



Replicability: the regulation of BT's retail business exchange line services

Draft consent

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Section 1

Introduction

Summary

- 1.1 On 28 November 2003, Ofcom published the market review entitled *Fixed narrowband retail services markets* ("the retail market review") in which, amongst others things, Ofcom concluded that BT had significant market power ("SMP") in the provision of retail residential analogue and digital exchanges line services and business analogue and digital exchange line services. As a result, Ofcom imposed a number of obligations on BT and these included the requirement to publish charges, terms and conditions and notify amendments to them. The requirement to publish charges, terms and conditions ensures transparency and means that Ofcom and BT's competitors can monitor prices to check against behaviour which might be anti-competitive. The retail market review also imposed an obligation on BT not to discriminate unduly.
- 1.2 For some time, however, Ofcom has been asked by business users, as well as BT itself, to allow BT to respond to the demands of individual business customers by offering unpublished bespoke prices for services in business retail markets. SMP services condition D2 ("the no undue discrimination SMP services condition") and SMP services condition D3 ("the requirement to publish charges SMP services condition") presently prevent this. Publication of prices and the provision of services on terms that do not discriminate unduly can, however, lead to price following and mean that BT's ability to tailor packages is limited. This can mute competition and is not in consumers' interest.
- 1.3 Ofcom recognised these potential issues and accepted that, once wholesale inputs were of sufficient standard to enable other Communications Providers to offer retail services that were commercially and technically replicable to those that BT might offer, the requirement to publish charges SMP services condition could be relaxed and Ofcom would reconsider its interpretation of the no undue discrimination SMP services condition.

The April statement and replicability

- 1.4 On 12 April 2006, Ofcom published the statement entitled *The replicability of BT's regulated retail business services and the regulation of business retail markets* ("the April statement")¹ in which it stated that should BT address certain specific deficiencies with wholesale line rental (WLR) (see paragraph 1.7), carrier pre-selection (CPS) and low bandwidth leased lines (PPCs), Ofcom would consent not to apply the requirement to publish charges as set out in the requirement to publish charges SMP services condition. To begin with, the consent would be limited to offers made to customers with an annual spend with BT in excess of £1million per year on a projected basis (assessed on the basis of spend during the previous 12 months plus anticipated spend in the next 12 months consequent on BT being awarded the contract for which it would be bidding with a bespoke unpublished price). Ofcom considered that these customers are subject to close account management by senior BT staff and, therefore, it might be expected that BT will be more able to ensure compliance with ex-ante conditions and competition law. There were, however, certain additional provisos to this (see paragraph 1.10 of this

¹ <http://www.ofcom.org.uk/consult/condocs/busretail/statement/statement.pdf>

document). Ofcom also explained in the statement entitled *BT's pricing of services for business customers* ("the May 2004 statement")² that service bundles which mix SMP products and non-SMP products would no longer be presumed to be discriminatory once BT's retail services could be replicated.

- 1.5 The April statement explained that once BT believed that it had resolved the outstanding issues which were a bar to replicability, it would write to Ofcom informing it of this view. Ofcom explained that it would then determine whether or not the outstanding issues had been resolved satisfactorily and, if so, it would consult on the draft form of Consent as required by section 49(4) of the Communications Act 2003 ("the Act"). Ofcom also explained that BT did not need to wait until it had resolved all the outstanding issues with each product set (WLR, CPS and PPCs) before writing to Ofcom. Instead, Ofcom explained that each product set could be examined and the relevant consent published separately if appropriate.
- 1.6 On 17 November 2006, BT wrote to Ofcom stating that it believed that it had resolved the outstanding issues in relation to WLR ("BT's request for consent") and that the solutions put in place were stable.

WLR and retail business exchange line services

- 1.7 Ofcom explained in the April statement that retail analogue and retail digital business (ISDN2 and ISDN30) exchange line services could not be considered to be replicable until BT had resolved certain issues in relation to WLR. Ofcom considered that competitors utilising WLR were not able to offer a commercially and technically replicable service to BT Retail until the following matters had been addressed:
- provision of call mapping on UXD5 exchanges to facilitate services such as 1571 voicemail;
 - availability of pre-validation to reduce order rejections;
 - elimination of the disparity in provisioning times between WLR and BT Retail exchange lines;
 - commitment to parity with respect to the forecasts for the WLR3 product;
 - provision of improved and consistent eCo repair availability; and
 - provision of improved access to appointment books in line with BT's relevant undertaking.
- 1.8 BT's request for consent explained that:
- BT's Switch Upgrade Programme enabled the provision of network services on UXD5 exchanges from 28 April 2006;
 - the functionality enabling pre-validation was delivered on 15 April 2006 and the service was provided with effect from 26 July 2006;
 - BT has ensured that for a sustained period the disparity in the provision of services to BT Retail customers and customers of WLR providers has been closed;

