

Representing:

Organisation

Organisation (if applicable):

British Telecom

What do you want Ofcom to keep confidential?:

Keep name confidential

If you want part of your response kept confidential, which parts?:**Ofcom may publish a response summary:**

Yes

I confirm that I have read the declaration:

Yes

Ofcom should only publish this response after the consultation has ended:

Yes

Comments:

Summary

1. In the main BT supports Ofcom's proposals to provide BT with a measure of regulatory freedom in the provision of its retail low bandwidth digital leased lines. On the basis that the services concerned have been found by Ofcom to be replicable, and in light of the competitive conditions that BT faces in the market for these services, BT believes Ofcom's conclusions and draft consent are timely and broadly appropriate. BT does however have a number of issues in relation to the detail of the proposed consent. These are addressed in BT's responses to Ofcom's consultation questions below.
BT's responses to Ofcom's consultation questions

Question 1: Do you agree with our assessment of the relevant competitive issues? Are there any other issues Ofcom should consider?:

2. BT agrees with Ofcom's assessment about the impact of replicability on competition. Since replicability has been reached, competition will be spread more evenly across the market. Therefore there is no risk that BT would seek to recover the common costs of the service disproportionately by reducing prices where competition is stronger and keeping prices high elsewhere.
3. In these circumstances BT's pricing freedom will further push competition in the market, preventing the 'price following behaviour' that occurs when all the players simply align their

prices just below the published BT prices, without effectively competing.

4. BT therefore agrees with Ofcom's conclusion that greater price flexibility will result in more price competition, taking the profitability of leased lines to a lower level, which will benefit all the customers.

5. BT also agrees with the proposal to allow BT's retail low bandwidth digital leased line services to be bundled with non SMP products. Not allowing bundling would make BT less competitive than other Communication Providers who have no price restriction, thereby distorting competition.

6. BT questions whether the retention of the no undue discrimination condition (I2) is necessary or desirable given paragraph 1.8 of the consultation where 'Ofcom considers that, overall, BT's retail low bandwidth digital leased lines can now be replicated by its competitors. This will enable them to compete more effectively with BT in the downstream market. It also means that we can now rely more confidently on the wholesale remedies in the upstream markets to deliver effective competition at the retail level.'

7. In the ongoing Fixed Narrowband Retail Services Markets Consultation with regard to ISDN Ofcom found that BT has SMP at the retail level but relied solely on wholesale remedies. The logic suggests that a similar approach be appropriate here: if the services are replicable no retail remedy is needed.

8. In BT's opinion disapplication of the 'no undue discrimination' condition would assist all concerned by removing any doubts about the practical application of the condition in the context of the proposals contained in the draft consent. Such disapplication would also best reflect the replicability of the services in question and associated competitiveness of the market concerned, as well as being consistent with Ofcom's approach in the retail narrowband consultation.

9. Given Ofcom's conclusion that the services concerned are replicable it is reasonable to argue that the three criteria test would not be met and therefore a new review by Ofcom of the market concerned here may reach fundamentally different conclusions to those contained in the December 2008 Business Connectivity Market Review Statement.

10. Given these considerations it is in BT's opinion reasonable for Ofcom to disapply the 'no undue discrimination' condition in addition to that requiring the publication of a reference offer. Reliance can instead be placed on the ready availability of the necessary wholesale inputs coupled with BT's existing ex post obligations.

Question 2: do you agree with our assessment of the preferred option?:

11. Setting aside the concerns expressed elsewhere in this response, BT supports Ofcom's assessment that Option 4 is the right option to realise optimum consumer and competition benefit from the proposed consent.

12. We agree with Ofcom's arguments against option 1 (status quo) which would result in harming competition because it could deliver a less efficient competitive outcome. The obligation of publishing a reference offer would be a not proportionate remedy in that it would limit BT's ability to win a contract even when it is more efficient than its competitors.

13. Equally BT is not in favour of option 2 (the process currently applied to Business Exchange Lines) as this would create a competitive disadvantage for BT because this would

limit pricing flexibility even if it was more efficient than competitors.

14. The experience of applying the deregulatory regime exchange business lines, as Ofcom recognizes, has shown that very few customers have been able to benefit from BT's commercial freedom with no relevant positive effect on competition (limited price decreases have occurred).

15. Option 3 (pricing freedom for all customers + FAC price floor) would not release any increment of unmet demand because of the limited pricing flexibility of a price floor based on FAC. The FAC price floor is not necessary because, as the retail service is fully replicable all BT's competitors can offer the same retail leased lines as BT to the whole market. Therefore there is no risk that BT abuses its market power. Ofcom itself recognizes FAC is over-cautious.

