



Waiver of BT's price notification requirements for certain of BT's WES, WEES and BES prices

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

Statement

Publication date: 30 January 2009

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Section 1

Summary

- 1.1 In this document, we set out the conclusions of Ofcom's review of BT's request for consent to waive price notification requirements in relation to some of its WES, WEES and BES prices.
- 1.2 As a result of regulation imposed on BT following the last review of leased lines markets¹ (the BCMR Statement), BT is obliged, pursuant to Significant Market Power (SMP) condition HH6, to send to Ofcom and to every person with which it has entered into a certain contract (known as an 'access contract') a written notice at least 90 days in advance of introducing price changes to WES, WEES and BES products.
- 1.3 Ofcom may under SMP condition HH6 give consent in writing to affect the operation of the price notification requirements. However, before doing so, Ofcom must be satisfied that the giving of such consent would be objectively justified, non-discriminatory, proportionate and transparent, in accordance with Section 49(2) of the Communications Act 2003 (the Act). In addition, Ofcom must publish a notification setting out its proposals to give consent and must provide an opportunity for interested parties to comment on the matter.
- 1.4 This Statement deals with BT's request for a waiver in a manner which is consistent with Ofcom's process for dealing with requests for notification waivers, as set out in the letter to industry of 11 October 2004 (the October 2004 Letter) discussed below and set out in full in Annex 1.
- 1.5 On 24 November 2008, BT notified its customers and Ofcom of new prices for some of its WES, WEES and BES services². In its notification, BT intended for some of these new prices to become effective from the date of the publication of the notification (i.e. 24 November 2008), whilst others would become effective on 1 February 2009.
- 1.6 In doing so, BT failed to comply with the obligation to give 90 days advance written notice of any new price for existing products and services to Ofcom, customers and competitors (SMP Condition HH6).
- 1.7 On the 28 November 2008, one CP wrote to Ofcom complaining about the breach of the notification obligation. Ofcom subsequently intervened and BT withdrew the new charges on 17 December 2008.
- 1.8 On the same day, 17 December 2008, BT also issued a notification of the new charges for the purpose of providing 90 days advance written notice, this time in compliance with their obligation. In that notification, it was intended that the new proposed prices would become effective on 1 April 2009.

¹ See the regulatory Statement of 8 December 2008 entitled *Business Connectivity Market Review, review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*: <http://www.ofcom.org.uk/consult/condocs/llmr/statement>

² These charges were set out in ACCN OR96, OR96a and OR096C, now withdrawn, and provided for reduced connection charges to take immediate effect, while reduced rental charges would have come into effect on the 1 February 2009.

- 1.9 On 7 January 2009, BT then wrote to us requesting consent to waive the 90 days notice period for the notified price changes, which are set out in Annex 3.
- 1.10 On 16 January 2009 Ofcom published the consultation entitled *Waiver of BT's price notification requirements for certain of BT's WES, WEES and BES prices, Notification of a proposal to give consent to affect the operation of BT's price notification requirements*³ (the January 2009 Waiver Consultation).
- 1.11 Ofcom set out in its consultation how it considered that the potential benefits to the industry arising from the consent would in its view outweigh its potential costs. Our preliminary conclusions therefore were that it would be appropriate to grant BT the requested consent to the waiver in this case.
- 1.12 We received 23 responses to the January 2008 Waiver Consultation. The vast majority of respondents supported our view. Of those respondents that disagreed, the main issue raised related to claims that some of the proposed prices could be contravening BT's SMP obligation in relation to the basis of its charges (Condition HH3). We are of the view that, without prejudice to the claims put forward, the scope of this review does not include an assessment of BT's compliance with its SMP conditions. Such an assessment is an issue to be considered separately.
- 1.13 In Section 2 of this Statement, we review the arguments made in the responses, and provide our comments, before completing this review. Having considered the evidence available to us in this case, and having considered the responses to the consultation, we remain of the view that it is appropriate to grant BT consent to the requested waiver. In doing so, we have taken into full consideration the criteria in Section 49(2) of the Communications Act (the Act), as well as our duties under Section 3 and Section 4 of the Act.
- 1.14 The consent is published in Annex 2 to this Statement and is effective from the date of its publication.

³ <http://www.ofcom.org.uk/consult/condocs/btprice/> [the font size is different here than the rest of the footnotes]

Section 2

Background to this Statement

Introduction

- 2.1 On 24 November 2008, BT notified its customers and Ofcom of new prices for some of its WES, WEES and BES services⁴. In its notification, BT intended for some of these new prices to become effective from the date of the publication of the notification (i.e. 24 November 2009), whilst others would become effective on 1 February 2009.
- 2.2 In doing so, BT failed to comply with the obligation to give 90 days advance written notice of any new price for existing products and services to Ofcom, customers and competitors. Such notification obligation stems from SMP Condition HH6 which Ofcom has imposed on BT through the BCMR Statement.
- 2.3 On the 28 November 2008, one CP wrote to Ofcom complaining about the breach of the notification obligation. Ofcom subsequently intervened and BT withdrew the new charges on 17 December 2008.
- 2.4 On the same day, 17 December 2008, BT also issued a notification of the new charges for the purpose of providing 90 days advance written notice, this time in compliance with their obligation. In that notification, it was intended that the new proposed prices would become effective on 1 April 2009.
- 2.5 On 7 January 2009, BT then wrote to us requesting consent to waive the 90 days notice period for the notified price changes, which are set out in Annex 3.
- 2.6 On 16 January 2009, Ofcom published the January 2009 Waiver Consultation, asking stakeholders to comment on its proposal to grant consent to BT to waive the price notification requirements for some of its WES, WEES and BES products. The public consultation closed on 23 January 2009. We received 23 responses from stakeholders.

