



Proposed discontinuation of the Charge Control for Number Portability Standard Services

Consultation

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Closing Date for Responses: **06 May 2004**

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The consultation

1. The Director General of Telecommunications said in his statement “Continuing Licence Conditions after 25 July 2003” that, in the majority of cases, before discontinuing any provisions of any Continuation Notice, he would consult on the matter for at least 14 days. On this occasion, Ofcom is allowing 28 days so that interested parties can more fully consider the implications of the proposal. Representations should arrive at Ofcom no later than 6 May 2004. After considering any such representations, Ofcom will, if appropriate, issue the notice of discontinuation.
2. Where possible, comments should be made in writing and sent by email to michael.richardson@ofcom.org.uk. However, copies may also be posted or faxed to the address below. If any parties are unable to respond in one of these ways, they should discuss alternatives with:

Further copies of this document

3. This document can be viewed on Ofcom's website, www.ofcom.org.uk. Paper copies can be made available on request.

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Publication of representations

4. On this occasion, Ofcom will not be inviting interested parties to comment on the representations made by others. However, in the interests of transparency, all representations will be published, except where respondents indicate that a response, or part of it, is confidential. Respondents are therefore asked to separate out any confidential material into a confidential annex which is clearly identified as containing confidential material. Ofcom will take steps to protect the confidentiality of all such material from the moment that it is received at Ofcom's offices. In the interests of transparency, respondents should avoid applying confidential markings wherever possible.
5. Non-confidential representations can be viewed on Ofcom's website.

Executive summary

Number portability

- S.1 Customers' ability to retain a phone number(s), when transferring service to an alternative provider, is a key facilitator of competition between providers of communications services.
- S.2 This consultation concerns services relating to the provision of portability, namely the technical services which enable end users to retain a phone number after transferring service from one provider to another, which are purchased from the former provider by the new provider, not by the end user. The services include initial per line set-up of the facility which enables an end user to retain his number and subsequent conveyance of each call from the former provider to the new provider.

Continuation of licence conditions and Condition 69A

- S.3 Although individual licences granted under section 7 of the Telecommunications Act 1984 have now been replaced in part by General Conditions made under the Communications Act 2003 (the "Act"), there were a number of specific conditions included in some individual licences which cannot be replaced by new conditions under the powers contained in the Act until the relevant market reviews have been completed and implemented. Schedule 18, paragraph 9 of the Act allows Ofcom to issue Notices to continue provisions in Licence Conditions until such time as it has reviewed the relevant market (these powers were previously exercised by the Director-General of Telecommunications (the "Director") until Ofcom assumed its powers on 29 December 2003). BT's Condition 69A (hereinafter referred to as "continued provision Condition 69A") was made to continue in force by such a continuation notice ("Continuation Notice") issued to BT by the Director on 23 July 2003.
- S.4 Continued provision Condition 69A concerns Portability Standard Services, which are services referred to in paragraph S2 above provided by BT pursuant to an agreement under continued provision Condition 45. Condition 69A requires BT to limit any price increases for Non-conveyance Portability Standard Services to RPI – 5 each year until 31 July 2006 (Non-conveyance Portability Standard Services are Portability Standard Services which are initial per line set-up services, as described in paragraph S2 above). It also requires BT to ensure that charges for all Portability Standard Services are cost oriented and non discriminatory and to notify changes in these charges to Ofcom and other providers, in advance, and to publish all charges.

Market Reviews

- S.5 The European Commission ("the Commission") has adopted a Recommendation on Relevant Products and Services Markets (the "Recommendation") which lists a set of markets in which ex ante regulation may be warranted. However, National Regulatory Authorities ("NRAs") are able to regulate markets that differ from those identified in the Recommendation where this is justified by national circumstances. Ofcom is obliged to take the utmost account of this Recommendation when defining markets appropriate to national circumstances. In some instances Ofcom has exercised its discretion to define markets other than those included in the

Recommendation, and it has notified these draft decisions to the Commission and other NRAs.

- S.6 The services referred to in paragraph S2 are not included in the markets listed in the Recommendation and are not included in markets which the Director or Ofcom has exercised its discretion to define as markets appropriate to national circumstances.

