



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

Explanatory Statement and Notification of proposal
to give a consent to affect the operation
of BT's price notification requirements

Consultation

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Contents

Section	Page
1 Summary	1
2 Explanatory statement	3
 Annex	 Page
1 Responding to this consultation	9
2 Ofcom's consultation principles	11
3 Consultation response cover sheet	12
4 Consultation questions	14
5 Notification - Proposed Consent	15
6 Ofcom's letter of 11 October 2004	19
7 BT's proposed price changes	22

Section 1

Summary

- 1.1 The purpose of this document is to notify interested parties of Ofcom's proposal to give a consent to BT to introduce the price changes set out in Annex 7 without requiring BT to comply with the 90 days' advance written notice and to invite comments from the industry on whether it would be appropriate for Ofcom to accept BT's request and to give the proposed consent set out in Annex 5 of this document.
- 1.2 BT has requested that Ofcom consent to BT introducing price changes to certain of its Wholesale Extension Services (WES) and Backhaul Extension Services (BES) products, without it having to comply with the 90 days' advance written notification requirement imposed on BT under SMP Condition HH5 in respect of the above-mentioned price changes on this occasion only.
- 1.3 As a result of regulation imposed on BT following the leased lines market review¹, BT is obliged, pursuant to the above-mentioned SMP condition, 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 and BES products. Industry, however, requested BT to reduce the advance written notification period from 90 days to 28 days in order to receive the benefits of lower prices sooner. In response, BT wrote on 25 May 2006 to Ofcom indicating it is in agreement with the request from industry and requesting consent from Ofcom to the reduced notification period.
- 1.4 Ofcom may under the said SMP conditions give a 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 a consent and must provide an opportunity for interested parties to comment on the matter.
- 1.5 In a previous consultation on the waiver of the price notification requirements for certain PPC and RBS backhaul prices² the notification period was waived entirely in order to ensure that the benefits of the reduced prices flow through to consumers as quickly as possible. It is Ofcom's view that such an approach is justified in this case also, especially when the time taken to conduct a consultation is taken into consideration. On 5 June 2006 Ofcom wrote to BT noting this and requested to understand the significance of the reduced notification period over a waiver. Subsequently BT and industry indicated that they would be in favour of a waiver, rather than a reduced notification period.
- 1.6 For the reasons set out in Section 2 of this document, Ofcom considers that the criteria set out in section 94(2) of the Act are likely to be met in this instance and proposes to accept BT's request for a consent, subject to any representations duly made to Ofcom during this consultation. In reaching this initial view, Ofcom has considered and acted in accordance with its duties under sections 3 and 4 of the Act.

¹ See the *Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*: <http://www.ofcom.org.uk/consult/condocs/llmr/statement>

² See the *Waiver of BT's price notification requirements for certain of BT's PPC and RBS backhaul prices*: http://www.ofcom.org.uk/consult/condocs/bt_waiver/

- 1.7 Ofcom considers that the exceptional circumstances of BT's request mean that it is appropriate to depart from the standard one month consultation period for consents normally required by section 49 of the Act and instead to consult for 5 working days. Ofcom has the power to do so under section 49(6) of the Act and has previously advised the industry³ of its intention to make use of shorter consultation periods when considering requests for price notification waivers, due to the need for urgency in such cases.

³ The letter from Ofcom advising the industry is reproduced in Annex 6.

Section 2

Explanatory statement

The leased lines market review

- 2.1 On 24 June 2004, Ofcom published the conclusions of its review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets ("the leased lines market review")⁴.
- 2.2 The leased lines market review defined, amongst others, a market for wholesale alternative interface symmetric broadband origination (AISBO) for all bandwidths and concluded that BT held Significant Market Power (SMP) in this market.
- 2.3 As a result of these findings of SMP, Ofcom imposed regulation on BT in the form of a series of conditions ("the SMP Conditions") made under section 45 of the Communications Act 2003 ("the Act") in each of the two markets.
- 2.4 SMP Condition HH1 requires BT to provide Network Access on reasonable request from Third Parties and where Ofcom directs it to do so. Backhaul Extension Services (BES) and Wholesale Extension Services (WES) 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.
- 2.5 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 within a radial distance of 25km.
- 2.6 WES are types of Network Access services that enable a Communications Provider (CP) to provide a secure link between a third party customer site and the CP's network at a CP's site within a radial distance of 25km⁵.
- 2.7 SMP Condition HH5 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". BT is therefore required to provide 90 days' advance written notice of any changes that it wishes to make to its prices for WES and BES products. The exception to that requirement is a case in which Ofcom has, pursuant to its powers under those SMP Conditions, given a consent in writing to affect the operation of the price notification requirements after consulting duly on such a proposed consent in accordance with section 49 of the Act.