The leased lines market review

- 2.7 On 8 December 2008, Ofcom published the regulatory Statement entitled *Business Connectivity Market Review, review of retail leased lines, wholesale symmetric broadband origination and trunk segments*⁵ (the BCMR Statement). This Statement completed the review of retail and wholesale leased lines markets in the UK, with the exception of the market for high bandwidth alternative interface symmetric broadband origination (AISBO) services in Hull.
- 2.8 In the BCMR Statement Ofcom defined, among others, a market for low bandwidth AISBO in the UK excluding the Hull area, for services provided at speeds up to and including 1 Gbit/s. Ofcom found that BT had Significant Market Power (SMP) in this market and imposed a set of SMP conditions on BT.

⁴ These charges were set out in ACCN OR96, OR96a and OR096C, now withdrawn, and provided for reduced connection charges to take immediate effect, while reduced rental charges would have come into effect on the 1 February 2009.

⁵ <http://www.ofcom.org.uk/consult/condocs/bcmr08/bcmr08.pdf>

- 2.9 SMP Condition HH1 requires BT to provide Network Access on reasonable request from Third Parties and where Ofcom directs it to do so. WES, WEES and BES are high speed, point-to-point data circuits that are permanently connected and available 24 hours a day, 365 days a year. These services are part of the AISBO market.
- 2.10 WES are types of Network Access services that enable a CP to provide a secure link between a third party customer site and the CP's network at a CP's site.
- 2.11 WEES are end to end wholesale network services that enable a CP to provide a secure link between two third party sites.
- 2.12 BES are types of Network Access services that enable Local Loop Unbundling (LLU) operators to provide a secure link between their Digital Subscriber Line Access Multiplexer (DSLAM) equipment at BT's Main Distribution Frame (MDF) site and a site within an LLU operator's applicable system connected to an appropriate BT node.
- 2.13 SMP Condition HH6 requires BT to publish its charges for AISBO products by sending to Ofcom and all purchasers of the products "a written notice of any amendment to the charges, terms and conditions on which it provides Network Access ... not less than 90 days before any such amendment comes into effect for existing Network Access"⁶.
- 2.14 BT is therefore required to provide 90 days' advance written notice of any changes that it wishes to make to its prices for WES, WEES and BES products. The exception to that requirement is if Ofcom decides, pursuant to its powers under those SMP Conditions, to give consent in writing to affect the operation of the price notification requirements. Ofcom will only give such consent after consulting duly in accordance with section 49 of the Act.

Ofcom's policy for dealing with notification waiver requests

- 2.15 Ofcom wrote to the industry on 11 October 2004 setting out the general approach it proposed to take when dealing with requests for consent to waive or reduce notification periods (the 2004 Letter). The 2004 Letter is reproduced in Annex 1.
- 2.16 Ofcom identified three scenarios in which it might be asked to consent to reduced notification periods for price changes, namely:
- i) where Ofcom had directed a provider to alter its prices forthwith;
 - ii) where a price notification might be considered to be advantageous to consumers; and
 - iii) where the provider had made an administrative error which requires correction.
- 2.17 In the case of directions to alter prices forthwith, Ofcom advised that it would generally consult on the implementation arrangements (including the reduced notice period) when consulting on the substance of the direction itself.

⁶ The 90 days notification requirement on BT with respect to AISBO products was first imposed in the regulatory Statement entitled *Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets* published in June 2004 (SMP Condition HH5), see: <http://www.ofcom.org.uk/consult/condocs/llmr/statement/>

- 2.18 In the case of price reductions proposed by an SMP provider (such as BT), Ofcom recognised that there was the potential for such price reductions to cause anti-competitive effects where the full notification period was not provided. Ofcom concluded that it would be appropriate to consult with interested parties before consenting to early implementation of price reductions.
- 2.19 In the case of administrative errors, Ofcom advised that where an SMP provider had made a genuine error in maintaining its price list or notifying price changes, Ofcom would conduct a short consultation exercise before considering whether to consent to a reduced notification period.
- 2.20 Before sending out the 2004 Letter, Ofcom invited the industry to comment on its proposed policy but received no responses on the matter, other than from BT.
- 2.21 The approach set out in the 2004 Letter has been successfully used twice since then to review separate requests for consent to waive or reduce advance notice periods⁷. On both occasions the rationale for the request was a price reduction.

Statutory requirements to be met before giving a consent

- 2.22 Section 49 of the Act applies where Ofcom proposes to give consent to affect the operation of a condition made under section 45 of the Act (including SMP 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.

⁷ Ofcom has in the past given consent to BT to reduce or waive the notification period in two instances: in 2005 (WES and BES products) and 2006 (Partial Private Circuits and Radio Base Station Backhaul products), see: <http://www.ofcom.org.uk/consult/condocs/btwesbes/> and http://www.ofcom.org.uk/consult/condocs/bt_waiver/

Section 3

Review of responses to the consultation and Ofcom's decision

Introduction

- 3.1 In the January 2009 Waiver Consultation, Ofcom set out its proposal to give BT consent to waive the price notification requirements for certain of its WES, WEES and BES products.
- 3.2 In paragraphs 2.32 to 2.59 of the January 2009 Waiver Consultation we set out our arguments why it would be appropriate in this case to consent to BT's request. In particular, we considered that the granting of the consent would in this case be objectively justifiable, non discriminatory, proportionate and transparent, as required by Section 49(2) of the Act. Paragraph 2.57 of the January 2008 Waiver Consultation set out how we considered that issuing a consent in these circumstances would appear to be consistent with its obligations under sections 3 and 4 of the Act. A detailed summary of those arguments is set out below.
- 3.3 In this Section, having regard for all evidence available to us at this time and the stakeholders' responses, we consider whether Ofcom should confirm its proposal and give consent to BT's requested waiver.
- 3.4 Firstly, we set out briefly a summary of our analysis in support of our proposal to grant consent to BT's request in this case. We then consider the stakeholders' responses and all the evidence available to us in view of the stakeholders' responses before setting out our final decision with respect to the matter of whether Ofcom should give BT's consent in this case to waive the price notification requirements in relation to certain WES, WEES and BES prices.

