



Waiver of BT's price
notification requirements for
certain of BT's Ethernet services

Statement

Publication date: 18 January 2010

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Section 1

Summary

We have decided to give consent to BT's request for a waiver

- 1.1 On 3 December 2009, BT issued an Access Charge Change Notice ("ACCN")¹ where it notified price reductions for some Ethernet connection and rental services. These changes were required to contribute to BT meeting its charge control obligations imposed on it in the Leased Lines Charge Control Statement² (the "LLCC Statement") published on 2 July 2009. Following the 90 day notification period, these charges will become effective on 4 March 2010.
- 1.2 On the same day, BT wrote to Ofcom requesting consent to introduce price reductions for some of its Ethernet rental charges without having to comply with the 90 days advance written notification requirement in SMP Condition HH6 imposed on it in the Business Connectivity Market Review Statement (the "BCMR Statement")³. The list of services affected by BT's request for a waiver is included in Annex 3.
- 1.3 On 17 December 2009, we published a consultation document (the "December Consultation") where we proposed granting BT the requested waiver. We considered BT's request in line with the policy approach set out by Ofcom in a letter to industry of 11 October 2004 (the "Industry Letter") for dealing with requests for notification waivers. In the December Consultation, we also conducted an analysis to establish 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 the same document, we also published the statutory notification setting out our proposals to give consent and provided an opportunity for interested parties to comment.
- 1.4 The consultation closed on 4 January 2010. We received ten responses from stakeholders (listed in Annex 2). Stakeholders (with the exception of one) agreed with our proposal to grant BT's waiver request. We have taken the comments in all responses into account in reaching our decision.
- 1.5 For the reasons set out in Section 3 of this document and following stakeholder responses, we consider that the criteria set out in section 49(2) of the Act are met in this instance and we therefore give consent to BT's request for a waiver (Annex 4).

¹ Openreach ACCN:OR161 published at <http://www.openreach.co.uk/orpg/pricing/notificationDetails.do?data=IMu0XOzQTUxzWnrHGAL7th9v5aqNnsq1%2FsXJq5bvuwX33FkRprdkPimbVIJEBnnx>

² <http://www.ofcom.org.uk/consult/condocs/llcc/llccstatement/>

³ <http://www.ofcom.org.uk/consult/condocs/bcmr08/bcmr08.pdf>

Section 2

Background

Introduction

- 2.1 On 3 December 2009, BT issued an Access Charge Change Notice ("ACCN")⁴ where it notified price reductions for some Ethernet connection and rental services. These reductions are required to contribute to BT meeting its charge control obligations imposed on it in the Leased Lines Charge Control Statement⁵ (the "LLCC Statement") published on 2 July 2009.
- 2.2 On the same day, BT wrote to Ofcom requesting consent to introduce price reductions for some of its Ethernet rental charges without having to comply with the 90 days advance written notification requirement in SMP Condition HH6 imposed on it in the Business Connectivity Market Review Statement (the "BCMR Statement")⁶.
- 2.3 Finally, on 17 December 2009, we published a consultation document (the "December Consultation")⁷ where we proposed to waive BT's price notification requirement in relation to the Ethernet rental price reductions, allowing BT to introduce these with the publication of this statement (the "Waiver Statement").
- 2.4 In this Section we provide a brief background:
- We first consider the obligations relevant to this waiver request and imposed on BT as a result of two prior Ofcom decisions.
 - Secondly, we summarise BT's request for a waiver and our consultation.
 - Thirdly, we deal with Ofcom's letter to industry of 11 October 2004 (the "Industry Letter") setting out our general policy approach that we would normally take into account before giving consent to a waiver of price notification requirements.
 - Finally, we review the criteria set out in section 49(2) of the Act which would need to be met before consenting to BT's waiver request.

BT needs to comply with its sector specific obligations

- 2.5 On 8 December 2008, Ofcom published a statement entitled "*Business Connectivity Market Review, review of retail leased lines, wholesale symmetric broadband origination and trunk segments*"⁸ (the "BCMR Statement"). The BCMR Statement sets out Ofcom's conclusions on the review of retail and wholesale leased lines markets in the UK.