² http://www.ofcom.org.uk/consult/condocs/pricing_business_customers/ofcom_statement/section1/

- forecasting is not required for WLR3;
- eCo repair was consistently available for the required minimum period of three consecutive months; and
- improved access to appointment books was delivered on 24 April 2006.

Ofcom's decision

- 1.9 Ofcom has reviewed BT's request for consent and considers that BT has resolved satisfactorily the outstanding issues that were set out in the April statement in relation to WLR. In other words, Ofcom considers that, all other things being equal, WLR analogue and digital services enable other Communications Providers to offer retail business analogue and retail business digital exchange line services that are commercially and technically replicable to those that BT Retail might choose to offer. The remedies put in place by BT to resolve the issues that were deemed to be a bar to replicability are set out in Section 2.

Disapplying the requirement to publish charges SMP services condition

- 1.10 Ofcom considers that BT has addressed the bars to replicability set out in paragraph 1.7 through the measures set out in paragraph 1.8. As a result, as set out in the April statement, Ofcom intends to consent to the non-application of the requirement to publish charges SMP services condition only in relation to the provision of business exchange line services to customers with an annual spend with BT in excess of £1million per year on a projected basis. This would mean that BT could offer bespoke prices to these customers and that these prices need not be published. The consent is, however, given on the provisos that:
- bespoke prices do not fall below a price floor which covers transfer charges for network components plus fully allocated retail costs; and
 - BT assesses each bespoke price for compliance with the Competition Act 1998 and any ex-ante safeguard tests, and to demonstrate that it has adequate management systems to ensure compliance.
- 1.11 Additionally, as explained in the April statement, Ofcom intends to conduct audits of BT's unpublished bespoke price offerings and will liaise with competitors to identify suitable cases for audit.
- 1.12 The draft Consent is set out at Annex 1.

Mixed services bundles

- 1.13 Ofcom explained in the May 2004 statement that once competitors could replicate exchange line services using wholesale inputs it would no longer presume that service bundles which mix SMP products with non-SMP products would be discriminatory in an undue manner. The presumption that service bundles which mix SMP and non-SMP products would be likely to be discriminatory in an undue manner is not expressly set out in an SMP services condition. Instead, Ofcom stated that it would interpret the no undue discrimination SMP services condition in this way.
- 1.14 Given that Ofcom considers that retail business analogue and digital exchange line services can now be replicated, Ofcom considers that it should no longer presume that mixed services bundles are discriminatory in an undue manner. The suggested

new interpretation of the no undue discrimination SMP services condition would only relate to service bundles which mixed retail business analogue and digital exchange line products with products from markets in which BT does not hold SMP. In other words, as BT retains SMP in the provision of inland calls and leased lines and Ofcom has not found that these products are replicable, Ofcom considers that it should continue to presume that service bundles involving these products would be likely to be discriminatory in an undue manner.

Next steps

- 1.15 Ofcom's view is that BT has addressed the issues with WLR that were identified in the April statement and, as a result, Ofcom sets out at Annex 1 its draft Consent to the non-application of the requirement to publish charges SMP services condition in relation to the provision of retail analogue and digital business exchange line services to customers with an annual spend with BT in excess of £1million per year on a projected basis.
- 1.16 However, the Consent could be withdrawn in the future should it no longer be possible, in Ofcom's view, for other Communications Providers to continue to replicate BT's retail analogue and business exchange lines products due to, for example, deterioration in the performance levels of the WLR analogue and digital business exchange lines products; or, due to changes to either BT's retail analogue and digital business exchange lines products or the WLR analogue and digital business exchange lines products which, in Ofcom's view, might present a new bar to replicability or an old bar to replicability re-emerges as a result.
- 1.17 Respondents are asked for comments on the draft Consent by **5 April 2007**. Subject to respondents' views, Ofcom intends to finalise the Consent shortly thereafter. As stated in the April statement, Ofcom might eventually extend the consent to all customers of business exchange line services (i.e. including those with an annual spend with BT which is below the £1million threshold per year on a projected basis) should it consider that the monitoring procedures in place are sufficient to ensure compliance, to Ofcom's satisfaction, with the requirements identified in paragraph 1.10 and WLR service provision does not deteriorate and therefore present a bar to replicability. Ofcom does not expect to extend the draft Consent beyond that set out at Annex 1 for at least one year.
- 1.18 It should be noted, however, that Ofcom intends to review retail markets more generally this year and in the market review Ofcom will determine relevant retail markets, whether or not any undertakings have SMP within those markets, and implement appropriate regulatory remedies thereafter. Nothing in this document would preclude Ofcom from finding SMP in any market or from adopting appropriate regulatory remedies in future.