Summary of review of statutory requirements and proposal

- 3.5 Paragraphs 2.7 and following of the January 2009 Waiver Consultation set out the statutory requirements stemming from Section 49(2) of the Act that Ofcom must meet before it can consider giving such consent as requested by BT. In particular, we set out how, 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.
- 3.6 Firstly, paragraphs 2.28 to 2.31 of the January 2009 Waiver Consultation reviewed the rationale for the obligation to provide 90 days advance notice, which Ofcom imposed on BT through the BCMR Statement as a result of BT's SMP in the market for low bandwidth AISBO. We set out how such an obligation is an accompanying

obligation to the non discrimination requirement, providing the means of ensuring all customers of BT wholesale products, which include its downstream divisions and competitors, are able to make the necessary amendments to their retail contracts, terms and conditions of provision in such a way that does not discriminate between end users (in this case, between BT end users and its competitors' end users). In addition, we set out how we considered that this obligation also promotes long term competition by allowing BT's competitors in the low bandwidth AISBO market to make appropriate changes to their products and allow them time to prepare their competitive response.

- 3.7 Finally, paragraph 2.29 of the January 2009 Waiver Consultation referred to paragraph 8.286 of the BCMR Statement, which set out how Ofcom considered that imposing SMP Condition HH6 was consistent with our duties under Section 3 and Section 4 of the Act in that the condition encouraged transparency, promoted the interests of the purchasers of low bandwidth AISBO products and promoted long-term competition in the low bandwidth AISBO market⁸.
- 3.8 Paragraphs 2.32 to 2.39 of the January 2009 Waiver Consultation set out how we considered that, in this case, giving BT the requested consent would be objectively justifiable. In particular, how we considered that, having reviewed all the facts and the evidence available to us, given the significance of the price reductions, and the widespread demand for lower prices BT has been facing for sometime, it would be in our initial view objectively justifiable in this case to allow BT to introduce the new prices set out in Annex 3 without having to comply with a 90 days advanced notice obligation.
- 3.9 Paragraph 2.40 of the January 2009 Waiver Consultation set out how we considered that it would not be unduly discriminatory to allow BT to introduce the price changes without having to comply with the price notification obligation ex BCMR Statement in that the price reductions that BT has put forward would benefit all purchasers of WES, WEES and BES.
- 3.10 Paragraph 2.41 to 2.54 of the January 2009 Waiver Consultation set out how we considered that it would be proportionate to grant BT the requested consent. In particular, how we considered that the industry in general would be likely to regard the potential benefits deriving from granting BT the requested consent as outweighing the potential costs including the risk of exit of BT's upstream competitors.
- 3.11 A key consideration in support of our initial view was that because of BT's first announcement of the new prices on 24 November 2008, CPs, including BT's upstream competitors, had already had in effect a 2 months' period in which to prepare their competitive response and make the necessary arrangements to their contracts to account for the new proposed charges. We considered that these circumstances significantly lowered the risk of exit and thus mitigated the potential long term detriment to competition.
- 3.12 Paragraph 2.55 of the January 2009 Waiver Consultation set out how we considered that the proposed consent would be transparent in that it was clear from it that BT would not be required to comply with the 90 days price notification requirements

⁸ See paragraphs 8.295 to 8.308 of the *Business Connectivity Market Review, Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*, <http://www.ofcom.org.uk/consult/condocs/bcmr08/>

under SMP Condition HH6 in respect of the proposed prices set out in Annex 3 of this Statement.

- 3.13 Paragraph 2.57 of the January 2009 Waiver Consultation set out how Ofcom was satisfied that issuing a consent in these circumstances would appear to be consistent with its obligations under sections 3 and 4 of the Act in that it would further the interests of consumers, by enabling them to access lower prices for their services, and would encourage the availability and use of high speed data transfer services throughout the UK by making the price reductions available at an earlier date. Given the mitigating circumstances summarised at paragraph 3.11 above, Ofcom also considered that giving consent would not prejudice the long term promotion of competition.
- 3.14 Finally, we set out at paragraphs 2.58 to 2.59 of the January 2009 Waiver Consultation how, having considered all evidence and having preliminarily concluded that the consent would meet the statutory requirements set out at Section 49(2) of the Act, Ofcom was minded to conclude that it would be appropriate in this case to consent to BT introducing the price changes in Annex 3 of this Statement from the publication date of any statement to that effect, without giving the required 90 days' advance written notice.

Responses to the January 2009 Waiver Consultation

- 3.15 In the January 2008 Wavier Consultation, we asked stakeholders to respond to the following questions:

Question 1: *do stakeholders agree with Ofcom that in this case it would be objectively justifiable to give consent to BT's request for a waiver?*

Question 2: *do stakeholders agree with Ofcom that the benefits of having the proposed WES, WEES and BES price changes introduced without advance notification outweigh in this case any potential costs?*

Question 3: *do stakeholders agree with Ofcom that is would be appropriate to give consent to BT to waive the 90 days notification period for the new proposed charges for WES, WEES and BES as set out in Annex 7?*

- 3.16 The consultation closed on 23 January 2009. We received 23 responses, some from CPs, some from downstream providers of business connectivity, one response from a public sector end user, and one from an end users association. Annex 4 shows the full list of respondents.

Main issues raised by respondents

- 3.17 Responses to the consultation fell into four main categories:
- i) those that fully supported our proposal to grant consent to the waiver (19 out of 23 respondents); some of these respondents, like BT, demanded the price changes to be backdated to 24 November 2008; others argued that charges should be backdated to 1 October 2008;

- ii) one respondent who did not consider that Ofcom had properly demonstrated the consent to be objectively justifiable and proportionate but did not oppose the waiver;
- iii) two respondents, COLT and Virgin Media, who did not consider that Ofcom had properly demonstrated the consent to be objectively justifiable and proportionate. They argued that some of the new prices are perceived as being below cost, opposed the consent and demanded that Ofcom investigate these prices before granting any consent. Virgin Media also argued that the imposition of the transparency obligation in the BCMR Statement, including the 90 days notice period, supports other conditions imposed on BT and that therefore the consideration of whether the new prices comply with BT's cost orientation obligation is relevant to this review about the waiver. Therefore, Virgin Media argued, Ofcom was not fulfilling its duties under Section 3 and 4 of the Act by not considering it; and
- iv) one respondent, the Communications Management Association (CMA), that raised concerns about the effect that granting the consent would have on long term competition and opposed the granting of the consent.