Removal of continued regulatory obligations

- S.7 Paragraph 9(11) of Schedule 18 of the Act requires Ofcom as soon as reasonably practicable after giving a continuation notice, to take all steps necessary to enable it to decide whether or not to set a Condition for the purpose of replacing the continued provision. It requires that Ofcom must then decide as soon as reasonably practicable whether or not to exercise its power to set a Condition within the categories set out in the Act. Paragraph 9(12) of Schedule 18 of the Act then requires that Ofcom must give a discontinuation notice with respect to the continuation notice as soon as reasonably practicable after making the decision required by paragraph 9(11). Ofcom considers therefore that while it is appropriate to keep such notices in place pending completion of planned market reviews, Ofcom does not believe it is appropriate to maintain Continuation Notices for services in a market where there are no plans to review that market under the Act. In this case, it is also relevant that there is already regulation in place in relation to the services.

General Conditions imposed under the Communications Act 2003

- S.8 General Conditions made under the Act may either apply to all providers of Electronic Communication Networks ("ECN") and Electronic Communications Services ("ECS"), including BT, or such ECN and ECS providers of a specified description. General Condition 18 (Number Portability) ("The Number Portability General Condition") requires all providers to offer number portability on reasonable terms to any of its subscribers who request this. It also requires it to provide portability at the request of another provider on reasonable terms; any charges levied must, subject to the requirement of reasonableness, be cost oriented and based on the incremental cost of provision, unless otherwise agreed or as directed by Ofcom.

Ofcom's proposal

- S.9 Ofcom considers that the Number Portability General Condition is sufficient to ensure that BT provides Portability Standard Services to other providers on reasonable terms. Ofcom does not presently intend to carry out a review of the market in which these services fall. Ofcom therefore proposes that BT's continued provision Condition 69A should now cease to have effect.
- S.10 In addition, BT has given Ofcom a non binding undertaking to continue to comply with continued provision Condition 69A, including the RPI-5 charge control for non conveyance portability services, as though the provision was still operative until 31 August 2006.

Next step

- S.11 Interested parties are invited to comment on the proposal contained in this document no later than 6 May 2004. Arrangements for submitting comments are detailed on page 2.

Section 1

Background and process

Ofcom

- 1.1 Ofcom assumed its powers under the Communications Act 2003 (the "Act") on 29 December 2003. The present document refers to action taken by the Director General of Telecommunications ("the Director") before that date, and specifies action which Ofcom now proposes to take having assumed the powers of the Director.

Continuing licence conditions

- 1.2 On 10 September 2003, the Director published a statement Continuing Licence Conditions after 25 July 2003 (the "September Statement"). As the September Statement explained, when the new EU communications regime was implemented in the United Kingdom on 25 July 2003, individual licences granted under section 7 of the Telecommunications Act 1984 were replaced by general conditions of entitlement which apply to all persons providing Electronic Communications Network ("ECN")s and Electronic Communications Service ("ECS")s, or all such providers of a specified description. Additionally, individual Communication Providers may be subject to specific conditions, such as those imposed as a result of a finding of Significant Market Power (SMP), Access Related Conditions or conditions imposed as a consequence of a provider being designated as a universal service provider.
- 1.3 The new Directives seek to ensure that there is a coherent transition from the old regime to the new regime and to ensure that there is no regulatory gap. The Director has already concluded a number of consultations in relation to the new regime such as consultations on the General Conditions, Universal Service Conditions and Conditional Access Conditions. Also he has concluded a number of market reviews proposing the imposition of SMP Service Conditions, along with consultations on the imposition of other Access-Related Conditions.
- 1.4 The Director had intended originally to complete market reviews so that new SMP Services Conditions could be imposed, where appropriate, on 25 July 2003. Before imposing SMP Services Conditions and Access-Related Conditions (other than Conditional Access Conditions) the Director was required by the new regime to carry out a national consultation. He was required also to notify and consult with the European Commission (the "Commission") and the National Regulatory Authorities ("NRAs") in other Member States for at least a month. However, following the Commission's advice that it could not receive market review proposals before the requirements of the new Directives came into effect on 25th July 2003, none of these conditions could be imposed on the first day of the new regime.
- 1.5 In order to avoid a regulatory gap, the Directives permit and require Member States to continue the existing regime until such time as each Member State can complete its assessment of the imposition of the new SMP Services and Access-Related (other than Conditional Access) conditions. This has been implemented in the United Kingdom by paragraphs 9 and 22 of Schedule 18 of the Communications Act 2003 (the "Act"). Schedule 18 permits the Director to issue Continuation Notices which have the effect of continuing certain Licence Conditions and Interconnection Directions under the old licensing regime for a transitional period. BT's Condition 69A (hereinafter referred to as "continued provision Condition 69A") was made to

continue in force by a notice ("Continuation Notice") issued by the Director to BT on 23 July 2003 ("BT's Continuation Notice").