Section 2

Replicability of exchange line services

Introduction

- 2.1 Ofcom explained in the April statement that it did not consider that BT's competitors could replicate BT's retail analogue and digital business exchange line products through the utilisation of WLR. Ofcom considered that there were a number of deficiencies with WLR that were a bar to replicability. Ofcom explained, however, that once these were resolved other Communications Providers should be able to commercially and technically replicate services that BT Retail might choose to offer and therefore retail regulation could be disappplied in some instances. The deficiencies highlighted in the April statement were:
- an absence of call mapping on UXD5 exchanges which would be able to facilitate services such as 1571 voicemail;
 - a need to make pre-validation available to reduce order rejections;
 - a need to eliminate the disparity in provisioning times between WLR and BT Retail exchange lines;
 - a need to provide a commitment to parity with respect to the forecasts for the WLR3 product;
 - a need for the provision of improved and consistent eCo repair availability; and
 - a need for the provision of improved access to appointment books in line with BT's relevant undertaking.
- 2.2 The April statement explained that once BT believed that it had resolved the outstanding issues which were a bar to replicability, it was expected to write to Ofcom informing it of this view. Ofcom explained that it would then determine whether or not in its view the issues that needed to be addressed had been resolved satisfactorily and, if so, it would consult on the draft form of Consent.

BT's request for consent

- 2.3 On 17 November 2006, BT submitted the request for consent in relation to WLR. BT explained that it believed that it had resolved the outstanding issues in relation to WLR and that the solutions put in place were stable.
- 2.4 BT's request for consent explained that:
- BT's Switch Upgrade Programme enabled the provision of network services on UXD5 exchanges from 28 April 2006;
 - the functionality enabling pre-validation was delivered on 15 April 2006 and the service provided with effect from 26 July 2006;
 - BT has ensured that for a sustained period the disparity in the provisioning of services to BT Retail customers and customers of WLR providers has been closed;

- forecasting is not required for WLR3;
- eCo repair was consistently available for a period of three consecutive months; and
- improved access to appointment books was delivered on 24 April 2006.

Call mapping on UXD5 exchanges

- 2.5 BT explained in the request for consent that it had enabled network services including 1571 to be available from 28 April 2006. This was relayed to Communications Providers on 24 February 2006 and the new functionality for UXD5 switches was set out in Openreach's *Briefing WLR020/06*³. Call mapping was one of a number of functionalities that were delivered on the same date.

Pre-validation

- 2.6 BT explained in the request for consent that the pre-validation functionality was delivered in the service provider gateway ("SPG") drop in April 2006. The functionality of pre-validation was set out in Openreach's *Briefing WLR023/06*⁴. The functionality was not available immediately because further views were needed on the legitimacy of passing through consumer information. Pre-validation was subsequently made available on 26 July 2006 as set out in Openreach's *Briefing WLR097/06*⁵.

Provisioning disparity

- 2.7 BT explained in the request for consent that the relative provisioning times for WLR and retail exchange lines requiring an engineering visit had dropped to a replicable level. The disparity between the two had been shared with the industry and, furthermore, Openreach stated that its immediate aim was to reduce the difference to less than 5% which equates to approximately one day or less. This target has been achieved consistently since September 2006 and frequently WLR Communications Providers have received a better service than BT Retail. This is shown in Table 1.