Backdating

- 3.18 With respect to the issue of backdating the price charges to 24 November 2008, we note that backdating in this specific case could amount to *de facto* invalidating the notice period obligation, which Ofcom does not see as appropriate. Some respondents argued that the price changes should be backdated to 1 October 2008, because that was the planned implementation date for the Leased Lines Charge Controls, before the restatement of BT's 2006/07 regulatory accounts led to their postponement. However, the price changes proposed by Openreach have not been mandated by Ofcom and are not among the proposals set out in the Leased Lines Charge Control Consultation⁹ (the LLCC Consultation). In the present context, therefore, it would not be appropriate to backdate implementation to 1 October 2008. Issues relating to the timing of the introduction of the new charge controls for leased lines are addressed in the LLCC Consultation.

Justification and proportionality

- 3.19 With respect to the issue that Ofcom has not properly assessed the justification and the proportionality of the proposed waiver, we consider that our analysis has set out what we perceive to be the costs and benefits of the waiver and, in particular, has properly explained how the mitigating circumstances we find to apply to this case (i.e. the fact that more than 2 months have already passed since the first notification on 24 November 2008) tilts the balance of the evidence in support of granting the consent. We have set out a summary of our arguments at paragraphs 3.8 to 3.10.

The issue of compliance with the cost orientation obligation is not relevant for assessing this waiver request

- 3.20 With respect to the issue of whether some of the charges are below cost, we note that this review is not concerned with the level of charges, but only with the proposed consent to waive the notification period. While one of the benefits of advance notification is that it aids transparency, its purpose is not to give time to Ofcom to assess whether the proposed prices comply with a cost orientation requirement. That

⁹ <http://www.ofcom.org.uk/consult/condocs/llcc/>

would amount to a pre-approval process for price changes, which has never been Ofcom's (or Oftel's) objective. In addition, assessing cost orientation is a complex task which in many cases would not be possible within 90 days. This waiver consent does not imply that we have assessed or approved the proposed prices. We consider that BT's compliance with its SMP obligations is a separate issue to be addressed by Ofcom separately to this consent.

Impact on long term competition

- 3.21 Finally, some respondents have raised the concern that granting the consent does not promote long term competition. We take these concerns very seriously, as we do our duties of promoting the citizens interests in downstream markets as well as promoting competition in upstream markets. In response to this concern, we first note that our analysis in the consultation document considers that the potential detriment to competition is greatly mitigated in this case by the effective 2 months' period which has already passed since the new prices were first notified. It is reasonable to consider that during this time BT's competitors would have had the opportunity to review their commercial arrangements. When this was considered against the potential benefits arising from allowing an early adoption of the new lower prices, we concluded that, overall, and in this case only, given the specific circumstances mitigating the potential detriment to competition, the potential benefits outweighed the potential costs.
- 3.22 Secondly, we would like to point to the work Ofcom has done in the past two years to promote competition in leased lines markets. The BCMR Statement, for example, has set out measures designed to promote competition in those markets where it is feasible, including deregulating where competitive conditions have already emerged, while tightening the regulation in those SMP markets that have little or no prospect of additional infrastructure competition. In addition, the LLCC Consultation sets out our proposals for charge controls in wholesale leased lines markets where BT has been found to have SMP. The proposals are designed to provide industry with the price certainty required for informed investment decisions and to give the right incentive for further competition to emerge in wholesale leased lines markets.

Other issues raised by respondents

- 3.23 One respondent raised three additional points:
- i) that in order to provide regulatory certainty for CPs to make informed investment decisions, Ofcom should use voluntary commitments from BT on prices for the 'middle mile' (i.e. backhaul), and provide greater certainty by using longer notice periods and no short-notice derogations in the future;
 - ii) that it considered a week long consultation period unsatisfactory for this matter; and
 - iii) that Ofcom had not guaranteed appropriate transparency with respect to the letter of 11 October 2004 by originally sending it only to some trade associations, and, as a result, excluding them from the correspondence.
- 3.24 With respect to the issue of providing greater certainty, especially over prices, we firstly note that the LLCC Consultation has set out a range of proposals for dealing with the future price of BT's regulated wholesale leased lines products, including backhaul or 'middle mile' products, all of which propose to require BT to comply in the future with a charge control for all its regulated wholesale leased lines products,

including backhaul products. We consider that the options being considered in the LLCC Consultation will provide the certainty over prices that the industry requires to make informed and effective investment decisions over and above an approach based on voluntary price commitments.

