

OFCOM CONSULTATION ON TELEPHONE DIRECTORY INFORMATION OBLIGATIONS AND REGULATIONS

YELL RESPONSE

1. Introduction

1.1 This document provides the response (the “Response”) of Yell Group plc (“Yell”) to Ofcom’s consultation on telephone directory information obligations and regulations (the “Consultation”). This document uses terms as they are used in the Consultation.

1.2 The areas which will be covered in the Response are:

- General observations on the Consultation setting out concerns about Ofcom’s approach
- Yell’s business objectives in relation to consolidated subscriber data
- The importance of consolidated subscriber data
- The need for ex ante regulation
- The pivotal position of BT
- The suggested approach to price and other terms
- Unlikely entry of a third party consolidator
- Additional information to be include in GC19
- Specific consultation questions.

1.3 Yell welcomes the opportunity to comment on the Consultation. Yell looks forward to the opportunity to discuss the Response and the Consultation further with Ofcom.

2. General Observations on the Consultation

Ofcom's Community Obligations

- 2.1 Yell does not accept that USC7 is ultra vires. In its view USC7 is lawful because it achieves the objectives of Art 5 of the Universal Service Directive. In finding otherwise, Ofcom fails to give effect to its Community obligations by not applying a purposive interpretation of Art 5.
- 2.2 Furthermore, by implementing the Community obligation at wholesale level, USC7 is an entirely appropriate and proportionate measure. The overall scheme of the EU Directives stresses the need for proportionality of implementation¹. In particular, regulatory controls should only be imposed at the retail level where wholesale obligations would be insufficient to achieve competition and public interest goals². Ofcom itself regularly claims that it closely follows the EU approach by imposing retail regulation only where regulation of the upstream wholesale market is not sufficient to address market failure³.
- 2.3 Irrespective of the merits of whether USC7 is not or is ultra vires (a question now before the Competition Appeal Tribunal in the appeal of the Determinations) Yell considers that Ofcom has disregarded its Community obligations in its approach proposed in the Consultation.
- 2.4 USC7 was imposed in order to discharge a binding Community obligation, imposed by the Universal Service Directive. The EC Treaty (Article 10) requires that full effect be given to Community law. Where Ofcom as a national regulatory authority is discharging a Community law function but has failed to do so effectively, its primary and immediate duty is to ensure that the defect is remedied and that the Community law obligation is discharged. It is inconsistent with fundamental principles of Community law to suspend the measure while deciding what to do; the effective enforcement of Community law requires that the measure immediately be made effective in implementation or in drafting.
- 2.5 Thus in the present case, if the perceived defect in the measure was that it was insufficiently clearly applicable to BT, then that is the defect which should be remedied. As regards process and procedure, it seems clear that the intention and understanding of the regulator and the regulated at the time when USC7 was drafted was that it was applicable to BT. There is a strong argument that no further consultation is needed when remedying defects in the measure, and that this can effectively be done informally and without consultation. Yell assumes that BT

¹ Art 8 Framework Directive; preamble (3) and Art 3.2 Universal Service Directive.

² e.g. preamble (26) and Art 17 Universal Service Directive.

³ See e.g. Ofcom consultation – BT's pricing of services for business customers 27 May 2004.

will not contend that its acquiescence in the wording of USC7 was based on an assessment that USC7 as drafted was actually ultra vires.

- 2.6 The principle of proportionality is again relevant here. Where Ofcom discovers that it has enacted an invalid measure, the principle of proportionality would normally require that the measure be corrected rather than that Ofcom should instead embark on a major (and inevitably slow) reanalysis of the whole area. The consequences for those participating in this sector are highly disproportionate to the perceived implementation error giving rise to the invalidity of USC7.

Burden of Proof

- 2.7 Ofcom assumes in the Consultation that there is a legally binding presumption against ex ante regulation unless the evidence indicates otherwise. Yell contends that this is the opposite of the analysis which Ofcom should make.
- 2.8 Specifically, Ofcom has the wrong position on the desirability or otherwise of imposing ex ante regulation. Is there any suggestion that Ofcom's predecessor Oftel did not consider the merits and the desirability of regulating OSIS when USC7 was drafted; that such an analysis was not properly performed; or that the applicable principles of EU law were not applied or complied with? Ex ante regulation was the result. The consequence of this must surely be that Ofcom now requires compelling evidence to withdraw from ex ante regulation, rather than the reverse. The perceived misimplementation through USC7 cannot operate to reverse this burden of proof.