⁴ Openreach ACCN:OR161 published at <http://www.openreach.co.uk/orpg/pricing/notificationDetails.do?data=IMu0XOzQTUxzWnrHGAL7th9v5aqNnsql%2FsXJq5bvuwX33FkRprdkPimbVIJEBnnx>

⁵ <http://www.ofcom.org.uk/consult/condocs/lcc/lccstatement/>

⁶ <http://www.ofcom.org.uk/consult/condocs/bcmr08/bcmr08.pdf>

⁷ <http://www.ofcom.org.uk/consult/condocs/ethernet/>

⁸ <http://www.ofcom.org.uk/consult/condocs/bcmr08/bcmr08.pdf>

- 2.6 In the BCMR Statement, Ofcom defined, among others, a market for low bandwidth alternative interface symmetric broadband origination ("AISBO") wholesale services in the UK excluding the Hull area, for services provided at speeds up to and including 1 Gbit/s. Ofcom found that BT had Significant Market Power ("SMP") in this market and imposed a set of SMP conditions on BT. Amongst these:
- SMP Condition HH1 requires BT to provide Network Access for AISBO services on reasonable request from Third Parties and where Ofcom directs it to do so.
 - SMP Condition HH6 requires BT to publish its charges for AISBO services by sending to Ofcom and all purchasers of the services "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".
- 2.7 The BCMR Statement also concluded that, in principle, BT should be subject to charge controls in the leased lines markets where it had SMP. On 2 July 2009, we published a further statement which set out our conclusions on the charge controls for wholesale leased lines services⁹ (the "LLCC Statement"), including the AISBO services referred to in paragraph 2.6 above. Specifically, we implemented a single basket for AISBO services (the "AI basket") where:
- Services in the AI basket are subject to an overall cap of RPI-7.00% (Condition HH4.4 (a)). This means that the average price of services in this basket will need to reduce by 7% in real terms in each year of the charge control.
 - Services in the sub-basket of Backhaul Extension Services ("BES") are subject to a safeguard cap of RPI+0% (Condition HH4.7). This means the average price of services in this sub-basket cannot increase in real terms in any given year of the charge control.
 - Each service in the AI basket is also further subject to a safeguard cap of RPI+5% (Condition HH4.8). Therefore the price of individual services in the AI basket cannot increase by more than 5% in real terms in any given year of the charge control.
- 2.8 When amending the prices of AISBO services in the AI basket, BT is required to comply with its SMP obligations as summarised in paragraphs 2.6 and 2.7 above.

BT requested a waiver of the 90 day notification period for price reductions to Ethernet rental charges

- 2.9 On 3 December 2009, BT issued an Access Charge Change Notice ("ACCN") in which it notified price reductions for some Ethernet connection and rental services to contribute towards meeting the charge control requirements imposed on it in the LLCC Statement (and summarised in paragraph 2.7 above)¹⁰.
- 2.10 On the same day, BT wrote to Ofcom requesting consent to introduce price reductions to some of its Ethernet rental charges without having to comply with the

⁹ <http://www.ofcom.org.uk/consult/condocs/llcc/llccstatement/>

¹⁰ Openreach ACCN:OR161 published at <http://www.openreach.co.uk/org/pricing/notificationDetails.do?data=IMu0XOzQTUxzWnrHGAL7th9v5aqNnsq1%2FsXJq5bvuwX33FkRprdkPimbVIJEbnnx>

90 days' advance written notification requirement imposed under SMP Condition HH6 (summarised in paragraph 2.6 above). The list of services affected by BT's request for a waiver is included in Annex 3. BT proposed to introduce the revised Ethernet rental charges on 1st January 2010 or as soon as possible thereafter if such consent is granted.