16. Moreover all these 3 options impose restrictions that are inconsistent with the behavioural bounds set by competition law.

17. Therefore we agree option 4 (pricing freedom for all customers + LRIC price floor) is the best one since LRIC is the price that conveys the right signal for efficient entry and investment and better benefits the customers. This is the only option which is consistent with competition law requirements.

Question 3: Do you think that a more cautious approach should be adopted for the segment at and above 2Mbit/s than for the lower bandwidth segment?:

18. It should be understood that BT has not supplied new 8Mbit/s retail digital leased line services since circa 2003 and the installed base is very small in comparison to the lower bandwidths. On this basis this question practically relates to the 2Mbit/s segment only.

19. BT does not think there is any particular logic or argument that would justify a more cautious approach for the segment at or above 2mbit. Accordingly BT fully supports the scope of the draft consent as written which applies to retail digital leased lines of up to and including two megabits per second bandwidth capacity. This definition includes BT's existing digital KiloStream and MegaStream 1 & 2 portfolio which is the whole range of low bandwidth retail digital leased lines currently offered for new supply by BT.

20. In paragraph 3.45 of the consultation Ofcom find that "As a result of the actions taken by BT, we believe that its retail low bandwidth digital leased lines should now be regarded as replicable." Since Ofcom does not differentiate this replicability between bandwidths it must be the case that BT's competitors have ready access to the necessary 2Mbit/s wholesale inputs on which to base their retail offers. Therefore treating this segment differently seems counter-intuitive on a replicability measure.

21. Whilst the market share for BT may be higher in the 2Mbit/s segment than in the rest of this market BT does not believe that this should cause Ofcom to take a more cautious approach in this segment. In fact BT suggests that a more cautious approach in the 2Mbit/s segment may have the undesirable side-effect of limiting the consumer and competition benefits that Ofcom cite in the consultation.

22. BT reproduces below some relevant extracts from the consultation which relate to BT's

share in the 2Mbit/s and above segment in support of its view that Ofcom's consent should apply as currently drafted i.e. across all bandwidth segments up to and including 2Mbit/s.

23. 4.56 Firstly, if BT's high volume share is due to entry barriers which until now prevented replicability, we would expect competition to intensify now that BT's retail leased lines are replicable.

24. 4.57 In addition, as reported in the BCMR Statement, market trends suggested that BT's share for the (higher value) digital 2 to 8 Mbit/s may fall in the future. It should also be borne in mind that the method used to calculate the retail sales of BT's competitors was somewhat approximate. Moreover, given that replicability implies that barriers to entry are substantially lowered, market shares may not provide the best indication of the level of competition. Finally, we note that it is likely to be relatively easy for operators who are already supplying lower bandwidth leased lines – in which BT's rivals have gained a 50% share – to begin to supply higher bandwidth leased lines as well.

25. To reinforce this point further BT agrees with Ofcom's views in paragraph 4.118 of the consultation that 'the ability to price down to LRIC promotes more efficient competition in the long term'. BT argues that this logic naturally extends to all bandwidth segments concerned with the consultation and to apply a more cautious approach to the 2Mbit/s segment is at odds with this assertion.

26. On an administrative and customer relationship basis BT would have an added measure of complexity to manage were Ofcom to decide upon a different approach to the 2Mbit/s segment. This would be particularly apparent for those situations where customers take a mix of 2Mbit/s and sub 2Mbit/s bandwidth services from BT.

Question 4: do you consider the proposed governance is adequate? Should we consider other options or variations?:

27. Building on the points made in BT's response to Question 1, it is in BT's opinion questionable that a governance process should be imposed on BT at all given Ofcom's conclusions in the consultation about the replicable nature of the services concerned.

28. In general terms BT manages its transactions with due regard to its obligations arising under applicable regulation and/or competition law. To this end BT employs governance and sign-off processes which generate the requisite information for the particular situation concerned. This approach includes the preparation of a cost analysis for the products in question and a case-by-case assessment of the price-points for those products.

29. BT does not agree with the requirement to provide quarterly reports to Ofcom as per paragraph 4.121 of the consultation. Whilst this approach may have been appropriate to the business exchange lines consent the volumes of transactions likely to arise under the proposed consent for BT's retail low bandwidth digital leased lines mean that this reporting requirement will be an unreasonable burden upon BT. If Ofcom considers the production of some information for monitoring purposes is necessary, perhaps for an initial 12 month period, BT would be pleased to discuss this.