Discontinuing continued provisions

- 1.6 As was explained in chapter 5 of the September Statement, paragraph 9(11) to Schedule 18 of the Act required the Director, as soon as reasonably practicable after making the Continuation Notice, to take all steps necessary to enable him to decide whether or not to set a condition for the purpose of replacing the continued provision. That statement also explained that paragraph 9 (12) to Schedule 18 of the Act required the Director to give a notice that the Continuation Notice ceases to have effect, and that he must do this as soon as reasonably practicable after taking a decision to impose (or not to impose) conditions under the new regime. These requirements now apply to Ofcom as they did to the Director. Ofcom considers therefore that while it is appropriate to keep such notices in place pending completion of planned market reviews, Ofcom does not believe it is appropriate to maintain Continuation Notices for services in a market where there are no plans to review that market under the Act (see below). In this case it is also relevant that there is already other regulation in place in relation to the services. A draft notice is attached at Annex 3 to the present consultation document, which when given to BT in final form will notify BT that continued provision Condition 69A in BT's Continuation Notice no longer applies.
- 1.7 Although the Act does not require the Director or, subsequently, Ofcom to consult before discontinuing a Continuation Notice, the Director stated in the September Statement that, in the majority of cases, before discontinuing any provisions of any Continuation Notice, he would consult on the matter for at least 14 days. On this occasion, Ofcom is allowing 28 days so that interested parties can more fully consider the implications of the proposal.

Market Reviews

- 1.8 The European Commission ("the Commission") has adopted a Recommendation on Relevant Products and Services Markets (the "Recommendation") which lists a set of markets in which ex ante regulation may be warranted. However, National Regulatory Authorities ("NRAs") are able to regulate markets that differ from those identified in the Recommendation where this is justified by national circumstances. The Director is obliged to take the utmost account of this Recommendation when defining markets appropriate to national circumstances. In some instances the Director has exercised his discretion to define markets other than those included in the Recommendation, and he has notified these draft decisions to the Commission and other NRAs.
- 1.9 The services referred to in Section 2 below and in paragraph S2 are not included in the markets listed in the Recommendation and are not included in markets which the Director has exercised his discretion to define as markets appropriate to national circumstances.

Section 2

Ofcom's proposal

Number portability, the new European regulatory framework and UK Regulation

- 2.1 The ability of an end user to retain his phone number, when transferring his service to an alternative provider, is a key facilitator of competition between providers of communications services.
- 2.2 This consultation concerns services relating to the provision of portability, namely the technical services which enable end users to retain a phone number after transferring service from one provider to another, and they are purchased from the former provider by the other provider, not by the end user. The services include initial per line set-up of the facility which enables an end user to retain his number, and subsequent conveyance of each call from the former provider to the new provider. The former type of services vary according to the type of number(s) to be ported, the time of day when the port is requested to be carried out, and the means by which the request is made.
- 2.3 The Universal Service Directive¹ requires NRAs to ensure that pricing for interconnection related to the provision of number portability is cost oriented and that direct charges to subscribers, if any, do not act as a disincentive for the use of these facilities. Oftel ensured these outcomes by imposing a General Condition² on all providers, including BT. That condition is referred to in this document as the Number Portability General Condition and requires all providers of Electronic Communications Networks or Services to provide number portability on reasonable terms to any of their subscribers who request this. It also requires them to provide portability at the request of another provider. Such portability must be on reasonable terms and in accordance with the functional specification published by Ofcom, and any charges levied must, subject to the requirement of reasonableness, be cost oriented and based on the incremental cost of provision.

Continued Provision Condition 69A

- 2.4 Continued provision Condition 69A concerns Portability Standard Services, which are services referred to in paragraph 2.2 above provided by BT pursuant to an agreement under Condition 45, which was also continued by means of BT's Continuation Notice. Continued provision Condition 69A requires BT to limit any price increases for Non-conveyance Number Portability Standard Services to RPI – 5 each year until 31 July 2006 (Non-conveyance Portability Standard Services are Portability Standard Services which are initial per line set-up services, as described in paragraph 2.2 above). It also requires BT to ensure that all charges for Portability Standard Services are cost oriented and non discriminatory, and to notify changes in these charges to Ofcom and other providers, in advance, and to publish all charges.