- 2.11 On 17 December 2009, we published our consultation where we proposed granting BT the requested waiver. The consultation closed on 4 January 2010. We received ten responses from stakeholders (listed in Annex 2). Stakeholders (with the exception of one) agreed with our proposal to grant BT's waiver request. We have taken the comments in all responses into account when reaching our decision.
- 2.12 For a detailed description of the services affected by BT's price notifications and request for waiver, see the LLCC Statement, paragraphs 2.5 to 2.13.

We set out our policy for dealing with notification waiver requests in a letter to industry dated 11 October 2004 (the "Industry Letter")

- 2.13 We set out the general approach we proposed to take when dealing with requests for consent to waive or reduce notification periods in an Industry Letter dated 11 October 2004. This letter is included in Annex 1.
- 2.14 We identified three main situations in which we would consider requests to waive or reduce notification periods for price changes, namely:
- where Ofcom had directed a provider to alter its prices forthwith;
 - where a price notification might be considered to be advantageous to consumers; and
 - where the provider had made an administrative error which requires correction.
- 2.15 In the case of directions to alter prices forthwith, we advised that we would generally consult on the implementation arrangements (including the reduced notice period) when consulting on the substance of the direction itself.
- 2.16 In the case of price reductions proposed by an SMP provider (such as BT), we recognised that there was the potential for such price reductions to cause anti-competitive effects where the full notification period was not provided. We concluded that it would normally be appropriate to consult with interested parties before consenting to an early implementation of such price reductions.
- 2.17 In the case of administrative errors, we advised that where an SMP provider had made a genuine error in maintaining its price list or notifying price changes, we would conduct a short consultation exercise before considering whether to consent to a reduced notification period.
- 2.18 We have implemented the above approach on three separate occasions¹¹.

¹¹ Ofcom has in the past given consent to BT to reduce or waive the notification period in three instances:

a) in 2005 (WES and BES services) <http://www.ofcom.org.uk/consult/condocs/btwesbes/>

Statutory requirements to be met before giving a consent

2.19 Section 49 of the Act applies where Ofcom proposes to give consent to affect the operation of a condition made under section 45 of the Act (including SMP 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:

- must be objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- must not discriminate unduly against particular persons or against a particular description of persons;
- must be proportionate to what it is intended to achieve; and
- must be, in relation to what it is intended to achieve, transparent.

2.20 In the next Section, we discuss how the above mentioned criteria are met in the present case.

b) in 2006 (Partial Private Circuits and Radio Base Station Backhaul services)
http://www.ofcom.org.uk/consult/condocs/bt_waiver/

c) in 2009 (WES, WEES and BES services)
<http://www.ofcom.org.uk/consult/condocs/btprice/statement/>

Section 3

Review of consultation responses and our decision

Introduction

- 3.1 In this Section we set out our views on consultation responses, together with our reasons for why we consider that the decision to consent to the waiver meets the statutory requirements.
- 3.2 As explained in paragraph 2.19, in order to give such consent, Ofcom must first satisfy itself that the criteria set out in section 49(2) are satisfied, namely that the granting of a consent:
- is objectively justifiable;
 - does not discriminate unduly against particular persons or against a particular description of persons;
 - is proportionate to what it is intended to achieve; and
 - is, in relation to what it is intended to achieve, transparent.
- 3.3 In the paragraphs below, and for each criteria listed in paragraph 3.2, we:
- first summarise our analysis from the December Consultation;
 - then summarise the stakeholder responses and other relevant evidence available to us at the time of granting this waiver; and
 - set out our conclusions.

The statutory requirements

The waiver is objectively justifiable

Our proposals

- 3.4 In its letter to Ofcom dated 3 December 2009, BT requested consent to waive the 90 day notification requirement for certain Ethernet rental charge reductions, on the basis that it would like to bring the economic benefits of these reduction to its customers at the earliest possible opportunity, especially given the current difficult economic climate. Following the 90 day notification period, such price reductions would become effective on 3 March 2010, whilst granting the waiver will enable BT to introduce these earlier (for example shortly after the publication of this Statement).
- 3.5 In order to assess whether the waiver is objectively justifiable, we have taken into account the fact that the new lower Ethernet rental prices would lead to significant savings for the industry and bringing these forward would be beneficial to customers. As discussed in our December Consultation (paragraph 2.22), we carried out an analysis of the potential savings anticipated as a result of the Ethernet rental price

reductions being introduced earlier (for example mid January 2010 as opposed to March 2010) which we quantified to be in the region of £3.5M.¹² The benefit of the waiver lies in the fact that these savings could accrue to end customers sooner rather than later.

