



Consent to a waiver of BT's
price notification requirement for
wholesale analogue exchange line
services connection charges

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Section 1

Request to waive a notice period

Summary of the August consultation

- 1.1 In the *Waiver of BT's price notification requirement for wholesale residential and business analogue exchange line services connection charges consultation*¹ (the 'August consultation'), we stated that Significant Market Power services condition AA6(a) *Requirement to notify charges* ('condition AA6(a)') was imposed on BT (hereafter we refer to Openreach which runs BT Group's local access network) following Ofcom's 2003 market review statement *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*² (the '2003 Market Review').
- 1.2 Condition AA6(a).2(a) required Openreach to give not less than 90 days' notice before changing charges for wholesale line rental ('WLR') services, including the charge for new line connections.
- 1.3 On 3 August 2009, Openreach requested that Ofcom consent to a waiver of the notification period under condition AA6(a) to enable it to give effect to a permanent price change earlier than 90 days, as set out in Access Charge Change Notice OR139 ('the ACCN'), also issued on 3 August 2009.³
- 1.4 The ACCN set out Openreach's planned permanent price reduction for new line connection charges for WLR analogue residential and business services. Openreach advised it would reduce the new line connection charge from £88 to £67. The ACCN stated a commencement date for the revised charge of 1 November 2009.
- 1.5 Openreach wished, however, to bring forward the date on which the permanent price change was to start to 1 October 2009 or as soon as possible thereafter. To do this, Openreach required Ofcom to consent to a reduction in the notification period of 90 days as set out in condition AA6(a).2(a).
- 1.6 Paragraph AA6(a).1 allows Ofcom to consent in writing to waive requirements otherwise imposed by the SMP condition. Paragraph AA6(a).1 states that:

"Except in so far as the Director may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below."
- 1.7 Openreach explained that it wished to bring the benefits of this price reduction to its customers as early as possible given the current economic climate. The price reduction was in line with Ofcom's proposed reduction to the WLR analogue charge control for the new line connection charge, as outlined in *Charge Controls for Wholesale Line Rental and related charges* published on 3 July 2009 ('the July

¹ See http://www.ofcom.org.uk/consult/condocs/waiver_bt_wholesale/

² See

http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

³ See

<http://www.openreach.co.uk/orpg/pricing/notificationDetails.do?data=7ECevbhThBFn6Jzkp0vSCqRG AHsEvgo1if%2BUrHZgHhB7phKFnzZGAs4YuwfZ736b>

consultation').⁴ The ultimate beneficiaries of the price reductions would be new retail consumers, who would pay less to connect a new line to their premises.

- 1.8 The August consultation explained that we considered that the proposed waiver of the notification period appeared to be justified and appropriate in this case and, furthermore, that the proposed price changes, when implemented, would be likely to be of benefit to retail customers.
- 1.9 We sought comments on the proposal to waive the notification period by 4 September 2009. The consultation period was shortened because consulting for a longer period would delay the introduction of the new charges, which we considered would be of benefit to retail customers.

Important changes since the publication of the August consultation

- 1.10 Since we published the August consultation, Ofcom has completed its *Review of the narrowband services wholesale markets*⁵ (the '2009 Market Review'), which has considered market definition, market power determinations and the imposition of regulation in, amongst other markets, WLR analogue exchange line services. Regulation imposed under the 2009 Market Review replaces obligations previously set by the 2003 Market Review.
- 1.11 In the 2009 Market Review we concluded that there is now only a single market for wholesale analogue exchange line services, and therefore, this market definition replaces the previous definition of two markets (a wholesale analogue *residential* exchange line services market and a wholesale analogue *business* exchange line services market).
- 1.12 Therefore, while the August consultation referred to the markets previously defined under the 2003 Market Review, we will now apply the most recent market definition of 'wholesale analogue exchange line services market' when discussing the relevant market for the purposes of this statement.
- 1.13 Under the 2009 Market Review, SMP services condition AA6(a) was revoked for the wholesale analogue residential exchange line services and wholesale analogue business exchange line markets and a new condition replicating the obligation on BT to notify charges was imposed on the newly defined wholesale analogue exchange lines market. This new SMP condition was given the new number of AAA6(a).
- 1.14 The basic requirements of AAA6(a) remain nearly identical to the provisions of the now revoked condition, AA6(a). There is however, one material difference between the two conditions. AAA6(a) has revised the price notification periods applicable for WLR analogue services. 90 days notice is now required for price changes to the core line rental and 28 days notice for price changes to all other services, including a new line connection charge, which is the subject of this consent.
- 1.15 BT's original application for a consent was made under the then current SMP condition AA6(a); indeed this was the only way the application could have been made by BT this time. As explained above, the operative SMP condition imposing a requirement to notify charges on BT is now AAA6(a).