- 3.25 With respect to the issue of adopting longer price notice periods, firstly, we note that this is a consent to waive the notification requirement on a specific occasion. We therefore consider that it would not be appropriate for us to consider revising the approach to setting the length of the price notification periods as part of this consultation. Moreover, Ofcom notes that the current notice periods have been used since 2003, and that they appear to have served the industry well in providing the transparency and certainty required by, among others, BT's competitors. We also note that when consulting on, among other proposed remedies, the proposed notification obligation as part of the January 2008 BCMR Consultation, Ofcom did not receive any objections to such notice periods. Finally none of the other respondents to the current consultation raised objections either to the length of the notice periods BT is required to provide in relation to low bandwidth AISBO products.
- 3.26 With respect to the issue of avoiding in the future short-notice derogations, we firstly note that only twice in the past since 2004 has Ofcom given consent to BT to waive the notification periods for BT's wholesale leased lines products¹⁰, while BT's price changes for its regulated products have been in the tens. We consider that such infrequency is in line with Ofcom's objective to consider granting such consents only in exceptional circumstances and we will continue to do so in the future.
- 3.27 With respect to the issue of the length of the consultation period, Ofcom considers that the reasons given in the October 2004 Letter remain broadly valid. In particular, we still consider that such a short consultation period is warranted in exceptional circumstances. If Ofcom were to consult for at least 1 month, there is a high probability that the whole process would easily take up to 2 months, hence making the granting of consent to waive a notice period meaningless in the case of short notice periods of 28 days, and unhelpful in the case of a 90 days notice period.
- 3.28 With respect to the point raised in relation to the level of transparency provided over the October 2004 Letter, Ofcom recalls that, before finalising the letter, we had consulted publicly on the proposed approach and that only BT responded. In addition, we note that in the two previous consultations where Ofcom used this approach to deal with a request for a waiver consent from BT, the first case of which was in 2005, Ofcom clearly set out the 2004 Letter in the Annex for all interested parties to consider, and that on those two occasions we received no comments in relation to the transparency of the approach used. We consider therefore that sufficient transparency has been provided to all stakeholders over our approach to deal with requests for waiving price notification requirements.

Final decision

- 3.29 We have considered above the responses provided to the January 2009 Waiver Consultation. The vast majority of respondents have agreed with Ofcom's proposal to grant BT the consent to the requested waiver. 19 of the 23 that responded supported

¹⁰ Ofcom has in the past given consent to BT to reduce or waive the notification period in two instances: in 2005 (WES and BES products) and 2006 (Partial Private Circuits and Radio Base Station Backhaul products), see: <http://www.ofcom.org.uk/consult/condocs/btwesbes/> and http://www.ofcom.org.uk/consult/condocs/bt_waiver/

our view that the consent would, on balance, generate more benefits than costs to the industry.

- 3.30 Some of the CPs that responded to our consultation supported our view that a *de facto* 2 months notice period, given the benefits arising from the price decreases, would be enough to mitigate the potential detriment to competition, in particular in consideration of the low volumes of competitive supply in this market, which would allow CPs to react to any price change relatively quickly.
- 3.31 Of those who disagreed, many considered that Ofcom should look into the cost orientation of such prices before considering granting any consent to BT. We have set out above why we consider that the waiver consent is not linked with any investigation into BT's compliance with its SMP conditions. In addition, we have addressed other stakeholder comments in relation to the approach used, and the consistency of the consent with Ofcom's policy of promoting long term competition.
- 3.32 Having considered these responses and the evidence available to us, it remains our view that the potential benefits from granting the consent would outweigh the potential costs, including the detriment to competition.
- 3.33 In particular, we consider that the reasons set out at paragraphs 2.28 to 2.54 to support our view that the granting of the requested consent would comply with the requirements of Section 49(2) of the Act. We also consider that our assessment that the granting of the requested consent would be consistent with our duties under Sections 3 and 4 of the Act. We have summarised the reasons provided in the January 2008 Waiver Consultation at paragraph 3.5 to 3.14 of this Statement.
- 3.34 We have therefore decided to consent to waive the relevant price notification requirement in this case. The consent is published in Annex 2 of this document and is effective from the date of publication of this Statement.

Annex 1

Ofcom's letter to industry of 11 October 2004

11 October 2004

To BT, Kingston, UKCTA, the 5 MNOs, ISPA, FCS

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Consent to reduced price change notice periods

As you will know, providers with SMP are obliged to provide advance notice of changes to prices in wholesale markets, unless Ofcom consents otherwise. The notice period varies from market to market and is generally either 90 days or 28 days. (In retail markets where there is SMP, price changes have to be notified within 24 hours of the change taking effect, so the concept of advance notice does not apply.)

There have been occasions when it has been appropriate to give consent to a reduced notice period, enabling price changes to take effect more quickly than usual. Under the pre July 2003 telecoms regime, Oftel was able to consent to reduced notice periods without consulting interested parties. Under the Communications Act this is not possible, as Ofcom is required to consult for a minimum of 1 month, unless there are exceptional circumstances justifying the use of a shorter period and the proposals do not have an effect on trade between EC Member States. Ofcom is setting out in this letter how it expects to operate under the new regime.

There appear to be a limited set of scenarios when Ofcom might be asked to consent to price changes taking effect more swiftly than is normally permitted.

- Ofcom might direct a provider to alter its prices forthwith, either to offer a price specified by Ofcom or to comply with a formulation, such as a margin squeeze test, under which a range of pricing permutations would be compliant with the direction.
- A price reduction which the provider proposes to introduce at short notice might be considered advantageous to customers (it is much less likely that Ofcom would agree to consult on a price increase being introduced at short notice although, in theory, that is possible).

- The provider may have made an administrative error which needs to be corrected by altering a published price swiftly.

Price changes directed by Ofcom

In the case of price changes which follow some kind of intervention, Oftel had generally consented (without first consulting) to revised prices being introduced without the usual notice being given. In future Ofcom will generally consult on the implementation arrangements (including a possible consent to a reduced notice period) when it consults on the substance of a direction. Consultation at an early stage should ensure that any issues are addressed and, if appropriate, notice of the price change is given.

Price reductions (and, in theory, increases) which the SMP provider wishes to implement

Ofcom recognises that price reductions are generally perceived to be advantageous to customers and, as such, that there may be an argument that price reductions should be implemented without delay imposed by regulation. However in the circumstances of a wholesale market where a vertically integrated supplier has SMP, the advantages are not so clear cut, and the reasons for imposing an obligation to give advance notice of price changes generally, which were explained in the relevant market review statements, remain valid. Ofcom does not believe SMP conditions should be modified to permit price reductions without notice. Furthermore, the damaging effects of leakage of advance information between the wholesale and retail arms of the dominant operator may be amplified where the wholesale provider is able to introduce price reductions at very short notice. The potential for anti competitive effects is perhaps even greater where the dominant wholesale supplier introduces a "special offer" with limited duration and at short notice. Ofcom will consult interested parties before consenting to early implementation of price reductions, so that their views on the specific case may be taken into account.