BT's request for consent to a change in price publication obligations

- 2.8 On 25 May 2006, BT wrote to Ofcom requesting a consent to a reduction of the notification period required under SMP Condition HH5 for changes to certain of the prices of its WES and BES products from 90 days to 28 days. All the price changes

⁴ See the *Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*: <http://www.ofcom.org.uk/consult/condocs/llmr/statement>

⁵ Note that future variants may extend this range.

are price reductions (see Annex 7). BT stated in its request that the proposed prices had all been agreed with the industry and that the industry had requested the change in the notification period.

- 2.9 BT has informed Ofcom that the proposed BES price reductions result from industry requests for a review of BES pricing at the BES Industry Forum on 12 May 2005. BES prices were proposed to the industry on 12 August 2005 via email and agreed with the industry at the BES Industry Forum on 16 September 2005.
- 2.10 Similarly, WES price reductions result from industry requests for a review of WES pricing at a meeting on 2 February 2005. WES prices were proposed to the industry on 13 March 2006 at the WES Industry Forum⁶ and agreed with the industry at the Ethernet Forum on 10 May 2006.
- 2.11 Additionally, BT has proposed to backdate the BES price changes to 16 September 2005 (the date upon which they were agreed). BT is not proposing to backdate the WES price changes as these were agreed with the industry only recently (10 May 2006).
- 2.12 BT has requested that Ofcom uses its powers under SMP Condition HH5, which are to be exercised in accordance with section 49 of the Act, and consent to waive the requirement to provide 90 days' advance written notice and accept a 28 days' advance written notice instead. BT informed Ofcom that the request for a shortened notification period originated with industry (specifically, with Cable & Wireless). Cable & Wireless have subsequently informed Ofcom that it raised the issue of a shortened notification period at the Ethernet Forum on 10 May 2006.
- 2.13 Subsequent to receiving BT's request Ofcom sought clarification as to why a reduction in the notification period, as opposed to a waiver of it, had been requested. This clarification was sought as previously in the case of certain changes to Partial Private Circuit (PPC) and Radio Base Station (RBS) backhaul charges⁷ BT had requested a waiver. BT indicated that the request had originated with industry and that it had no objection to a waiver as opposed to a reduction in the notification period. Cable & Wireless indicated that it was supportive of a waiver and that it had canvassed opinion amongst the UK Competitive Telecommunications Association (UKCTA), receiving six responses also supportive of a waiver. It is Ofcom's view that a waiver is preferable to a change in the notification period as it ensures that the benefits of any price reductions are passed on as quickly as possible and avoids the need to determine, on a case-by-case basis, what an appropriate notification period should be.
- 2.14 Note that any consent by Ofcom to a waiver of, or change to, the notification period required by SMP Condition HH5 does not indicate that Ofcom has approved the pricing proposed by BT.

Question 1: *What is your view of a waiver of the price notification requirements as opposed to a reduction in the notification period? Please explain your answer.*

⁶ See the minutes and accompanying presentation in the WES Industry Forum Minutes & Issues documentation pack available on the BT website:

<http://www.BT.co.uk/orpg/downloads/zip/notes/notes.zip>

⁷ See the *Waiver of BT's price notification requirements for certain of BT's PPC and RBS backhaul prices*: http://www.ofcom.org.uk/consult/condocs/bt_waiver/

