would be intended to give WLR service providers' incentives to increase their wholesale residential analogue exchange line customer-base by offering rebates against the standard connection charge for a proportion of new connections made during the Offer Period³. The number of new connections made during the Offer Period would be measured against new connections made in the 13 calendar weeks to 27 February 2009 (the 'Background Count') and the rebates available would vary to the extent to which the provider increases the average number of new customer connections. The specific rebates announced were as follows:

Growth Incentive Matrix per CP		
Percentage growth during Offer Period	Connection Discount	Connection Charge for all WLR Basic Analogue lines above 'Background Count' (excluding VAT)
<2%	0%	£88.00
2 - 49.99%	30%	£61.60
50 – 149.99%	40%	£52.80
> 150%	50%	£44.00

- 1.3 Openreach stated that rebates would be credited to relevant bills within sixty calendar days of the end of the Offer Period.
- 1.4 Openreach wishes, however, to bring forward the date on which the Offer Period starts to 2 May or as soon as possible thereafter. To do this, Openreach needs

¹ see http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

² see <http://www.openreach.co.uk/orpg/news/productbriefings/wlr/wlr01909.do>

³ The Offer Period is presently set to last from 4 July 2009 to 6 November 2009

Ofcom to consent to a reduction in the notification period set out in SMP services condition AA6(a).2(a).

- 1.5 Ofcom may consent to a reduction in the notification period set out in the SMP services condition 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

- 1.6 Openreach explained that a number of WLR service providers have approached them seeking reductions in the connection price as they consider that the level of it acts as a barrier to take-up and they would benefit from greater price flexibility. That aside, Openreach has experienced a significant decline in copper lines and considers that this could be due to increasing numbers of mobile-only households as well as the current economic climate. Openreach therefore considers that providing an incentive to its wholesale customers to increase their own consumer-base is needed and would benefit its customers and end-users. They also wish to introduce the incentive system as soon as possible.

Ofcom's view

- 1.7 On 19 March 2009, we published the consultation document entitled *Review of the fixed narrowband services wholesale markets* ('the March consultation') in which we set out the proposed markets, market definitions and proposed remedies in various markets including the market for wholesale analogue exchange line services. We set out in that document our view that Openreach retains SMP in the market for wholesale analogue exchange line services and proposed setting various SMP services conditions on Openreach including a new Condition AA6(a). The new Condition AA6(a) would continue to require Openreach to give advance notification of price changes in various markets including the market for wholesale analogue exchange line services which itself includes the installation of new residential exchange lines.
- 1.8 We proposed in the March consultation that Openreach should only be required to give twenty-eight days' notice for price changes under the new Condition AA6(a) and the proposal set out here is therefore consistent with that. That proposal is, however, subject to respondents' views.
- 1.9 We consider, nonetheless, that the proposed price changes in this case are likely to be of benefit to Openreach's wholesale customers and end-users more generally. The structure of the offer is such that all wholesale customers could benefit to the extent that they increase their customer base in comparison to the Background Count. We therefore consider that we should proceed to grant consent in this case and enable Openreach to introduce the rebate earlier than it would otherwise be able to do.

Statutory requirements to be met before giving a consent

- 1.10 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 first satisfy itself that the criteria set out in section 49(2) are satisfied, namely the giving of a consent:

- i) must be objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - ii) must not discriminate unduly against particular persons or against a particular description of persons;
 - iii) must be proportionate to what it is intended to achieve; and
 - iv) must be, in relation to what it is intended to achieve, transparent.
- 1.11 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.
- 1.12 Firstly, we consider that granting this waiver is objectively justifiable as the price reductions could benefit any of Openreach's wholesale customers who purchase residential analogue exchange lines. We also consider that it is likely to benefit consumers 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 consumers. 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.
- 1.13 Secondly, we do not consider that granting this waiver would discriminate unduly against particular persons or against a particular description of persons as the price reductions could benefit all of Openreach's wholesale customers who purchase residential analogue exchange lines. Openreach explained that 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. We also consider that this would not unfairly favour downstream activities to a material extent given that the rebate is intended to benefit all WLR service providers who succeed in extending their customer base in comparison to the Background Count period.
- 1.14 Finally, we also consider 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 grant 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. This explanatory statement sets out why we are proposing to grant the waiver and therefore meets the requirement for Ofcom's actions in this area to be transparent.
- 1.15 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 benefit consumers at the earliest possible opportunity.

Consultation details and Notification of a proposal to give consent

- 1.16 Ofcom is seeking comments on its proposal to grant a waiver in this particular case by 30 April 2009. We note that this gives little time for respondents to consider the proposals set out here. But we consider that the proposals set out herein are likely to

be of benefit to Openreach's wholesale customers and that they would wish them introduced at the earliest possible opportunity. Requiring Openreach to give ninety days' notice as set out in ACCN OR120 or requiring Openreach to give a further twenty-eight days' notice subsequent to this consultation would serve to delay introduction of the rebates and therefore delay the potential consumer benefits.

1.17 Ofcom cannot give a consent under section 49 of the Act unless we have published 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.

1.18 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.

1.19 Section 50(4) of the Act requires us to send to the Commission a copy of every notification published under section 49(4) with respect to a proposal which:

"...