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 or 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.

In the event that Ofcom believes there may be merit in consenting to a reduced notice period applying to a price increase, it will adopt a similar approach.

Administrative errors

Where an SMP provider had made a genuine error in maintaining its price list or in notifying customers of a price change, Oftel generally gave formal consent (without first consulting) to prices being corrected without advance notice being given. Ofcom will conduct a short consultation exercise before consenting to prices being changed without the usual lengthy notice.

Next steps

Ofcom is not planning to consult formally on these new processes, and expects to adopt these from now on. However, if you have any comments on how these systems can be made fairer and more efficient, Ofcom would be interested to read these. Please do not hesitate to let me have your views.

Yours sincerely

Michael Richardson

Competition Policy Manager

Annex 2

Consent

Consent under Condition HH6 imposed on BT as a result of the analysis of symmetric broadband origination markets listed in the Schedule to this Consent in which BT has been found to have significant market power

WHEREAS:

- (A) as a result of a market analysis carried out by OFCOM in the Statement entitled *Business Connectivity Market Review, review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*, OFCOM issued a Notification on 8 December 2008 in accordance with section 79 of the Act that BT has significant market power in the symmetric broadband origination markets listed in the Schedule and set certain SMP conditions on BT, such as Condition HH6;
- (B) this Consent concerns matters to which Condition HH6 relates;
- (C) for the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM are 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 are satisfied that they have acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
- (E) on 16 January 2009, OFCOM published a notification of the proposed Consent in accordance with section 49 of the Act;
- (F) OFCOM have considered every representation about the proposed Consent duly made to them; and

NOW, therefore, pursuant to Condition HH6, OFCOM gives the following Consent:

1. For the purposes of complying with its obligations under Condition HH6, OFCOM consents that BT shall not be obliged to provide an

Access Charge Change Notice in respect of the prices (as specified in Annex 3 of the Explanatory Statement accompanying the publication of this Consent) before these amendments come into force on the dates specified in the said Annex 3.

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 8 December 2008; 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.
6. Annex 3 of the Explanatory Statement accompanying the publication of this Consent shall form part of this Consent.

Gareth Davies

Competition Policy Director

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

2 February 2009

Schedule

1. The market for alternative interface symmetric broadband origination at speeds up to and including 1 Gbit/s in which British Telecommunications plc has been found to have significant market power.

Annex 3

BT's price changes

WES/WEES 100MBit/s circuits and above - Connection Charges

(Prices are per end – Note 2)	Operative Date	Until	Connection (£) Exc VAT
WES/WEES 100	08/01/2007	23/11/2008	2,750.00
WES/WEES 100	24/11/2008	17/12/2008	975.00
WES/WEES 100	18/12/2008	31/01/2009	2,750.00
WES/WEES 100	01/02/2009		975.00
WES/WEES 155	08/01/2007		4,500.00
WES/WEES 622	14/06/2007		5,200.00
WES/WEES 1000 (LAN /SAN)	14/06/2007	23/11/2008	5,200.00
WES/WEES 1000 (LAN /SAN)	24/11/2008	17/12/2008	1,997.50
WES/WEES 1000 (LAN /SAN)	18/12/2008	31/01/2009	5,200.00
WES/WEES 1000 (LAN /SAN)	01/02/2009		1,997.50
WES/WEES 1000 Extended Reach	14/06/2007	23/11/2008	6,500.00
WES/WEES 1000 Extended Reach	24/11/2008	17/12/2008	2,500.00
WES/WEES 1000 Extended Reach	18/12/2008	31/01/2009	6,500.00
WES/WEES 1000 Extended Reach	01/02/2009		2,500.00
WES/WEES 2500	14/06/2007		10,000.00
WES/WEES 10000	14/06/2007		14,000.00

WES/WEES 100MBit/s circuits and above Annual Rental Charges

(Prices are per end – Note 2)	Operative Date	Until	Annual Rental
			(£) Ex VAT (Note 2)
WES/WEES 100	08/01/2007	31/01/2009	2,750.00
WES/WEES 100	01/02/2009		2,300.00
WES/WEES 155	08/01/2007		5,210.00
WES/WEES 622	14/06/2007		8,500.00
WES/WEES 1000 (LAN /SAN)	14/06/2007	31/01/2009	7,500.00
WES/WEES 1000 (LAN /SAN)	01/02/2009		5,000.00
WES/WEES 1000 Extended Reach	14/06/2007	31/01/2009	9,500.00
WES/WEES 1000 Extended Reach	01/02/2009		6,865.00
WES/WEES 2500	14/06/2007		10,750.00
WES/WEES 10000	14/06/2007		13,090.00

WES/WEES 10Mbit/s Connection and Rental Charges

(Prices are per end – Note 2)	Operative Date	Until	Connection	Annual Rental
			(£) Exc VAT	(£) Ex VAT (Note 2)
WES/WEES 10 (Unmanaged)	02/06/2008	23/11/2008	1,200.00	2,100.00
WES/WEES 10 (Unmanaged)	24/11/2008	17/12/2008	975.00	2,100.00
WES/WEES 10 (Unmanaged)	18/12/2008	31/01/2009	1,200.00	2,100.00
WES/WEES 10 (Unmanaged)	01/02/2009		975.00	2,100.00

WES/WEES 10 – (Local Reach)	02/06/2008	23/11/2008	1,150.00	2,000.00
WES/WEES 10 – (Local Reach)	24/11/2008	17/12/2008	975.00	2,000.00
WES/WEES 10 – (Local Reach)	18/12/2008	31/01/2009	1,150.00	2,000.00
WES/WEES 10 – (Local Reach)	01/02/2009		975.00	2,000.00
WES/WEES 10 Managed	02/06/2008	23/11/2008	1,450.00	2,300.00
WES/WEES 10 Managed	24/11/2008	17/12/2008	975.00	2,300.00
WES/WEES 10 Managed	18/12/2008	31/01/2009	1,450.00	2,300.00
WES/WEES 10 Managed	01/02/2009		975.00	2,300.00