³

<http://www.openreach.co.uk/orpg/news/productbriefings/wlrdownloads/Briefing%20WLR020%2006.doc>

⁴

<http://www.openreach.co.uk/orpg/news/productbriefings/wlrdownloads/Briefing%20WLR023%2006.doc>

⁵

http://www.openreach.co.uk/orpg/news/productbriefings/wlrdownloads/Briefing_WLR097_06.pdf

Table 1 – Provisioning disparity between BT Retail and WLR

	September 06	October 06	November 06	December 06	January 07
Overall WLR	21.84	22.59	19.75	18.89	21.94
Overall BT Retail	20.6	21.9	20.9	19.4	22.70
Overall Difference	1.24	0.69	-1.15	-0.51	-0.76
Different from WLR	6.02%	3.15%	-5.50%	-2.63%	-3.35%
Business WLR	21.63	22.45	19.53	18.72	21.73
Business BT Retail	21.2	20.3	21.4	20.0	23.30
Business Difference	0.43	2.15	-1.87	-1.28	-1.57
Different from BT Retail	2.03%	10.59%	-8.74%	-6.40%	-6.74%
Residential WLR	23.86	24.08	21.53	20.52	23.80
Residential BT Retail	20.3	22.6	20.6	19.1	22.30
Residential Difference	3.56	1.48	0.93	1.42	1.50
Different from BT Retail	17.54%	6.55%	4.51%	7.43%	6.73%

Forecasting for WLR

- 2.8 BT explained in the request for consent that forecasting will not be required for WLR3.

Stability of eCo repair

- 2.9 BT explained in the request for consent that it achieved the stability target set out in the April statement by 12 July 2006. The stability requirement stated that Openreach had to demonstrate to Ofcom that the eCo repair platform was consistently available for a period of three consecutive months. The preceding 3 months had seen short duration interruptions to eCo repair and these had a minor impact on other Communications Providers. BT explained that reliability of the eCo repair platform had been achieved by:

- providing additional server capacity;
- deploying back and front-end code fixes;
- providing an alternative route via a separate website address;
- reducing systems clustering and improving load balancing;
- improving user interfaces; and

- providing for customer visits and diagnostics.
- 2.10 Ofcom has received no complaints from WLR Communications Providers with regard to the performance of the eCo Repair platform and is not aware of any significant eCo Repair specific outages since the three-month period of consistent availability was completed in July 2006. It is on this basis that Ofcom considers that eCo repair is functioning satisfactorily.

Improved access to appointment books

- 2.11 BT explained in the request for consent that improved access to appointment books was delivered by the software drop on 24 April 2006. This was relayed to Communications Providers on 24 February 2006 and was set out in Openreach's *Briefing WLR020/06*⁶.

Ofcom's view

- 2.12 Ofcom has reviewed BT's submission and considers that BT has addressed the required functionality and/or service improvements in relation to retail analogue and digital WLR services that were set out in the April statement. It is on the basis of the new service functionality and/or service improvements that BT has delivered that Ofcom considers that Communications Providers could utilise analogue and digital WLR services to replicate exchange line services provided by BT.
- 2.13 The requirements set out in the April statement were not, however, requirements that BT addressed at a specific point in time and therefore the functionality and/or service improvements need to be provided on an ongoing basis. For instance, in terms of provisioning timescales, Ofcom would not expect the difference to increase. Any increase in the disparity between BT Retail and WLR Communications Providers might bring into question whether retail analogue and digital exchange line services continue to be replicable. Also, the eCo repair platform needs to be available and stable consistently.
- 2.14 Nonetheless, Ofcom considers that, on the basis of the information set out in BT's request for consent, BT has addressed the issues that were identified in the April statement and, therefore, Ofcom intends to consent to the disapplication of certain retail regulation. The applicable reduction in retail regulation for analogue and digital retail business exchange line services is explained in Section 3. The draft consent to the disapplication of certain retail obligations is set out at Annex 1.

⁶

<http://www.openreach.co.uk/orpg/news/productbriefings/wlrdownloads/Briefing%20WLR020%2006.doc>