Standard of Proof

- 2.9 The scheme of the EU Directives has a presumption against ex ante regulation and a rebuttable presumption against ex ante regulation where there is no market failure. However, where there is market failure, there is an irrebuttable presumption in favour of ex ante regulation - in order words, where significant market power is found then there is an obligation to take at least some form of regulatory action. Ofcom rightly points to market failure or at least market power in relation to the markets involved in the provision of OSIS - Ofcom notes that an alternative provider of consolidated subscriber data has not emerged to date and is unlikely to emerge in the future.
- 2.10 At the very least, the evidence which Ofcom would require in order to rebut the presumption in favour of ex ante regulation should be strong and compelling, which is not at all the case for the evidence in the Consultation. It also seems in the Consultation that Ofcom will be satisfied on a simple balance of probabilities or maybe even less; however, given that this measure has

consequences for market participants and also that Ofcom is in effect seeking to avoid taking action required to discharge a Community obligation, the standard of proof should clearly be much higher than this. It is indeed questionable whether the presumption in favour of ex ante regulation can be rebutted at all.

- 2.11 There is a further substantive flaw in the reasoning of Ofcom in its approach to the Determinations. Ofcom treats its ability to intervene in the dispute as if it is constrained by the same limits as those which apply to its ability to regulate. In effect, Ofcom takes this as meaning that it should only intervene on a 'proportional' basis, in a minimal way. Again, this has the effect of reversing the burden of proof. This approach was roundly disapproved last month by the Competition Appeal Tribunal in T-Mobile and others v Ofcom⁴ which made clear that “dispute resolution is itself a third potential form of regulatory restraint that operates in addition to other ex ante obligations and ex post competition law.”⁵

Impact Assessment

- 2.12 Yell also wishes to observe that the impact assessment in the consultation is in its view deficient. The assessment at Annex 7 to the Consultation fails to identify the various interests of differing categories of DIPs in the maintenance of ex ante regulatory obligations upon BT. Yell considers that Ofcom should carry out a comprehensive impact assessment in relation to its proposed measures. The proposed measures should then start from the position that proper ex ante regulation as required by the Universal Service Directive is in force and that the impact being analysed is the removal of ex ante regulatory obligations which Community obligations require to be in place.

3. Yell’s business objectives

- 3.1 Yell’s business as a directory provider depends squarely on access to consolidated subscriber data.
- 3.2 Yell only uses that element of the OSIS data which contains new and amended listings under the business tariff. Yell then calls each new business subscriber direct. From the information obtained in that call, Yell then compiles its own classified database. So Yell only needs the OSIS data as a filter to identify the telephone numbers of new and amended business subscribers. Yell then does the rest. This is the business model which Yell has built around the existence of OSIS.

⁴ [2008] CAT 12 at paragraphs 84 to 101; judgment of 20 May 2008.

⁵ Ibid paragraph 88.

3.3 Yell's aim in relation to consolidated subscriber data is to prevent disruption to the continued functioning of its business model. This boils down to the following specific aims:

- to secure access to consolidated subscriber data which tags business subscribers
- to do so at a fair price
- to have stability and continuity of access in the long term.

4. Consolidated subscriber data

4.1 In the UK there are well over 150 Communications Providers⁶. Ofcom recognises that this fragmentation in the industry means that it is important for data from these Communications Providers to be consolidated in one central point for the classified directories and DQ markets to be able to operate efficiently⁷. If a situation were created under which each provider of directories (or DQ services) had to collect the subscriber data necessary for the operation of its business from all the relevant Communications Providers, this would undermine the continued operation of the relevant markets to the detriment of the businesses involved and to that of ultimate consumers.

4.2 In the absence of an ex ante regulatory obligation on BT to provide consolidated subscriber data the producers of classified directories (and providers of DQ services) will face major uncertainty in relation to one of their key inputs. As described above, Yell's business model is based on the continued existence of a consolidated set of subscriber data. Indeed, the whole chain of supply for directory providers (and providers of DQ services) is based on the same principle.

4.3 If directory providers (and providers of DQ services) had to seek subscriber data from each of the Communications Providers in the market this would lead to a fundamental change in business models and would make the production of directories (and DQ services) significantly more inefficient and costly. For the market to function effectively a centralised set of consolidated data is required.

4.4 Yell's clear preference is for a third party, which is independent of any Communications Provider such as BT, to arrange for the provision of consolidated subscriber data e.g. Ofcom or

⁶ The Intercai Mondiale study of 11 May 2006 headed "Study of Geographic Telephone Number Demand" identified 183 Communications Providers

⁷ Consultation para 5.27

a contractor of Ofcom. This is one of the options identified in the Consultation but which Ofcom rejects as inefficient and disruptive⁸.