WES/WEES Main Link Charge

(Prices are per metre of part thereof – Note 2)	Operative Date	Until	Connection	Annual Rental
			(£) Exc VAT	(£) Ex VAT (Note 2)
Main link	14/06/2007	31/01/2009		0.54
Main link	01/02/2009		0.00	0.40

Wholesale Extension Services Local Access – Connection

(Prices are per circuit)	Operative Date	Until	Connection
			(£) Ex VAT
WES Local Access 10 managed	14/06/2007	23/11/2008	2,000.00
WES Local Access 10 managed	24/11/2008	17/12/2008	1,950.00
WES Local Access 10 managed	18/12/2008	31/01/2009	2,000.00
WES Local Access 10 managed	01/02/2009		1,950.00
WES Local Access 100 managed	14/06/2007	23/11/2008	3,398.00
WES Local Access 100 managed	24/11/2008	17/12/2008	1,950.00
WES Local Access 100 managed	18/12/2008	31/01/2009	3,398.00
WES Local Access 100 managed	01/02/2009		1,950.00
WES Local Access 1000 managed	14/06/2007	23/11/2008	5,700.00
WES Local Access 1000 managed	24/11/2008	17/12/2008	2,500.00
WES Local Access 1000 managed	18/12/2008	31/01/2009	5,700.00
WES Local Access 1000 managed	01/02/2009		2,500.00

Wholesale Extension Services Local Access – Annual Rental Charges

(Prices are per circuit)	Operative Date	Until	Annual Rental Charges
			(£) Ex VAT
WES Local Access 10 managed	14/06/2007		2,650.00
WES Local Access 100 managed	14/06/2007	31/01/2009	3,072.00
WES Local Access 100 managed	01/02/2009		2,650.00
WES Local Access 1000 managed	14/06/2007	31/01/2009	7,750.00
WES Local Access 1000 managed	01/02/2009		5,000.00

WES/WEES Resilience Option 1 (Hot Standby) Connection & Rental Charges (Notes 12 & 13)

	Operative Date	Until	CONNECTION (£) Ex VAT	ANNUAL RENTAL
			Is site served by fibre from BT serving exchange?	(£) Ex VAT
WES 100 Resilient Option 1 Connection per end (1)	17/07/2006		8,350.00	5,840.00
WES 1000 Resilient Option 1 Connection per end (1)	17/07/2006		13,400.00	21,600.00
WEES 100 Resilient Option 1 Connection per end (1)	17/07/2006		8,350.00	5,840.00
WEES 1000 (LAN/SAN) Resilient Option 1 Connection per end (1)	17/07/2006		13,400.00	21,600.00
Notes				
1) Both the above prices include Hot Standby Electronics				
Generic Resilience Facility fee per path	20/12/2007		n/a	n/a
Main link per metre or part thereof	20/12/2007	31/01/2009	0.00	0.00
Main link per metre or part thereof	01/02/2009		0.00	0.00
Resilience link per metre or part thereof	20/12/2007	31/01/2009	0.00	0.00
Resilience link per metre or part thereof	01/02/2009		0.00	0.00

WES Resilience Option 2 - Connection & Rental Charges (Notes 11 & 12)

	Operative Date	Until	Connection	Rental Charge
			(£) Ex VAT	(£) Ex VAT
WES Generic Resilience Facility fee per circuit (all bandwidths)	20/12/2007			800.00
Main link per metre or part thereof	20/12/2007	31/01/2009		0.62
Main link per metre or part thereof	01/02/2009		0.00	0.45
Resilience link per metre or part thereof	20/12/2007	31/01/2009		0.62
Resilience link per metre or part thereof	01/02/2009		0.00	0.45

WEES Resilience Option 2 - Connection & Rental Charges (Notes 15 & 16)

	Operative Date	Until	Connection	Rental Charge
			(£) Ex VAT	(£) Ex VAT
WEES Generic Resilience Facility fee per circuit (all bandwidths)	20/12/2007			800.00
Main link per metre or part thereof	20/12/2007	31/01/2009		0.62
Main link per metre or part thereof	01/02/2009		0.00	0.45
Resilience link per metre or part thereof	20/12/2007	31/01/2009		0.62

Resilience link per metre or part thereof	01/02/2009		0.00	0.45
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WES - Aggregation Connection and Rental Charges

	Operative Date	Until	Connection	Annual Rental Charge
			(£) Ex VAT	(£) Ex VAT
WES Aggregation Tail 10Mb unmanaged (up to 25km radial)	08/01/2007		2,950.00	1,170.00
WES Aggregation Tail 100Mb managed (up to 25km radial)	08/01/2007		3,800.00	2,750.00
Distance charge between exchanges metre or part thereof (spoke)	20/12/2007	31/01/2009		0.54
Distance charge between exchanges metre or part thereof (spoke)	01/02/2009		0.00	0.40
WES Aggregation Aggregated Link 9xRJ45 Handover	08/01/2007		15,200.00	9,830.00
WES Aggregation Aggregated Link 1Gb optical Handover	08/01/2007		16,100.00	9,830.00
Distance charge between exchanges (Aggregated link) per metre or part thereof (> 0m)	20/12/2007	31/01/2009		0.54
Distance charge between exchanges (Aggregated link) per metre or part thereof (> 0m)	01/02/2009		0.00	0.40