- 3.6 In our December Consultation, we saw benefits in consumers enjoying these reductions sooner rather than later. This is because, given the competitive nature of the downstream markets involved, we would expect these savings to be quickly reflected in lower retail prices passed on to end customers¹³. On this basis, our initial view was that there is an objective justification to the policy aim of consenting to these price reductions being implemented earlier.
- 3.7 In the same consultation, we also noted that the Ethernet rental price reductions would have been anticipated by industry players as part of BT's compliance with its leased lines charge control obligations (paragraph 2.23).
- 3.8 Finally, in our view, it was also reasonable to assume that most stakeholders would have anticipated these price reductions to occur earlier in the charge control year (for example at the start of the charge control i.e. 1st October 2009, around 90 days after the publication of the LLCC Statement on 2 July 2009). We noted that, in the absence of granting this waiver, the new lower Ethernet rental prices would become effective on 4 March 2010, which would be 5 months into the first charge control year (which is running from 1st October 2009 to 30 September 2010). On the other hand, granting the waiver means that these reductions will come into effect earlier and therefore be more closely aligned with most stakeholders' expectations.
- 3.9 Therefore, following from the above, it was our initial view that it was objectively justifiable in this case to allow BT to introduce the new prices set out in Annex 3 without having to comply with a 90 days advanced notice obligation.

Stakeholder responses

- 3.10 We asked stakeholder the following question:

Question 1: *Do stakeholders agree with Ofcom that in this case it would be objectively justifiable to give consent to BT's request for a waiver? In addition, do*

¹² BT calculated the saving that would accrue due to the Ethernet rental price reductions by taking the difference in the Current and Proposed rental charges for services in Annex 3 and multiplying these with actual volumes of AISBO services in 2008/09. Of the £28m in Ethernet rental price reductions calculated in this way, £19m is estimated to accrue to BT's downstream division and £9m to BT's external customers. If the £28m worth of Ethernet rental price reductions were spread evenly across a year, the savings that could accrue to customers in 1.5 months would be worth around £3.5m. This is a conservative estimate, as the Ethernet rental price reductions are now to be spread across around 9 months (January to September 2010).

¹³ For example, some Ethernet services (such as Wholesale Extension Services, "WES") are used to provide connectivity to a variety of businesses, but also to schools, the Police and other public services. Public services and private companies alike are in today's economic climate under increased pressure to reduce their costs, and such price reductions would help them to meet these demands. Similarly, purchasers of BT's Ethernet backhaul services will benefit from lower prices for their broadband backhaul services, enabling them to provide a cheaper and better retail broadband service to their customers.

stakeholders agree that introducing the wholesale Ethernet rental price reductions earlier will be quickly reflected in lower retail prices?

- 3.11 All stakeholders (but one) agreed that it is objectively justifiable to give consent to BT's request for waiver. The same respondents have also confirmed that the lower wholesale Ethernet rental prices will be quickly reflected in lower retail prices and therefore the benefits would be quickly passed onto the end consumers. For example, the National Education Network commented that¹⁴:

"The National Educational Network believes that it would be in local authorities' interests and ultimately schools interests for these price reductions to be applied as soon as possible. Through our organisation, local authorities will be made aware that BT Openreach has reduced prices and if this reduction is not immediately reflected in wide area network supplier pricing, then informed questions will be asked."

- 3.12 Only one respondent disagreed with our proposal to give consent to BT's request for a waiver on the basis that some prices were below cost. In this respondent's view, this showed that BT behaved in an anticompetitive manner, and would continue to do so. In our view, this particular issue is not relevant in the context of whether it would be objectively justifiable to grant this waiver. This is because the issue raised by this respondent does not arise in relation to Ethernet rental services. In addition, even if prices were below costs, this review is not concerned with the level of charges (and therefore BT's compliance with its cost orientation obligations), but only with the proposed consent to waive the notification period. We discuss our response on this issue in full in paragraph 3.26 below.