⁴ See <http://www.ofcom.org.uk/consult/condocs/wlrcc/wlrcc.pdf>

⁵ See http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/

- 1.16 We have carefully considered whether this change in regulation should affect the present application made by BT for a consent to waive the notice period under the requirement to notify charges obligation. We consider that it is still appropriate for Ofcom to issue a statement in relation to the waiver request. The application by Openreach was made under the previous condition, AA6(a), and for consistency with the intention of the new condition, AAA6(a), we believe that it is appropriate for Ofcom to treat the waiver request as if it were made under the new condition. We considered whether this course of action would materially impact upon stakeholders and considered the comments made during the course of the consultation, which we discuss in more detail below. We discussed in the August consultation at paragraphs 1.8 and 1.9 the forthcoming market review and the proposals that had been made under that review. We consider that, as AAA6(a) imposes all of the same requirements as AA6(a), save for a shortened notice period which applies to, amongst other services, the new line connection charge, it would be appropriate to continue to consider this waiver application as an application to waive the notice period under the operative SMP condition, which at this time is now AAA6(a).

Respondents' views

- 1.17 We received three responses to the consultation; one from TalkTalk Group and two others which were submitted on a confidential basis.
- 1.18 TalkTalk Group agreed with Ofcom's proposed waiver. However, it raised two specific issues: that it considered Ofcom to be pre-judging the outcome of the July consultation; and it noted that Openreach has never sought to expedite the introduction of reductions in MPF new provide charges, which it feels 'is symptomatic of the continual discrimination against MPF and in favour of WLR'.
- 1.19 The two confidential respondents were both opposed to Ofcom consenting to the waiver. One confidential respondent stated that it was 'premature and presumptuous of Openreach to seek to implement a new charge whilst it is still the subject of consultation'. It then went on to argue that the 'scale of the proposed reduction...should be effected by way of a glide path'. The respondent also raised a concern with the way in which Ofcom had referred to the proposal to reduce the price notification period applicable to WLR to 28 days, which was contained in the 2009 Market Review. It felt that Ofcom had also pre-judged the outcome of that review.
- 1.20 The final respondent stated that should the notification period be reduced it would not be in a position to pass the price decrease on to new customers within the reduced timeframe. This was because of issues that are specific to its business. As a reseller, the CP does not have full control of all systems related to the provision of its WLR analogue services and is therefore subject to externally-controlled processes when implementing changes. Therefore, this impacts its ability to respond to notifications of price changes.

Ofcom's response

- 1.21 We do not believe that the waiver consultation pre-judged the outcome of other Ofcom consultations. We felt that it was appropriate to acknowledge the changes proposed in other consultations in the context of this waiver consent request from Openreach. We believe that, at present, given the existing regulation which governs Openreach's pricing of WLR analogue services, Openreach is able to reduce the connection charge below the charge ceiling, within the constraints of the cost orientation obligation on WLR.

- 1.22 In paragraph 1.12 of the August consultation we stated that the recent analysis conducted for the July consultation, which assessed the costs of a new line connection, demonstrated that the costs of providing this service had fallen since the previous review period. While the exact starting point for the revised charge ceiling has yet to be agreed, as pointed out by respondents, the underlying evidence that costs have fallen is clear from this analysis. Therefore, we felt that as the price notified by Openreach moved in the direction we would expect based on this recent analysis, this supported our view that consenting to this waiver request would have benefits for end users.
- 1.23 As outlined in the August consultation, we felt that the waiver request met the tests set out in section 49(2) of the Act and that it was consistent with our duties contained in section 3 and 4 of the Act, by facilitating price decreases to be introduced at the earliest appropriate opportunity.
- 1.24 Therefore, we consider that we assessed the appropriateness of this request in a manner consistent with the way in which we have considered other waiver requests and in the interest of consumers, and specifically, based on the relevant regulation that applies to Openreach presently.
- 1.25 With reference to the arguments made by the confidential respondent in relation to the mechanics of the change to the WLR analogue connection charge, and to Talk Talk's suggestion that this consent amounts to discrimination between MPF and WLR, Ofcom are of the view that such matters fall outside the scope of this waiver consultation process where the key question is whether a shorter notification period should be agreed to and will be dealt with under the July consultation process.
- 1.26 Finally, in relation to the comments made by the second confidential respondent regarding the difficulty its business faces in meeting a reduced timeframe, while we are sympathetic to the issues it raised, we believe that it would not be appropriate for Ofcom to withhold consent to this request based on the response time of an individual firm in the market. We appreciate the complexities this particular stakeholder faces. However, we consider that it would not be appropriate to use its specific systems and processes as a benchmark for the market, which in this case would delay the introduction of price reductions.
- 1.27 In summary, we consider that the new charges will bring benefits to consumers and this justifies a reduction in the price notification period in this instance.

