

Explanatory Statement

Proposed Consent under BT SMP Condition OA1

Consultation

Publication date: **15 July 2005**

Closing Date for Responses: **16 August 2005**

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Section 1

Summary and background

- 1.1 BT is required to prepare regulatory financial statements on an annual basis to a detailed reporting specification. The purpose of these statements is primarily to verify compliance with cost orientation and non discrimination obligations.
- 1.2 These new reporting obligations were set out in a Statement and Notification ("The regulatory financial reporting obligations on BT and Kingston Communications") (Regulatory Financial Reporting Statements) published in July 2004 and apply for the first time to the 12 month period ending 31 March 2005. BT is required to publish these financial statements within four months of the end date - in this case by 31 July 2005.
- 1.3 These statements will be significantly different in form and content from previous years and BT has explained that the preparation process will take longer as a result. BT has therefore asked for consent to defer publication until 31 August 2005. As a consequence Ofcom is formally consulting on this matter.

Relevant SMP services conditions

- 1.4 The following SMP service condition was imposed on BT in the Regulatory Financial Reporting final statement and notification:
 - the requirement to publish its Regulatory Financial Statements (meaning any financial statement in respect of a Financial Year as defined in the SMP Condition prepared or required to be prepared by BT in accordance with these conditions) and any corresponding audit opinions within 4 months after the end of the period to which they relate (SMP Condition OA6 (b));
- 1.5 The requirement is for BT to publish its Regulatory Financial Statements (meaning any financial statement in respect of a Financial Year as defined in the SMP Condition prepared or required to be prepared by BT in accordance with these conditions) and any corresponding audit opinions within 4 months after the end of the period to which they relate.

BT's request

- 1.6 BT has been discussing with Ofcom the detailed implementation of its new regulatory accounting obligations since the publication of the Statement and Notification last year. These new statements require significant changes to the underlying systems and processes.
- 1.7 In June this year BT formally requested a deferment to its publication date from 31 July to 31 August in recognition of the difficulties it faced in preparing a new set of financial statements within the four month timescale. Ofcom proposes to give its consent to this deferment as Ofcom considers this request to be reasonable in the circumstances.

The proposed Consent

- 1.8 SMP Condition OA1 allows Ofcom to consent in writing to a longer period, than that set out in SMP Condition OA6(b).

Legal tests

- 1.9 The section below sets out Ofcom's reasons why it considers that the relevant legal tests under the Act for granting the Consent as proposed in this Section are met. This Section should be read in the light of relevant considerations and Ofcom's conclusions as set out above in this explanatory statement.

Relevant tests

- 1.10 Ofcom is required to be satisfied that the granting of consents is in accordance with the requirements of section 49(2) of the Communication Act 2003 (The Act). Ofcom also has to consider and act in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
- 1.11 Ofcom's proposal to give the Consent to BT is set out in a notification published at Annex 5. The Schedule to that notification sets out the draft Consent. The effect of, and reasons for making, those proposals are set out in the paragraph headed "BT's Request" above.
- 1.12 The period within which representations may be made to Ofcom about the abovementioned proposals, and the procedures for making such representations, can be found in Annex 1 of this document.

Section 3 and 4 – general duties & the six Community requirements

- 1.13 Section 3 of the Act sets out the general duties of Ofcom in carrying out its functions, in particular that it furthers the interests of citizens in relation to communications and further the interests of consumers in relevant markets. Section 4 of the Act requires that Ofcom acts in accordance with the six Community requirements concerning: the promotion of competition; the development of the European internal market; the promotion of the interests of all EU citizens; non-discrimination; promoting efficiency and sustainable competition and the maximum benefit for consumers; and facilitating service interoperability and securing freedom of choice for consumers.
- 1.14 This Consent is necessary to ensure that BT has sufficient and reasonable time in which to meet its reporting obligations for this first year implementation of a new reporting framework.

Section 49(2) – general tests

- 1.15 Section 49(2) of the Act requires that Ofcom must not give a Consent unless it is satisfied that to do so 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.

1.16 In respect of the proposed draft Consent, Ofcom considers that it:

- is objectively justifiable as it will allow BT sufficient time in which to prepare an important set of financial statements for compliance purposes;
- does not discriminate unduly even though it only applies to BT as, although similar SMP services conditions have been imposed on Kingston, Kingston does not have such extensive or detailed reporting requirements;
- is proportionate, as it recognises the initial implementation issues faced by BT in the first year of preparation;
- is transparent, in that it is clear on the face of the proposed Consent (as set out in the notification at Annex 5) what is required from BT in terms of complying.

Conclusions

1.17 Ofcom has provisionally concluded that a Consent should be granted to BT to allow deferment of publication of the regulatory financial statements by one month. Ofcom is satisfied that, in proposing the granting of the Consent it has met all relevant tests.

Notification to the European Commission

1.18 As required by Article 7 of the Framework Directive (as implemented by sections 50 and 81 of the Act), Ofcom's proposals are being sent to the European Commission and to other NRAs as, in Ofcom's opinion, the proposals may affect trade between Member States.