Our decision

- 3.13 We conclude that it is objectively justifiable in this case to allow BT to introduce the new prices set out in Annex 3 without having to comply with a 90 days advanced notice obligation.

The waiver is not unduly discriminatory

Our proposals

- 3.14 As discussed in our December Consultation (paragraphs 2.26 to 2.27), we considered that it would not be unduly discriminatory to allow BT to introduce the Ethernet rental price reductions set out in Annex 3 early as these would benefit all purchasers of such services. We considered that these price reductions would treat similar stakeholders in a similar manner. In any event, we considered that there was an objective justification for giving this consent because we considered that introducing price reductions early would benefit all purchasers of these services, as discussed above in paragraph 3.5. With regards to the potential competition effects of granting this waiver, we discuss these in paragraph 3.26 below.
- 3.15 In the December Consultation, we also considered that the proposed waiver is unlikely to have an adverse effect on any diversity groups. This is because, if such a waiver is granted and price reductions are implemented earlier, then all end customers in the relevant downstream markets are going to benefit at the same time and in a similar manner.

¹⁴ <http://www.ofcom.org.uk/consult/condocs/ethernet/responses1/nen.pdf>

Stakeholder responses

- 3.16 Stakeholders have not provided any comments on whether the waiver would be unduly discriminatory.

Our decision

- 3.17 Following from the above paragraphs, we conclude that granting this waiver is not unduly discriminatory.

The waiver is proportionate

Our proposal

- 3.18 In paragraphs 2.28 to 2.37 of the December Consultation, we discussed at length the key issues we would need to consider when deciding whether granting a waiver would be proportionate. For example, we noted that in some cases, the promotion of upstream competition in the relevant wholesale market would be a key issue to consider. We further discussed how, in such cases, a proportionate measure would need to balance the short term benefits of reduced prices with the long term benefits of competition. One such case would be, for example, when a waiver request from the SMP operator affects 'horizontal' competitors that rely on the SMP operator for upstream SMP services.
- 3.19 We discuss above the main benefits we anticipate coming from an early implementation of these price reductions, whereby these price reductions would be enjoyed by the downstream markets earlier rather than later. We have not been able to identify an alternative mechanism which could achieve this objective with less intrusive means.
- 3.20 Following from the above, in proposing to grant this waiver, we also took into account the following two important considerations:
- *Whether the benefits of having the price reductions introduced earlier outweigh any potential costs of doing so.* We noted that purchasers of Ethernet services are likely to incur some costs to amend their contracts, terms and conditions of provisions for their retail customers. However, we assumed that such additional costs would be of a much smaller magnitude than the perceived benefits of having lower charges. We have asked stakeholders a specific consultation question to confirm that this is a reasonable assumption for us to make (see paragraph 3.23 below).
 - *Whether the benefits of having the price reductions introduced earlier outweigh any potential cost associated with the risk of exit of BT's competitors.* As discussed in paragraphs 2.35 to 2.36 of the December Consultation, BT's competitors may be forced to exit the market as a result of not being able to swiftly respond to BT's price changes thereby losing customers. However, we also noted that there were minimal risks of exit and any detriment to competition would be mitigated. This was because the price reductions are implemented so that BT complies with its charge control obligations and therefore would have been anticipated by industry. In addition, the waiver request is in relation to Ethernet rental prices (and not connections) and will therefore mainly benefit existing customers (rather than new customers).

- 3.21 We also noted (paragraph 2.36) that BT would have served around half of its notification period, which corresponds to the time between the publication date of the ACCN (3 December 2009) and the publication date of the Waiver Statement (which we signalled we would expect to publish mid January 2010 at the earliest).
- 3.22 Our initial view was therefore that the benefits of granting this waiver outweighed the total potential costs, including the risk of exit of BT's upstream competitors, and we considered granting such a waiver would be proportionate.