Statutory requirements to be met before giving a consent

- 1.28 Section 49 of the Communications Act 2003 ('the Act') applies where Ofcom proposes to grant a consent which affects the operation of a condition made under section 45 of the Act (including SMP services conditions). In order to give such consent, Ofcom must first satisfy itself that the criteria set out in section 49(2) are satisfied, namely the giving of a consent:
- i) must be objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - ii) must not discriminate unduly against particular persons or against a particular description of persons;
 - iii) must be proportionate to what it is intended to achieve; and

- iv) must be, in relation to what it is intended to achieve, transparent.
- 1.29 We consider that the criteria set out in section 49(2) of the Act are satisfied for the following reasons and therefore consider that we should consent to this waiver request.
- 1.30 Firstly, we consider that granting this waiver is objectively justifiable as the price reductions would be of direct benefit to potential retail customers of WLR analogue exchange line services. We consider that this waiver application is not contingent upon finalisation of the July consultation and consider that the reasons for granting it are self-standing. Openreach explained that it would like to bring the benefits of this price reduction to its wholesale customers at the earliest possible opportunity, and considers that this is particularly important given the present economic conditions.
- 1.31 Secondly, we do not consider that granting this waiver would discriminate unduly against particular persons or against a particular description of persons as the price reduction is available to any of Openreach's wholesale customers who purchase analogue exchange lines. We acknowledge the issues raised by the confidential respondent, in that they suggest that their customers would, in effect, be discriminated against by the inability of the CP to pass through the charge reductions within the reduced notice period. We consider these concerns may be related to the efficiency of its own internal processes and specific contractual arrangements rather than external factors and therefore it would not be appropriate to "benchmark" the timings of a process on the structure of an individual CP, especially where this could be to the detriment of other consumers. Openreach explained that the reduction is in line with both its Equivalence of Inputs (EOI) obligations and those under the SMP condition, which ensure that it does not unfairly favour to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with it.
- 1.32 Finally, we consider that granting the consent in this case is both proportionate and transparent. Requiring Openreach to meet the requirements of SMP services condition AAA6(a) (previously AA6(a)), in this particular case would delay the price reduction being passed onto wholesale customers and would not therefore achieve corresponding retail price reductions within the shortest time. The granting of consent in this case will therefore achieve Ofcom's aim of ensuring that price reductions may be passed on to customers at the earliest appropriate opportunity and is considered proportionate in this case. The August consultation set out why we proposed to grant the waiver and therefore met the requirement for Ofcom's actions in this area to be transparent.
- 1.33 We also consider that the granting of this waiver request is consistent with our obligations under sections 3 and 4 of the Act, in that it would further the interests of consumers and encourage retail level price competition on connection charges by enabling Openreach to introduce the price reduction at an earlier stage and therefore result in general benefits to consumers at the earliest possible opportunity.
- 1.34 Ofcom cannot give a consent under section 49 of the Act unless we have published 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.
- 1.35 Section 49(5) of the Act requires that the period for making representations must be one month after the day of the publication of the notification. Where there are exceptional circumstances justifying the use of a shorter notification period and the notification is not one that is required to be sent to the European Commission ("the Commission") under section 50(4) of the Act, a shorter notification period may be used so long as it is reasonable in the circumstances (section 49(6)).
- 1.36 The August consultation constituted the notification that we are required to give under Section 49 of the Act and in it we set out why we were consulting for a shorter period.
- 1.37 We also stated that we did not consider that the notification was one that would need to be sent to the Commission under section 50(4) of the Act as we did not consider that there would be an effect on trade between Member States resulting from the proposals in this case. This remains the case.

Next steps

- 1.38 Openreach intends to issue a replacement Access Charge Change Notice stating when the new price set out in ACCN will take effect.