Section 3

The form of consent

Publication of prices

- 3.1 As explained in Section 2, Ofcom believes that BT has addressed the issues that were in need of resolution. As a result, Ofcom considers that it should disapply the requirement to publish charges SMP services condition to the extent that it applies to services sold to business users with a projected spend with BT in excess of £1million per year (assessed on the anticipated spend in the next 12 months consequent on BT being awarded the contract for which it would be bidding with a bespoke unpublished price). Ofcom considers that these customers are subject to close account management by senior BT staff and, therefore, it might be expected that BT will be more able to ensure compliance with ex-ante conditions and competition law. There are certain provisos linked to this (see paragraph 3.3).
- 3.2 The disapplication of the requirement to publish charges SMP services condition in this case would mean that, to the extent that it applies to services sold to customers whose spend on BT is projected to be in excess of £1million in the next 12 months, BT:
- need not seek Ofcom's consent should it choose to deviate from its published price list;
 - need not publish retail analogue and digital business exchange line services prices, terms or conditions;
 - need not publish any amendment to retail analogue and digital business exchange line services prices, terms or conditions;
 - need not place on its website any information relating to prices, terms or conditions;
 - need not inform Ofcom should it choose to change such prices, terms or conditions; and
 - may depart from charges, terms and conditions set out in its published price list.
- 3.3 The provisos referred to in paragraph 3.1 are that:
- prices do not fall below a price floor which covers transfer charges for network components plus fully allocated retail costs;
 - the consent applies only to services sold to customers whose spend with BT is projected to be in excess of £1million in the next 12 months; and
 - BT puts in place and maintains appropriate internal management systems to ensure that prices do not go below the price floor.
- 3.4 Ofcom further notes that BT's prices, of course, do not breach the Competition Act 1998.

- 3.5 Ofcom may reapply the requirement to publish charges SMP services condition should BT fail to satisfy Ofcom that bespoke prices remain above the cost floors referred to or be unable to demonstrate that its management systems are sufficient to ensure compliance. BT previously committed to the maintenance of contracts for the lifetime of the contract or for a minimum of 2 years – whichever was shorter – should it be permitted to offer bespoke prices. This includes any changes to the initial contract. BT also confirmed that it would monitor the impact of bespoke pricing on its revenues and gross margins that result from any bids that were successful.
- 3.6 Additionally, as explained in the April statement, Ofcom intends to conduct audits of BT's unpublished bespoke price offerings and will liaise with competitors to identify suitable cases for audit. In any case, Ofcom may reapply the condition in the future should, in its view, a new bar to replicability emerge or an old bar to replicability re-emerge.
- 3.7 The draft consent is set out at Annex 1.

Mixed service bundles

- 3.8 Ofcom explained in the May 2004 statement that once competitors could replicate exchange line services using wholesale inputs it would no longer presume that service bundles which mix SMP products with non-SMP products would be discriminatory in an undue manner. The presumption that service bundles which mix SMP and non-SMP products would be likely to be discriminatory in an undue manner is not expressly set out in an SMP services condition. Instead, Ofcom stated that it would interpret the no undue discrimination SMP services condition in this way.
- 3.9 Given that Ofcom considers that retail business analogue and digital exchange line services can now be replicated, Ofcom will no longer presume that mixed services bundles are unduly discriminatory. The suggested new interpretation of the no undue discrimination SMP services condition would only relate to service bundles that mixed retail business analogue and digital exchange lines with products from markets in which BT does not hold SMP. In other words, as BT retains SMP in the provision of inland calls and leased lines and Ofcom has not found that these products are replicable, Ofcom considers that it should no longer presume that service bundles involving these products would be likely to be discriminatory in an undue manner. However, the new interpretation shall not prejudice Ofcom's ability to decide otherwise in relation to abuses under the Competition Act 1998.

Communications Act tests

- 3.10 Ofcom considers that the draft consent set out at Annex 1 meets the tests set out in the Act.
- 3.11 Ofcom has considered its duties under section 3 and all the Community requirements set out in section 4 of the Act. In particular, the consent is aimed at promoting competition and securing efficient and sustainable competition for the maximum benefit of retail consumers because BT would no longer incur regulatory costs in relation to the requirements of the requirement to publish charges SMP services condition. In a competitive market place Communications Providers would be able to and need to compete for individual contracts and would therefore need to set prices at the competitive level. They would not be able to simply undercut BT Retail's prices because they would not know the exact level at which they were set. Consenting to the removal of the obligation to publish prices would allow the market to set prices and avoid price following whilst still implementing a safety floor for BT's prices. In

combination, Ofcom considers that this would help to promote competition in downstream narrowband markets.

3.12 Section 49 of the Act requires directions to be objectively justifiable, non-discriminatory, proportionate and transparent.