Stakeholder responses

- 3.23 We asked stakeholders the following question:

Question 2: *Do stakeholders agree with Ofcom that the benefits of having the proposed Ethernet rental price reductions introduced without advance notification outweigh in this case any potential costs?*

- 3.24 Most stakeholders agreed with our initial assumption that any potential costs of introducing the price reductions earlier will be outweighed by the potential benefits. National Education Network¹⁵ and Synetrix¹⁶ noted that the costs associated with such a change are administrative in nature (such as changing the billing system to include the new lower Ethernet rental prices) and minimal when compared to the value of the associated savings.
- 3.25 Verizon noted that any potential risks to competition are minimal¹⁷.
- 3.26 Only one respondent disagreed with Ofcom potentially consenting to grant the waiver on the basis that BT has been selling some Ethernet services below long run incremental costs ("LRIC"). In this respondent's view this showed that BT behaved in an anticompetitive manner, and would continue to do so. In our view this is not a relevant issue in the context of this waiver request for the following reasons:
- Firstly, the waiver request is in relation to Ethernet rental services which are not below available estimates of BT's cost¹⁸. Pricing concerns for some Ethernet connection services are therefore not within the scope of this request.
 - Secondly, even if prices were below cost, this review is not concerned with the level of charges, but only with the proposed consent to waive the notification period. While one of the benefits of advance notification is that it aids transparency, its purpose is not to give time to Ofcom to assess whether the proposed prices comply with a cost orientation requirement. That would amount to a pre-approval process for price changes, which is not a mechanism imposed on BT under SMP Condition HH6 to which this waiver consent relates. Therefore, this waiver consent does not imply that we have assessed or approved the proposed prices.

¹⁵ <http://www.ofcom.org.uk/consult/condocs/ethernet/responses1/nen.pdf>

¹⁶ <http://www.ofcom.org.uk/consult/condocs/ethernet/responses1/synetrix.pdf>

¹⁷ <http://www.ofcom.org.uk/consult/condocs/ethernet/responses1/verizon.pdf>

¹⁸ See BT's regulatory Financial Statements for 2008/09 (pages 50 and 51) at <http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2009/CurrentCostFinancialStatements.pdf>

3.27 National Education Network commented on the costs associated with changing products, for instance from Wholesale Extension Services ("WES") to Ethernet Access Direct ("EAD"), which is encouraged by the proposed price changes. They noted that it would be a great benefit to the educational users of BT products to have a greater understanding of the roadmap of the various connectivity products. In their view, it is also not possible to get the best value for money when prices change often (more than once per year) and not always in a consistent manner.

- We appreciate the National Education Network's interest in having a product roadmap for certain Ethernet services and we encourage them to raise this issue with BT directly. As regards BT's flexibility to change prices more than once a year, this is a flexibility offered as part of the charge control design. BT, being closer to the market and their customers, are better placed to give decisions around how to implement such price changes. However, BT is required to implement these changes within the overall charge control framework and in a manner which is compliant with the various obligations imposed on them by Ofcom.

3.28 Finally, some stakeholders (such as Verizon Business and Sky) commented on the fact that waivers should be considered on a case by case basis and not given lightly. We agree that our decisions to grant such waivers should not be taken lightly. Indeed, we look at each case on its merits, following a consultation process and taking our statutory requirements into account.

Our decision

3.29 We conclude that it is proportionate to grant BT's waiver request.

The waiver is transparent

Our proposal

3.30 In our December Consultation (paragraph 2.38), we considered that the proposed consent would be transparent in that its aims and effects are clear. The text of the draft notification was published with the December Consultation. Its intended operation and likely effects have also been clarified through the consultation process. From the above, it is clear that the effect of the waiver will be that BT is not required to comply with the 90 days price notification requirements under SMP Condition HH6 in respect of the proposed prices set out in Annex 3 of this document.