Statutory requirements to be met before giving a consent

- 2.15 Section 49 of the Act applies where Ofcom proposes to give a consent to affect the operation of a condition made under section 45 of the Act (including SMP Conditions). In order to give such a notice, 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.
- 2.16 Ofcom wrote to the industry on 11 October 2004 setting out the approach it proposed to take when dealing with requests for consent to introduce prices with a reduced notification period. The letter is reproduced in Annex 6.
- 2.17 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.
- 2.18 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.
- 2.19 In the case of price reductions proposed by an SMP provider, 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.
- 2.20 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.
- 2.21 Ofcom invited the industry to comment on its proposed policy but received no responses on the matter, other than from BT.
- 2.22 Ofcom's main reason for imposing SMP Condition HH5 was to enable both Ofcom and BT's competitors to monitor BT's prices for possible anti-competitive behaviour. Ofcom concluded that imposing SMP Condition HH5 was consistent with its duties under sections 3 and 4 of the Act in that the conditions encouraged transparency,

promoted the interests of the purchasers of AISBO products and promoted long-term competition in the AISBO market⁸.

- 2.23 Ofcom is satisfied that allowing BT to introduce the WES and BES price changes set out in Annex 7, without giving the required advance written notice, would still enable competitors to monitor BT's prices and remain consistent with Ofcom's duties under sections 3 and 4 of the Act.
- 2.24 Ofcom therefore considers that the criteria set out in section 49(2) of the Act are satisfied in that there is an objective justification for allowing BT to introduce the BES and WES price changes from the date of any statement to that effect as the price reductions would appear to be expected by the industry and would be beneficial to it, whilst still remaining consistent with Ofcom's duties under sections 3 and 4 of the Act.
- 2.25 Ofcom further considers that it would not be unduly discriminatory to allow BT to introduce the price changes early as they would benefit all purchasers of WES and BES.
- 2.26 As discussed above, the main reasons for imposing the requirement to provide 90 days' advance written notice of price changes was to provide protection to the rest of the industry by enabling other CPs to monitor BT's prices for possible anti-competitive effects and give them sufficient time to adjust their downstream prices to enable competition with BT's own retail leased lines products. Whether or not it is proportionate to allow BT to introduce the BES and WES price changes without giving the full 90 days' advance written notice would therefore appear to depend largely on whether the industry considers that the benefits of having the price reductions introduced earlier than otherwise outweighs any potential costs of doing so. Ofcom's initial view is that the industry in general is likely to regard the benefits as outweighing the potential costs and the giving of a consent would thus be proportionate.
- 2.27 Ofcom also considers that the proposed consent is transparent in that it is clear from it that BT is not required to comply with the 90 days price notification requirements under SMP Condition HH5 in respect of the proposed prices set out in Annex 7 of this document.
- 2.28 Ofcom is also 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 and encourage the availability and use of high speed data transfer services throughout the UK by making the price reductions available at an earlier date. The giving of the consent would ultimately also promote competition.
- 2.29 Ofcom is therefore minded to conclude that it is appropriate to consent to BT introducing the price changes in Annex 7 from the publication date of any statement to that effect, without giving the required 90 days' advance written notice. Ofcom is, however, interested in obtaining the views of the rest of the industry, particularly as to whether the benefits of having the price changes introduced with a reduced notification period are outweighed by any potential costs of having less time to

⁸ See paragraphs 7.93, 7.94 and 7.95 of the *Review of the retail leased lines, symmetric broadband origination and wholesale trunk segments markets*:
<http://www.ofcom.org.uk/consult/condocs/llmr/statement>

consider the impact of the price changes and make any necessary amendments to the prices of their own retail products.

Question 2: *What is your view of whether the benefits of having the proposed WES and BES price changes introduced without advance notification outweigh any potential costs due to having less time to consider the impact on, and make any necessary amendments to, your own retail products?*

Notification of Ofcom's proposal to give consent

2.30 Before a consent can be given under section 49 of the Act, Ofcom is required by section 49(4) to publish a notification:

- i) stating that there is a proposal to give, modify or withdraw it;
- ii) identifying the person whose proposal it is;
- iii) setting out the direction, approval or consent to which the proposal relates;
- iv) setting out the effect of the direction, approval or consent or of its proposed modification or withdrawal;
- v) giving reasons for the making of the proposal; and
- vi) specifying the period within which representations may be made about the proposal to the person whose proposal it is.

2.31 Section 49(5) requires that the period for making representations must be one month after the day of the publication of the notification unless there are exceptional circumstances, in which case a shorter notification period may be used so long as it is reasonable in the circumstances. A shorter notification period can only be given where the notification is not one that is required to be sent to the European Commission ("the Commission") under section 50(4) of the Act.