3.13 Ofcom considers that the draft consent is:

- i) objectively justifiable as it is aimed at promoting competition in the provision of retail business analogue and retail digital exchange line services as other Communications Providers could replicate services offered by BT Retail;
- ii) proportionate as it would apply to retail business analogue and digital exchange line services only as Ofcom considers that BT has resolved satisfactorily the outstanding issues that were a bar to replicability. It would not apply to other markets in which BT Retail has SMP;
- iii) not unduly discriminatory to BT because there is no other Communications Provider with SMP currently specifically required to provide WLR services; and
- iv) transparent in that the disapplication of the requirement to publish charges SMP services condition applies to services sold to customers whose spend on BT is projected to be in excess of £1million in the next 12 months and this is clearly set out in this document.

Section 4

Responding to this Consultation

How to respond

- 4.1 Ofcom invites written views and comments on the issues raised in this document, to be made by 5pm on **5 April 2007**.
- 4.2 Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, 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. The cover sheet can be downloaded from the 'Consultations' section of our website.
- 4.3 Please can you send your response to: michael.galvin@ofcom.org.uk
- 4.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Michael Galvin
Competition Group
4th Floor
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Telephone: 020 7783 4158
Fax: 020 7783 4109
- 4.5 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.

Further information

- 4.6 If you have any wish to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Michael Galvin using the contact details given above.

Confidentiality

- 4.7 Ofcom thinks 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.
- 4.8 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 which are marked as confidential, in order to meet legal obligations.

- 4.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

- 4.10 Following the end of the consultation period, subject to respondents' views, Ofcom intends to consent to the disapplication of the requirement to publish charges SMP services condition in the circumstances set out in this document.
- 4.11 Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

- 4.12 Ofcom is keen to make responding to consultations easy, and has published some consultation principles which it seeks to follow, including on the length of consultations.
- 4.13 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.
- 4.14 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 1

Notification of Consent under section 49(4) of the Communications Act 2003

Proposal for giving BT Consent under section 49 of the Act and SMP services condition D3 imposed on BT as a result of the market power determinations made by the Director that BT has significant market power in markets for retail business analogue exchange line services, retail business ISDN2 exchange line services and retail business ISDN 30 exchange line services in the UK excluding the Hull Area

WHEREAS:

1. Ofcom hereby makes, in accordance with section 49 of the Act, the following proposal for Consent to be given to BT under section 49 of the Act and SMP services condition D3 which is set out in the Schedule 1 to the Notification of the Director of 28 November 2003.
2. The draft consent is set out in the Schedule to this Notification.
3. The effect of the draft Consent and the reasons for making the proposal are set out in the accompanying explanatory statement.
4. Representations may be made to Ofcom about the draft Consent by **5pm on 5 April 2007**.
5. For the purpose of this Notification:
 - 'the Act' means the Communications Act 2003;
 - '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;
 - 'Director' means the Director General of Telecommunications; and
 - 'Ofcom' means the Office of Communications
6. Except insofar as the context otherwise requires, words and expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as in the Notification of the Director of 28 November 2003 and otherwise any word or expression shall have the same meaning as in the Act.
7. For the purpose of interpreting this Notification:
 - (i) headings and titles shall be disregarded; and
 - (ii) the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.
8. The Schedule to this Notification shall form part of this Notification.

Gareth Davies
Competition Policy Director

A person authorised under paragraph 18 of the Schedule to the Office of Communications Act 2002

1 March 2007

Schedule

[Draft] Consent under section 49 of the Communications Act 2003 ('the Act') and SMP services condition D3 imposed on British Telecommunications plc ('BT') as a result of the market power determinations made by the Director General of Telecommunications ('the Director') that BT has significant market power in markets for retail business analogue exchange line services, retail business ISDN2 exchange line services and retail business ISDN 30 exchange line services in the UK excluding the Hull Area

WHEREAS:

- (A) as a result of a market analysis carried out by the Director, he proposed on 17 March 2003 and on 26 August 2003, in accordance with sections 48(2) and 80 of the Act that BT has significant market power in the markets for retail business analogue exchange line services, retail business ISDN2 exchange line services and retail business ISDN 30 exchange line services in the UK, excluding the Hull Area, and the setting of certain SMP services conditions including SMP services condition D3;
- (B) the Director considered every representation duly made and on 28 November 2003 pursuant to sections 48(1) and 79 of the Act by way of publication of a Notification identified the relevant services markets, made market power determinations to the effect referred to in recital (A) and set certain SMP services conditions on BT to take effect on 28 November 2003, unless otherwise stated in Schedule 1 thereto, including SMP services condition D3 which is as follows:

"D3.1 Except in so far as the Director may otherwise consent in writing, the Dominant Provider shall publish charges, terms and conditions and act in the manner set out below.