Stakeholder responses

3.31 Stakeholders have not provided any specific comments.

Our decision

3.32 We conclude that the proposed consent is transparent.

We have decided to grant consent to BT's request for a waiver

Our proposal

3.33 In our December Consultation (paragraphs 2.39 to 2.42), we indicated our view that issuing a consent in these circumstances would appear to be consistent with our obligations under sections 3 and 4 of the Act in that it would further the interests of

consumers, as any anticipated savings from introducing the Ethernet rental price reductions would accrue to end users earlier rather than later. Furthermore, we noted that BT would have served around half of its notification period as, at the very least, 6 weeks would have passed between it notifying the new prices on 3 December 2009 and us publishing the waiver statement (which we anticipate to be at the earliest mid January 2010). In our view, any potential competition effects that could arise from granting this waiver (for example BT's competitors exiting the market or leakage of information between the wholesale and retail arms of BT) was greatly reduced. In addition, we also noted that the price reductions are introduced so as to allow BT to comply with its charge control obligations and in that were anticipated by industry players. Given these mitigating circumstances, we also considered that giving consent would not prejudice the promotion of competition.

- 3.34 We therefore also proposed that it would be appropriate to consent BT introducing the price changes set out in Annex 3 from the publication date of any statement to that effect, without it giving the required 90 days' advance written notice.

Stakeholder responses

- 3.35 We asked stakeholders the following question:

Question 3: *Do stakeholders agree with Ofcom that it would be appropriate to give consent to BT to waive the 90 days notification period for the new proposed charges for the Ethernet rental services as set out in Annex 7?*

- 3.36 All stakeholders (with the exception of one) agreed that in this instance it was appropriate to give consent to BT to waive its 90 day notification period.

Conclusions

- 3.37 Stakeholders have agreed with our proposal to grant the waiver request. Only one stakeholder disagreed, on the basis that some Ethernet prices are below cost. We have set out above why we consider that the waiver consent is not linked with any investigation into BT's compliance with its cost orientation obligations. In addition, as noted above, evidence from BT's regulatory financial statements for 2008/09 indicates that the prices for the services affected by the waiver are above cost.
- 3.38 Having considered the stakeholder responses and the evidence available to us, it remains our view that, in this instance, the potential benefits from granting the consent outweigh the potential costs, including any detriment to competition.
- 3.39 In particular, we consider that the reasons set out at paragraphs 3.4 to 3.32 support our view that the granting of the requested consent would comply with the requirements of section 49(2) of the Act. We also consider that the granting of the requested consent is consistent with our duties under sections 3 and 4 of the Act. We have therefore decided to consent to waive the relevant price notification requirement in this case. The consent is published in Annex 4 of this document and is effective from the date of publication of this Statement.

Annex 1

Ofcom's letter to industry 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, Ofcom 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 2

Respondents

A2.1 The following organisations submitted non-confidential responses to the December Consultation:

- Exponential-e
- National Education Network
- Scottish and Southern Energy Plc
- Sky
- Synetrix Ltd (3 separate responses)
- Updata Infrastructure UK Ltd
- Verizon Business

A2.2 Non- confidential responses are published on our website at <http://www.ofcom.org.uk/consult/condocs/ethernet/responses1/>

Annex 3

BT's Ethernet rental price reductions

A3.1 BT's new Ethernet rental charges are shown in the table below.