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

"...

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

2.33 In its letter to industry of 11 October 2004 (see Annex 6), Ofcom recognised that it may not be appropriate for it to consult for one month when considering requests for

consent and that it was necessary for Ofcom to take into account its duties under sections 3 and 4 of the Act, in particular the promotion of competition. Ofcom advised that in most cases Ofcom would consult for five working days only, though this may vary according to the significance or complexity of the price change. Ofcom also noted that proposals to implement price changes with shorter than usual notice may be unlikely to affect trade between Member States.

- 2.34 Ofcom considers that there are exceptional circumstances justifying the use of a shorter consultation period in this case. Without a reduced consultation period, and given the time taken to prepare the consultation document and a following statement, there would be little benefit to consumers in consulting on the early introduction of price reductions as any consent would likely be published only marginally before 90 days from Ofcom's receipt of BT's request (i.e. 23 August 2006) by which time BT could have introduced the price changes anyway.
- 2.35 Ofcom does not consider that the notification is one that is required to be sent to the Commission under section 50(4) of the Act as, although it relates to the giving of a consent for the purposes of an SMP condition, Ofcom does not consider that the proposal itself would affect trade between Member States.
- 2.36 The proposed consent relates to a waiver of the requirement to provide 90 days' advance written notice of the price changes in Annex 7. Reducing the prices now, rather than at a later date, will not have an effect on trade between Member States as the price reduction would otherwise come into force at the end of the 90 days' advance notice period required by SMP Condition HH5.
- 2.37 In light of the foregoing considerations, Ofcom considers it justified and appropriate to specify the period within which representations may be made to Ofcom about its proposal to give the said consent to BT as 5 working days. In other words, representations on Ofcom's proposed consent set out in Annex 5 should be made by the deadline and in the manner specified in Annex 1 of this document. As regards the effect of the proposed consent and Ofcom's reasons for making this proposal, these are set out above.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 4 July 2006**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/btwesbes/howtorespond/form>, 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 (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email graeme.hodgson@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Graeme Hodgson
04:65
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 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.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Graeme Hodgson on 020 7783 4417.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response coversheet that this is acceptable).

- A1.9 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex so that non-confidential parts may be published along with the respondent's identity.
- A1.10 Ofcom reserves its power to disclose any information it receives where this is required to facilitate the carrying out of its statutory functions.
- A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use in order 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/account/disclaimer/>

Next steps

- A1.12 Following the end of the consultation period, Ofcom intends to publish a statement in July 2006.
- A1.13 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.14 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.15 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.16 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

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

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

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

Before the consultation

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

During the consultation

- A2.3 We will be clear about who we are consulting, why, on what questions and for how long.
- A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened 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.
- 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 organizations 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 coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed coversheets 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 coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any 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 coversheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

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)

Annex 4

Consultation questions

A4.1 The following questions are asked within this consultation. They are reproduced here for convenience.

Question 1: *What is your view of a waiver of the price notification requirements as opposed to a reduction in the notification period? Please explain your answer.*

Question 2: *What is your view of whether the benefits of having the proposed WES and BES price changes introduced without advance notification outweigh any potential costs due to having less time to consider the impact on, and make any necessary amendments to, your own retail products?*

Annex 5

Notification - Proposed Consent

NOTIFICATION UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003

Proposal to give a consent to British Telecommunications plc ("BT") under SMP services condition HH5, imposed on BT as a result of the analysis of symmetric broadband origination markets listed in the Schedule to the Proposed Consent annexed to this Notification in which BT has been found to have significant market power

1. OFCOM hereby make, in accordance with section 49 of the Act, a proposal to give a consent under SMP services condition HH5, imposed on BT as a result of the analysis of symmetric broadband origination markets listed in the Schedule to the Proposed Consent set out in the Annex to this Notification in which BT has been found to have significant market power.
2. The proposed consent is set out in the Annex to this Notification.
3. The effect of the proposed consent, and the reasons for making the proposal, are set out in Section 2 of the accompanying Explanatory Statement hereto.
4. In making the proposal set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3 of the Act and the six Community requirements set out in section 4 of the Act.
5. Representations may be made to OFCOM about the proposal set out in this Notification and the accompanying Explanatory Statement by 5pm on 4 July 2006.
6. In this Notification—
 - (a) **"Act"** means the Communications Act 2003;
 - (b) **"BT"** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989; and
 - (c) **"OFCOM"** means the Office of Communications.