- (a) relates to the giving of a direction, approval or consent for the purposes of –
 - (i) an access-related condition falling within section 73(2) or (4), or
 - (ii) an SMP services condition,or to the modification or withdrawal of such a direction, approval or consent; and
- (b) is a proposal which, in Ofcom's opinion, would affect trade between Member States,"

1.20 We consider that the reduction in the consultation period in this case is consistent with section 49(6) of the Act as we have previously written to the industry to advise that we would consider shorter notification periods when considering requests to waiver notification periods. In this case, we also consider that there are exceptional circumstances which justify a shorter notification period since a full one month consultation period would not allow sufficient time for Ofcom to grant such a consent

and enable Openreach to implement its price reductions. We consider that this notification does not need to be sent to the Commission.

- 1.21 The letter referred to above was published to the industry on 11 October 2004 and stated that:

"In the circumstances of a proposed consent to a waiver of a 28 day notice period, it would not be appropriate to consult on the proposition for 1 month, and unhelpful even in the context of a 90 day notice period. In such cases Ofcom will take into consideration its duties under Sections 3 and 4 of the Communications Act, in particular the promotion of competition, in deciding whether a case is justified. Ofcom also notes that proposals to implement a price change with shorter than usual notice may not be likely to affect trade between member states. The period for consultation may vary according to the significance of complexity of the proposed price change, but in most of these particular cases, Ofcom will consult for 5 working days only, unless there are particular reasons for allowing a longer period. Ofcom will endeavour to adopt a very concise and standardised format for such consultations, to minimise the time which it will take for interested parties to consider the proposition. Ofcom will also aim to consider responses and publish its consent, or a refusal, within a few days of the consultation period ending unless, the nature of the responses received requires more extended analysis."

- 1.22 We consider that it is appropriate in this case to consult for a shorter period and enable Openreach to introduce the price changes at the earliest possible opportunity to enable consumers to benefit from whatever discounts are passed on.
- 1.23 We do not consider that the notification is one that is required to be sent to the Commission under section 50(4) of the Act as we do not consider that there would be an effect on trade between Member States resulting from the proposals in this case
- 1.24 The proposed consent relates to a waiver of the requirement to provide ninety days' notice under SMP services condition AA6(a). We consider, however, that an earlier reduction in prices will not have an effect on trade between Member States as the price reduction would otherwise come into force at the end of the ninety days' notification period in any event.
- 1.25 In light of the foregoing considerations, Ofcom considers it justified and appropriate to reduce the consultation period in this case. The effect of the proposed consent and Ofcom's reasons for making this proposal are as set out herein.

Do respondents agree that Ofcom should proceed to waive the notification period in this particular case? If not, please explain why.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 30 April 2009**.
- A1.2 Ofcom strongly prefers to receive responses, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues.
- A1.3 Responses may be sent to michael.galvin@ofcom.org.uk or alternatively be posted faxed to the address below, marked with the title of the consultation.

Michael Galvin
4th Floor
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Fax: 020 7783 4158

- A1.4 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.5 Please explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.6 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Michael Galvin on 020 7783 4158.

Confidentiality

- A1.7 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual

property rights is explained further on its website at
<http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.10 Following the end of the consultation period, Ofcom proposes to proceed in the manner set out in this document.
- A1.11 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see:
http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.12 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.13 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.14 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals. In this case, Ofcom considers that it is not necessary to consult for ten weeks for the reasons set out in the document.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

Annex 4

Draft Notification – proposed consent

NOTIFICATION UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003

Proposal to grant a consent to British Telecommunications plc (“BT”) under SMP services condition AA6(a), imposed on BT as a result of the analysis of wholesale residential analogue exchange line services markets in which BT has been found to have significant market power

1. OFCOM hereby make, in accordance with section 49 of the Act, a proposal to give a consent under SMP services condition AA6(a), imposed on BT as a result of the analysis of wholesale residential analogue exchange line services markets in which BT has been found to have significant market power.
2. The proposed consent is set out in the Annex to this Notification.
3. The effect of the proposed consent, and the reasons for making the proposal, are set out in the accompanying Explanatory Statement.
4. In making the proposal set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3 of the Act and the six Community requirements set out in section 4 of the Act.
5. Representations may be made to OFCOM about the proposal set out in this Notification and the accompanying Explanatory Statement by **5pm on 30 April 2009**.
6. In this Notification—
 - (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 736 of the Companies Act 1985, as amended by the Companies Act 1989; and
 - (c) **“OFCOM”** means the Office of Communications.

Gareth Davies
Competition Policy Director

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

23 April 2009

Annex

[Proposed] Consent under SMP services condition AA6(a) imposed on BT as a result of the analysis of wholesale residential analogue exchange line services markets in which BT has been found to have significant market power

WHEREAS:

- (A) 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 Act that BT has significant market power in the market for wholesale residential analogue exchange line services in the UK except the Hull area and imposed certain SMP services conditions on BT, including Condition AA6(a);
- (B) this Consent concerns matters to which Condition AA6(a) relates;
- (C) 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.
- (D) 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;
- (E) on 23 April 2009, OFCOM published a notification of the proposed Consent in accordance with section 49 of the Act;
- (F) OFCOM has considered every representation about the proposed Consent duly made to it; and

NOW, therefore, pursuant to Condition AA6(a), OFCOM gives the following Consent:

1. For the purposes of complying with its obligations under Condition AA6(a), OFCOM consents that BT shall not be obliged to give ninety days' notice in respect of the proposed price changes set out in Access Charge Change Notice OR120 issued on 3 April 2009 which relates to the installation of new wholesale residential analogue exchange line 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 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;

- (c) **"Notification"** means the Notification referred to in recital (A) of this Consent above, as published on 23 April 2009; and
 - (d) **"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 and otherwise any word or expression shall have the same meaning as it has in the Notification as appropriate.
 - 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.

Gareth Davies
Competition Policy Director

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

May 2009