BES/BES Daisy Chain 100MBit/s and above Connection

(Prices are per end – Note 3)	Operative Date	Until	Connection
			(£) Exc VAT (Note 1)
BES 100	14/06/2007	23/11/2008	2,750.00
BES 100	24/11/2008	17/12/2008	975.00
BES 100	18/12/2008	31/01/2009	2,750.00
BES 100	01/02/2009		975.00
BES 155	14/06/2007		4,500.00
BES 622	14/06/2007		5,200.00
BES 1000	14/06/2007	23/11/2008	5,200.00
BES 1000	24/11/2008	17/12/2008	1,997.50
BES 1000	18/12/2008	31/01/2009	5,200.00
BES 1000	01/02/2009		1,997.50
BES 1000 Extended Reach	14/06/2007	23/11/2008	6,500.00
BES 1000 Extended Reach	24/11/2008	17/12/2008	2,500.00
BES 1000 Extended Reach	18/12/2008	31/01/2009	6,500.00
BES 1000 Extended Reach	01/02/2009		2,500.00
BES 2500	14/06/2007		10,000.00
BES 10000	14/06/2007		14,000.00

BES/BES Daisy Chain 100MBit/s and above Rental Charges

(Prices are per end – Note 3)	Operative Date	Until	Annual Rental	Daisy chain Annual Rental
			(£) Ex VAT (Note 3)	(£) Ex VAT (Notes 3 & 13)
BES 100	14/06/2007	31/01/2009	2,480.00	2,210.00
BES 100	01/02/2009		1,830.00	1,560.00
BES 155	14/06/2007		4,700.00	4,670.00
BES 622	14/06/2007		8,230.00	7,960.00
BES 1000	14/06/2007	31/01/2009	7,230.00	6,960.00
BES 1000	01/02/2009		5,000.00	4,865.00
BES 1000 Extended Reach	14/06/2007	31/01/2009	9,230.00	N/A
BES 1000 Extended Reach	01/02/2009		6,865.00	N/A
BES 2500	14/06/2007		10,480.00	10,210.00
BES 10000	14/06/2007		12,820.00	12,550.00

BES/BES Daisy Chain 100MBit/s Term Rental Charges

(Prices are per end – Note 3)	Operative Date	Until	3 year minimum period Annual Rental	5year minimum period Annual Rental	Daisy Chain 3 year minimum period Annual Rental	Daisy Chain 5 year minimum period Annual Rental
			(£) Ex VAT (Note 15)	(£) Ex VAT (Note 15)	(£) Ex VAT (Note 15)	(£) Ex VAT (Note 15)
BES 100	19/08/2008	31/01/2009	2,108.00	1,984.00	1,878.50	1,768.00
BES 100	01/02/2009		1,555.50	1,464.00	1,326.00	1,248.00
BES 155	14/06/2007		n/a	n/a	n/a	n/a
BES 622	14/06/2007		n/a	n/a	n/a	n/a
BES 1000	19/08/2008	31/01/2009	6,145.50	5,784.00	5,916.00	5,568.00
BES 1000	01/02/2009		4,250.00	4,000.00	4,135.25	3,892.00
BES 1000 Extended Reach	19/08/2008	31/01/2009	7,845.50	7,384.00	n/a	n/a
BES 1000 Extended Reach	01/02/2009		5,835.25	5,492.00	n/a	n/a
BES 2500	14/06/2007		n/a	n/a	n/a	n/a
BES 10000	14/06/2007		n/a	n/a	n/a	n/a

BES/BES Daisy Chain 10MBit/s Connection and Rental Charges

(Prices are per end – Note 3)	Operative Date	Until	Connection	Annual Rental	Daisy chain Annual Rental
			(£) Exc VAT (Note 1)	(£) Ex VAT (Note 3)	(£) Ex VAT (Notes 3 & 13)
BES 10	02/06/2008	23/11/2008	1,200.00	1,830.00	1,560.00

BES 10	24/11/2008	17/12/2008	975.00	1,830.00	1,560.00
BES 10	18/12/2008	31/01/2009	1,200.00	1,830.00	1,560.00
BES 10	01/02/2009		975.00	1,830.00	1,560.00

Main Link Charges					3 year minimum period Annual Rental	5 year minimum period Annual Rental
(Prices are per metre of part thereof – Note 2)	Operative Date	Until	Connection	Annual Rental	Annual Rental	Annual Rental
			(£) Exc VAT	(£) Ex VAT (Note 2)	(£) Ex VAT (Note 2 & 15)	(£) Ex VAT (Note 2 & 15)
Main link per metre or part thereof (>0m up to 25,000 metres)	19/08/2008	31/01/2009	0.00	0.54	0.46	0.43
Main link per metre or part thereof (>0m up to 25,000 metres)	01/02/2009		0.00	0.40	0.34	0.32

Resilient Option 2 (Notes 9 & 10)					3 year minimum period Annual Rental Charge	5 year minimum period Annual Rental Charge
Description	Operative Date	Until	Connection	Annual Rental Charge (£) Ex VAT (Note 2)	Annual Rental Charge (£) Ex VAT (Note 2 & 15)	Annual Rental Charge (£) Ex VAT (Note 2 & 15)
Backhaul Extension Services Generic Resilience Facility fee per circuit (all bandwidths)	20/12/2007		N/A	800.00	800.00	800.00
Main link per metre or part thereof	19/08/2008	31/01/2009	N/A	0.62	0.53	0.50
Main link per metre or part thereof	01/02/2009		N/A	0.45	0.38	0.36
Resilience link per metre or part thereof	19/08/2008	31/01/2009	N/A	0.62	0.53	0.50
Resilience link per metre or part thereof	01/02/2009		N/A	0.45	0.38	0.36

Annex 4

List of respondents to the consultation

- BT
- Cable & Wireless
- Calyx CS
- CarphoneWarehouse
- Claranet
- Communications Management Association (CMA)
- COLT
- Easynet
- Entanet International
- Exponential-e
- InTechnology
- KCOM
- Scottish & Southern Energy
- Synetrix
- Tiscali
- Updata Infrastructure UK
- Verizon
- Virgin Media
- Warwickshire Educational Services
- 4 CPs provided confidential responses