Gareth Davies

Competition Policy Director

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

27 June 2006

Annex

[Proposed] Consent under Condition HH5 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, OFCOM issued a Notification on 24 June 2004 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 HH5;
- (B) this Consent concerns matters to which Condition HH5 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 27 June 2006, 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 HH5, OFCOM gives the following Consent:

- 1. For the purposes of complying with its obligations under Condition HH5, OFCOM consents that BT shall not be obliged to provide an Access Charge Change Notice in respect of the prices (as specified in Annex 7 of the Explanatory Statement accompanying the publication of this Consent) before these amendments come into force on the dates specified in the said Annex 7.
- 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 24 June 2004; 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 4 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

XX July 2006

Schedule

1. The market for alternative interface symmetric broadband origination at any speeds in which British Telecommunications plc has been found to have significant market power.

Annex 6

Ofcom's letter 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 affect 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 7

BT's proposed price changes

BES Price List Entry

Connection and Rental Charges

Description (Prices are per end except Main Link Element – Note 3)	Effective Date	Until	Connection (£) (Note1)		Annual Rental (Note 3) (£)
			Is site served by fibre from serving exchange (Note 2)		
			Served	Not Served	
BES 10 – per Local End	11/05/2005		2,700	4750	1,170
BES 100 – per Local End	TBA		2,750	5,550	2,480
BES 155 – per Local End	TBA		4,500	7,500	4,700
BES 622 – per Local End	TBA		5,200	8,200	9,300
BES 1000 – per Local End	TBA		5,200	8,200	8,900
Main link per metre or part thereof (> 0m)	11/05/2005		0.0	0.0	0.50

Description (Prices are per end except Main Link Element – Note 3)	Effective Date	Until	Connection (£) (Note1)		Annual Rental (Note 3) (£)
			Is site served by fibre from serving exchange (Note 2)		
			Served	Not Served	
BES 10 – per Local End	11/05/2005		2,700	4750	1,170
BES 100 – per Local End	11/05/2005	TBA	2,750	5,550	2,920
BES 155 – per Local End	11/05/2005	TBA	4,500	7,500	5,600
BES 622 – per Local End	11/05/2005	TBA	5,200	8,200	11,200
BES 1000 – per Local End	11/05/2005	TBA	5,200	8,200	10,800
Main link per metre or part thereof (> 0m)	11/05/2005		0.0	0.0	0.50

Annual rental price changes shown effective on TBA will be backdated to 16/09/05.

WES Price List Entry

Connection and Rental Charges

Description (Prices are per end except Main Link Element – Note 2)	Effective Date	Until	Connection (£)		Annual Rental (Note 3) (£)
			Is site served by fibre from serving exchange (Note 1)		
			Served	Not Served	
WES 10 – (Local Reach) per End	24/03/2005		2,700	4750	780
WES 10 – per End	24/03/2005		2,700	4750	1,170
WES 100 – per End	TBA		2,750	5,550	2,750
WES 155 – per End	TBA		4,500	7,500	5,210
WES 622 – per End	TBA		5,200	8,200	10,300
WES 1000 (LAN Extension) – per End	TBA		5,200	8,200	9,830
Main link per metre or part thereof (> 0m)	24/03/2005		0.0	0.0	0.50

Description (Prices are per end except Main Link Element – Note 2)	Effective Date	Until	Connection (£)		Annual Rental (Note 3) (£)
			Is site served by fibre from serving exchange (Note 1)		
			Served	Not Served	
WES 10 – (Local Reach) per End	24/03/2005		2,700	4750	780
WES 10 – per End	24/03/2005		2,700	4750	1,170
WES 100 – per End	24/03/2005	TBA	2,750	5,550	2,920
WES 155 – per End	24/03/2005	TBA	4,500	7,500	5,600
WES 622 – per End	24/03/2005	TBA	5,200	8,200	11,200
WES 1000 (LAN Extension) – per End	24/03/2005	TBA	5,200	8,200	10,800
Main link per metre or part thereof (> 0m)	24/03/2005		0.0	0.0	0.50