Annex 1

Consent

Consent under SMP services condition AAA6(a) imposed on BT as a result of the analysis of wholesale analogue exchange line services markets contained in the Review of the narrowband services wholesale markets dated 15 September 2009, in which BT has been found to have significant market power

BACKGROUND:

1. As a result of a market analysis carried out by Ofcom in its *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit market* dated 28 November 2003⁶ (the '2003 Market Review'). BT was found to have SMP in, amongst others, the markets for wholesale residential analogue exchange lines and wholesale business analogue exchange lines (the 2003 Wholesale analogue exchange lines markets).
2. SMP services condition AA6(a) was set under the 2003 Market Review which imposed a requirement upon BT to notify charges in relation to various markets including the 2003 wholesale analogue exchange line markets.
3. On 19 March 2009⁷, Ofcom issued proposals in relation to a review of the narrowband wholesale markets, including the 2003 Wholesale analogue exchange lines markets.
4. On 3 July 2009, Ofcom issued proposals in its consultation *Charge Controls for Wholesale Line Rental and related charges*⁸ for a charge control to be applied to certain WLR services, including the new line connection charge.
5. On 3 August 2009 BT requested that Ofcom consent to a waiver of the notification period imposed by SMP services condition AA6(a) for a reduction in its price charged for WLR new line connections (the August request').
6. On 21 August 2009, Ofcom published a notification of the proposed Consent⁹ in accordance with section 49 of the Act.
7. On 15 September 2009 Ofcom issued a final statement and Notification in its *Review of the fixed narrowband services wholesale markets*¹⁰ (the 2009 Market Review'). Ofcom decided, amongst other matters:
 - a. the market definition for the 2003 Wholesale analogue exchange lines markets was no longer appropriate;
 - b. a new market definition of a single wholesale analogue exchange lines market be identified;
 - c. that BT held SMP in the wholesale analogue exchange lines market;

⁶ See

http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

⁷ See http://www.ofcom.org.uk/consult/condocs/review_wholesale/

⁸ See <http://www.ofcom.org.uk/consult/condocs/wlrc/wlrc.pdf>

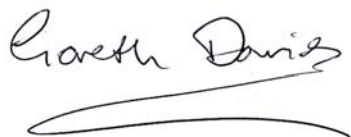
⁹ See http://www.ofcom.org.uk/consult/condocs/waiver_bt_wholesale/

¹⁰ See http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/

- d. that SMP conditions, including AA6(a), imposed in relation to the 2003 wholesale analogue exchange lines markets should be revoked;
 - e. a new SMP condition, AAA6(a) imposing a requirement on BT to notify charges be set and applied to the wholesale analogue exchange lines market; and
 - f. that SMP condition AAA6(a) impose a price notification period of 90 days for wholesale analogue exchange line core service and 28 days notice for all other services related to wholesale analogue exchange lines.
8. BT's August request was made in relation to SMP condition AA6(a). Following the 2009 Market Review, this SMP condition no longer exists. However, new SMP condition AAA6(a) replaces AA6(a) in imposing a requirement upon BT to notify charges in respect of, amongst other services WLR new line connection charges. Ofcom, therefore, are treating BT's August request as being made in relation to this regulatory obligation.
9. We have modified our proposals for this consent by simply referring to compliance with SMP Condition AAA6(a), rather than AA6(a).
10. For the reasons set out in the Explanatory Statement accompanying this Consent, Ofcom is 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.
11. For the reasons set out in the Explanatory Statement accompanying this Consent, Ofcom is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act.
12. By virtue of section 49(9) of the Act, Ofcom may give effect, with or without modifications, to a proposal with respect to which Ofcom has published a notification under section 49(4) of the Act only if:
- a. Ofcom has considered every representation about the proposal that is made to it within the period specified in the notification; and
 - b. Ofcom has had regard to every international obligation of the United Kingdom (if any which has been notified to it for the purpose by the Secretary of State).
13. As set out in the Explanatory Statement accompanying this Consent, Ofcom has considered the three representations 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.

CONSENT

15. Ofcom, in accordance with section 49 of the Act and pursuant to Condition AAA6(a), hereby gives the following Consent:
14. For the purposes of complying with its obligations under SMP Condition AAA6(a), Ofcom consents that BT shall not be obliged to give 28 days' notice in respect of the proposed price changes set out in Access Charge Change Notice OR139 issued on 3 August 2009 which relates to the installation of new wholesale analogue exchange line services.
15. 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) **"Consent"** means this notification proposing to give consent to BT for a waiver of its required notice period as set out in paragraph 7;
 - (d) **"Hull Area"** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc (now KCOM);
 - (e) **"Notification"** means the notification referred to in paragraph 6; and
 - (f) **"Ofcom"** means the Office of Communications.
16. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 8 above and otherwise any word or expression shall have the same meaning as it has in the Notification as appropriate.
17. 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.
18. This Consent shall take effect on the day it is published.

A handwritten signature in black ink that reads "Gareth Davies". The signature is written in a cursive style and is underlined with a long, horizontal stroke.

Gareth Davies
Competition Policy Director

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

17 September 2009