Future regulation of Portability Standard Services

¹ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights (the "Universal Service Directive")

² General Conditions of Entitlement 18 (Number Portability)

- 2.5 Unlike continued provision Condition 69A, the Number Portability General Condition does not require providers to publish charges for portability, nor does it apply an RPI – 5 price cap to any portability services. As Ofcom has not carried out a review of competition to provide portability services, it cannot assert that BT, or any other supplier, has SMP. It therefore cannot impose any specific requirements such as price publication or a charge control on any individual operator. However, Ofcom considers that the Number Portability General Condition would be sufficient to ensure that any operator, including an operator with SMP, provides Portability Standard Services to other providers on reasonable terms.
- 2.6 Whilst an obligation for suppliers to publish prices would enhance transparency, the community of purchasers of wholesale number portability services is relatively small and Ofcom believes that differential pricing by suppliers, including any suppliers which may have SMP, would become apparent relatively quickly and enable wholesale purchasers to draw this to the attention of Ofcom if they believed such prices were not reasonable and not cost oriented. Ofcom also believes that in such circumstances purchasers would be willing and able to disclose to Ofcom the prices being charged by any supplier which was under investigation. Where appropriate, Ofcom would take enforcement action.
- 2.7 The setting of an RPI – x formula can provide a greater degree of certainty for purchasers than a more general obligation to offer cost oriented prices based on incremental costs, particularly in a market where there has been a history of infringements of a general cost orientation obligation. Should Ofcom find that a supplier has breached the obligation contained in the Number Portability General Condition to ensure that prices are cost oriented and based on incremental costs, it would consider conducting a wider review of competition in the relevant market to determine whether that supplier, or any other supplier, has SMP and, if so, whether additional conditions, including a charge control, should be imposed on suppliers with SMP. Should a supplier be found to have a position of dominance and to have abused that position, action could also be taken by Ofcom under the Competition Act 1998.
- 2.8 Ofcom has also taken into account in proposing to discontinue Condition 69A that BT has given a non binding commitment to continue to comply with continued provision Condition 69A, including the RPI-5 charge control for non conveyance portability services, as though the provision was still operative until 31 August 2006. Given the detailed analysis of BT's costs, including assumptions about volume changes, efficiency gains and cost-volume elasticities, which was undertaken in 2002, Ofcom believes that prices charged by BT which adhere to that formula are unlikely to give rise to any concerns that they are not based on incremental costs. As no such analysis has been conducted in respect of other suppliers, Ofcom is not in a position to make similar observations about other suppliers.
- 2.9 Ofcom does not presently intend to carry out a review of the market in which these services fall. Ofcom therefore proposes that continued provision Condition 69A should now cease to have effect. However, Ofcom wishes to emphasise that it retains the discretion under the new regime to identify and review any markets in which these services fall at any time in the future. It is also open to Ofcom to use its powers under the Competition Act 1998 and the Enterprise Act 2002 in relation to providers of portability services where appropriate.

Next steps

- 2.10 Interested parties are invited to comment on the proposal contained in this document. Arrangements for submitting comments are detailed on page 2. If, after taking into account any representations made, Ofcom remains of the view that continued provision Condition 69A should be discontinued, Ofcom will give a notice which discontinues that continued provision. A draft notice is attached to this consultation document at Annex 3.

Annex 1

Ofcom's consultation principles

How we will approach each formal consultation

There are seven principles which we will follow for each written consultation:

Before the consultation

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

2. We will be clear about who we are consulting, why, on what questions and for how long.
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.
4. **We will normally allow ten weeks for responses.**
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.
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

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.

We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website.

We would prefer people and organisations to give us views which they would be happy to see in public. But if those who have responded to a consultation tell us that some or all of their views must stay confidential, we will respect this.

We will also:

- list these seven principles in every consultation document that we publish;
- run a consultation helpdesk – to help organisations such as small businesses and consumer and community groups make their views heard in response to our consultations; and

keep a table on our website at www.ofcom.org.uk listing all current consultations, those recently closed and (as far as possible) those we are planning in the near future. The table will include a brief summary of each document.

Annex 2

Consultation response cover sheet

- A2.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, as soon as possible after the consultation period has ended, 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, unless we are asked not to.
- A2.2 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.
- A2.3 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.
- A2.4 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, 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.