D3.2 The Dominant Provider shall publish charges, terms and conditions, including bundled charges, terms and conditions (whether or not those bundles include charges, terms and conditions for services supplied in markets to which this Condition does not apply.

D3.3 The Dominant Provider shall publish any amendments to the charges, terms and conditions published under paragraph D3.2, including charges, terms and conditions for any new services, within 24 hours of the time that amendment comes into effect

D3.4 Publication referred to in paragraphs D3.2 and D3.3 shall be effected by placing a copy of the information on any relevant website operated or controlled by the Dominant Provider.

D3.5 The Dominant Provider shall send to the Director a written notice of any amendment to the charges, terms and conditions published under paragraph D3.2 (including charges, terms and conditions for new services) within 24 hours of the time that the amendment comes into effect and shall send a copy of the notice to any person who may reasonably request such a copy.

D3.6 Where it would be impracticable for the Dominant Provider to publish under paragraphs D3.2, D3.3 or D3.5 any charges or amended charge, the Dominant Provider shall instead publish the method to be adopted for determining that charge or amended charge.

D3.7 The Dominant Provider shall provide services at the charges, terms and conditions published under this Condition, and shall not depart there from either directly or indirectly.”

- (C) by virtue of the Transitional Provisions the Director was able to exercise the powers under the Act for an interim period. OFCOM assumed those powers as of 29 December 2003;
- (D) this draft consent concerns matters to which SMP services condition D3 relates;
- (E) this Notification and accompanying explanatory statement are published in accordance with section 49 of the Act and OFCOM invites representations about any of the proposals set out herein by 5 April 2007;
- (F) by virtue of section 49(9) of the Act, OFCOM may give effect to the proposal set out in the Notification, with or without modification, only if –
 - (a) they have considered every representation about the proposal that is made to them within the period specified in the notification; and
 - (b) they have had regard to every international obligation of the United Kingdom (if any) which has been notified to them for this purpose by the Secretary of State;
- (G) for the reasons set out in the explanatory statement accompanying this draft consent, OFCOM are satisfied that they have acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
- (H) for the reasons set out in the explanatory statement accompanying this draft consent, OFCOM are satisfied that, in accordance with section 49(2) of the Act, the draft 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.

NOW THEREFORE, PURSUANT TO SECTION 49 OF THE ACT AND CONDITION D3.1 OFCOM GIVES THE FOLLOWING CONSENT:

1. The obligations placed on BT which are set out in SMP services condition D3 shall not apply to retail business analogue exchange line services, retail business ISDN2 exchange line services and retail business ISDN30 exchange line services to the extent that:-
 - (a) any prices do not fall below a price floor which covers transfer charges for network components plus fully allocated retail costs;
 - (b) the consent applies only to services sold to customers whose spend with BT in the 12 months following award of the contract is projected to be in excess of £1million; and

- (c) BT puts in place and maintains appropriate internal management systems to ensure that prices do not go below the price floor set out above.
- 2. For the purpose of interpreting this Direction, the following definitions shall apply:
 - (a) '**Act**' means the Communications Act 2003;
 - (b) '**OFCOM**' means the Office of Communications;
 - (c) '**Transitional Provisions**' means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No.3) and Communications Act 2003 (Commencement No. 2) Order 2003;
 - 3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraphs 2 above and otherwise any word or expression shall have the same meaning as it has in The Notification or, if the context so permits, in Schedule 1 thereto, as appropriate, and otherwise any word or expression shall have the same meaning as it has in the Act.
 - 4. For the purpose of interpreting this draft consent:
 - (a) headings and titles shall be disregarded; and
 - (b) the Interpretation Act 1978 shall apply as if this draft consent were an Act of Parliament.
 - 5. This consent shall take effect on the day that it is published.

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 version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest. Ofcom considers in this case, however, that one month for responses to this consultation gives respondents sufficient time to consider whether they wish to respond and on what basis. Ofcom has previously explained that it would Consent to the disapplication of certain regulatory rules should BT address certain bars to replicability and therefore the issues set out in this document are not novel.

A2.6 There will be a person within Ofcom who 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. This individual (who we call the 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. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. 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, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a cover sheet for responses and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- 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 cover sheet 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 in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' Section of our website.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. 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 do not have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: **Replicability: the regulation of BT's retail business exchange line services**

To (Ofcom contact): **Michael Galvin**

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. 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)