Service		Current Price £	Proposed Price £	Absolute difference (£)	% Difference
WES Local Access 10 m managed	Rental	2,650.00	2,252.50	-397.50	-15%
WES/WEES 10 (Local Reach)	Rental	2,000.00	1,700.00	-300.00	-15%
WES/WEES 10 Managed	Rental	2,300.00	1,761.32	-538.68	-23%
WES/WEES 10 Unmanaged	Rental	2,100.00	1,591.32	-508.68	-24%
WES Local Access 100 managed	Rental	2,650.00	2,517.50	-132.50	-5%
WES/WEES 100	Rental	2,300.00	2,117.42	-182.58	-8%
WES/WEES 100 Opt 1	Rental	3,400.00	3,162.42	-237.58	-7%
EAD Local Access 10	Rental	2,500.00	2,125.00	-375.00	-15%
EAD 10	Rental	4,400.00	3,352.64	-1,047.36	-24%
EAD Local Access 100	Rental	2,500.00	2,375.00	-125.00	-5%
EAD 100	Rental	4,400.00	4,044.84	-355.16	-8%
EAD 100 Resilient Option 1	Rental	6,800.00	6,324.84	-475.16	-7%
EAD 100 Local Access Resilient Option 1	Rental	6,800.00	6,460.00	-340.00	-5%
EAD 10 Resilient Option 1	Rental	6,800.00	5,392.64	-1,407.36	-21%
EAD 10 Local Access Resilient Option 1	Rental	6,800.00	5,780.00	-1,020.00	-15%
ONBS 1000 – per end	Rental	6,960.00	3,891.00	-3,069.00	-44%
ONBS main link – 1 G	Rental	0.4	0	-0.40	-100%
BES 1 G – 3 year	Rental	-	3,764.67		
BES 1 G – 5 year	Rental	-	3,764.67		
BES 1 G	Rental	4,137.00	3,764.67	-372.33	-9%
BES 1G extended Reach – 3 year	Rental	-	5,168.89		
BES 1G extended Reach – 5 year	Rental	-	5,168.89		
BES 1G extended Reach	Rental	5,680.10	5,168.89	-511.21	-9%
BES Daisy Chain – 3 year	Rental	-	3,663.02		
BES Daisy Chain – 5 year	Rental	-	3,663.02		
BES Daisy Chain	Rental	4,025.30	3,663.02	-362.28	-9%

Annex 4

Consent

Consent under Condition HH6 imposed on BT as a result of the analysis of symmetric broadband origination markets contained in the Business Connectivity Market Review dated 8 December 2008 and listed in the Schedule to this Consent, in which BT has been found to have significant market power

BACKGROUND

1. as a result of a market analysis carried out by OFCOM, OFCOM issued a Notification on 8 December 2008 in accordance with section 79 of the Act that BT has significant market power in the symmetric broadband origination markets listed in Part 1 of the Schedule of this Consent and set certain SMP conditions on BT, such as Condition HH6.
2. This Consent concerns matters to which Condition HH6 relates.
3. 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.
4. 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.
5. 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 by 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).
6. On 17 December 2009, OFCOM published a notification of the proposed Consent in accordance with section 49 of the Act.
7. OFCOM has considered every representation about the proposed Consent duly made to it.

CONSENT

OFCOM, in accordance with section 49 of the Act and pursuant to condition HH6, hereby gives the following Consent:

1. For the purposes of complying with its obligations under SMP Condition HH6, OFCOM consents that BT shall not be obliged to give 90 days' notice in respect of the proposed price changes included in the Access Charge Change Notice dated 3 December 2009 as listed in Part 2 of the Schedule to this Consent.
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 paragraph 1 of this Consent above, as published on 17 December 2009; 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. The Schedule to this Consent forms part of the Consent.
6. This Consent shall take effect on the day it is published.

Gareth Davies

Competition Policy Director

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

18 January 2010

Schedule

Part 1

1. The market for alternative interface symmetric broadband origination services at speeds up to and including 1 Gbit/s in which British Telecommunications plc has been found to have significant market power.

Part 2

2. BT's new Ethernet rental charges are shown in the table below.

Service		Current Price £	Proposed Price £
WES Local Access 10 managed	Rental	2,650.00	2,252.50
WES/WEES 10 (Local Reach)	Rental	2,000.00	1,700.00
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EAD 10 Resilient Option 1	Rental	6,800.00	5,392.64
EAD 10 Local Access Resilient Option 1	Rental	6,800.00	5,780.00
ONBS 1000 – per end	Rental	6,960.00	3,891.00
ONBS main link – 1 G	Rental	0.4	0
BES 1 G – 3 year	Rental	-	3,764.67
BES 1 G – 5 year	Rental	-	3,764.67
BES 1 G	Rental	4,137.00	3,764.67
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