Next steps

1.19 Consultation on the proposed Consent in this document closes on 16 August 2005. When Ofcom has considered the representations made in response to this consultation, including any comments made by the European Commission, it will decide whether to give effect to its proposed Consent, with or without modifications. It will do this by publishing a further statement before the end of August.

Annex 1

Responding to this consultation

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 16th August 2005.16 August 2005**

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 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to first ..@ofcom.org.uk.

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

William Fell
Competition and Markets
3rd Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7783 4103

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

Further information

If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Bill Fell on .

Confidentiality

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 (when respondents confirm on their response cover sheer that this is acceptable).

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.

Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.

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 www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

Following the end of the consultation period, Ofcom intends to publish a statement around the end of August.

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

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations.

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, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Tony Stoller, Director, External Relations, who is Ofcom's consultation champion:

Tony Stoller
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3550
Fax: 020 7981 3333
E-mail: tony.stoller@ofcom.org.uk

Annex 2

Ofcom's consultation principles

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

Before the consultation

- A2.1 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

- A2.2 We will be clear about who we are consulting, why, on what questions and for how long.
- A2.3 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.
- A2.4 We will normally allow ten weeks for responses to consultations on issues of general interest.
- A2.5 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.
- A2.6 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

- A2.7 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 (see below) 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 don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Explanatory Statement

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?

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

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. 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

Question 1: Do stakeholders have any comments in respect of the proposal for BT to defer its publication of the regulatory financial statements by one month?

Annex 5

Legal notification for proposed consent

Notification of a proposal under section 49 of the Communications Act 2003

Proposals for giving a Consent under SMP Services Condition OA1 in Schedule 2, Part 2 to the Notification at Annex 2 of *The regulatory financial published reporting obligations on British Telecommunications plc and Kingston Communications* final statement and notification made on 22 July 2004

1. OFCOM hereby make, in accordance with section 49(4) of the Act, the following proposal for a Consent to be given to BT under SMP Services Conditions OA1 in

Schedule 2, Part 2 to the Notification at Annex 2 of *The regulatory financial reporting obligations on British Telecommunications plc and Kingston Communications* final statement and notification made on 22 July 2004.

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, is set out in of the accompanying explanatory statement.

4. In making the proposals set out in this Notification, OFCOM have considered and acted in accordance with their general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.

5. Representations may be made to Ofcom about the draft Consent by 16 August 2005. Representations shall be addressed to the person named in, and otherwise made in the manner set out in Annex 3 of the accompanying explanatory statement.

6. In accordance with section 50 of the Act, copies of this notification have been sent to the Secretary of State, the European Commission and to the regulatory authorities of every other Member State.

David K S Thomas
Director of Regulatory Finance, Ofcom

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

15 July 2005

SCHEDULE

[Draft] Consent under section 49 of the Communications Act 2003 and SMP Services Condition OA1 imposed on British Telecommunications plc in Schedule 2, Part 2 to the Notification at Annex 2 of *The regulatory financial reporting obligations on British Telecommunications plc and Kingston Communications* final statement and notification made on 22 July 2004

WHEREAS:

- A as a result of a market analysis carried out by the Director General of Telecommunications (the 'Director') and OFCOM, in accordance with sections 48(1) and 79 of the Act, BT has been designated as having Significant Market Power ('SMP') in respect of certain identified markets as set out in the Notification and the notification of Annex 2 of the Review of the wholesale local access market, made on 16 December 2004 ;
- B as a result of such SMP designations, BT has been subjected to various SMP services conditions in accordance with sections 45 and 86 to 92 of the Act, including:
 - (a) conditions OA1 to OA34 and FA10, imposing obligations on BT in respect of wholesale cost accounting, retail cost accounting and accounting separation in relation to BT's activities in those markets where BT has been designated as having SMP;
- C this Consent concerns matters to which Condition OA6 (b) relates;
- D 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 Direction is:
 - (b) 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;
- E 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;
- F on 15 July 2005, OFCOM published a Notification of the proposed Consent and accompanying explanatory statement in accordance with section 49 of the Act and invited representations about any of the proposals therein by 16 August 2005;
- G 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;

- H OFCOM has considered every representation about the proposed Consent duly made to it and the Secretary of State has not notified OFCOM of any international obligation of the United Kingdom for this purpose; and

Therefore, pursuant to section 49 of the Act and SMP Conditions OA1 in Schedule 1 to the Notification, OFCOM gives the following Consent:

1. In SMP Condition OA6 (b), the four month period within which BT must publish its Regulatory Financial Statements and any corresponding audit opinions after the end of the period to which they relate shall be extended to the 31 August 2005 for the reporting period ending 31 March 2005.
2. For the purpose of interpreting this Direction, the following definitions shall apply:
 - a) **'Act'** means the Communications Act 2003; and
 - b) **'The Notification'** means the notification at Annex 2 of *The regulatory financial published reporting obligations on British Telecommunications plc and Kingston Communications* final statement and notification made on 22 July 2004.
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, and otherwise any word or expression shall have the same meaning as it has in the Act.
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.

[Name]

[Title]

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

[Date]