4.5 Thereafter Yell's preference would be the creation of new ex ante regulatory obligations on BT to make OSIS available. In Yell's view, the status quo represented by Ofcom's determinations on Conduit/BT and The Number/BT⁹ (the "Determinations") is not a viable option.

5. Need for ex ante regulation

5.1 At retail level the UK has a vibrant directory and DQ sector. There are many market players and consumers have an extensive choice of products, including of course those of BT itself. However, the health of the retail level depends directly on sufficient access at wholesale level to consolidated subscriber data.

5.2 The status quo which flows from the Determinations is not a viable option. This assumes that the only legal constraint on BT in the provision of OSIS data is based on competition law. In Yell's view this is an inadequate constraint. In the event of abusive conduct by BT in the provision of OSIS data, resolution will take too long to be effective and harm will be done which cannot readily be rectified. This will do no good to market players and will be detrimental to ultimate consumers. In this regard, though, BT's own directory and DQ businesses will probably suffer materially less than those of their competitors, both from uncertainty generally and as regards abusive behaviour by BT as an essential upstream supplier..

5.3 Yell's experience from its own dealings with BT as a licensee for the provision of OSIS data does not give Yell confidence that a future unregulated system would be unproblematic. Yell's previous experience with BT in relation to OSIS is summarised briefly in Section 6 below.

5.4 Yell could only support the removal of the GC8 retail obligation to provide a paper directory on the basis that there is ex ante regulation at wholesale level.

5.5 Ex ante regulation and at wholesale level creates a continuing responsibility which is specific rather than general and which removes serious threats to disruption. It is a proportionate and efficient response to the need to ensure access to consolidated subscriber data at fair prices and to achieve continuity and stability. It is this access at wholesale level on which the efficient and competitive retail directory and DQ sectors depend¹⁰.

⁸ Consultation para 5.29.

⁹ 10 March 2008.

¹⁰ As seen in Section 2, the scheme of the EU Directives and the declared policy of Ofcom is to prefer wholesale to retail regulatory controls.

6. BT

- 6.1 As well as being the incumbent provider of the OSIS database as part of its wholesale business, BT's retail business is also UK's principal Communications Provider with approximately 70% of the UK's fixed line subscriber base. BT also competes in the directory and DQ markets.
- 6.2 Yell's experience with BT in relation to the provision of OSIS data has not been positive.
- 6.3 Yell holds a licence¹¹ from BT for the provision of OSIS data. In June 2003 BT gave 6 months' notice to terminate the licence with a view to negotiating new standard form licences with all OSIS users and against new pricing and commercial terms. Since then the notice of termination has progressively been extended a few months at a time and, in the case of Yell, is currently extended to end December 2008. BT's communication of 26 June 2008 (Annex 1) expressed its "intention to extend the licence for an additional six month period ending 30 June 2009" with the same purpose as in 2003 i.e. to allow for the negotiation of a replacement licence on different pricing and other commercial terms.
- 6.4 In the negotiations which followed the notice of termination in June 2003, BT asserted that it had database rights not only in the OSIS data but also in the database created by Yell after it had used the telephone numbers derived from OSIS to contact subscribers. BT also wished to introduce a royalty-based pricing model (i.e. one which was not cost oriented). BT has asserted that it is under no obligation at all to provide OSIS data to Yell, a surprising position to take even having regard to BT's competition law obligations.
- 6.5 It is against this direct experience of dealings with BT on OSIS that Yell strongly prefers not to rely on any generalised assurances that BT "does not intend to deliberately disrupt the marketplace or behave in such a way as to raise competition concerns"¹².

7. Price and other terms

- 7.1 One of Yell's objectives is to continue to source consolidated subscriber data at a fair price.
- 7.2 BT's intentions as to future pricing of OSIS were left intentionally vague in its communication of 26 June 2008 (Annex 1). This communication did not say that it would maintain the current level of pricing for OSIS. Instead it says

¹¹ The current version is dated 6 March 2001.

¹² BT Directory Solutions communication 2 June 2008 (Annex 2).

“During this period [to end June 2009] BT’s charges will be cost oriented. However BT reserves the right to alter its prices bearing in mind that the OSIS cost stack is influenced by the cost of acquiring information from others.”

In addition to this uncertainty to the end of June 2009, the communication is silent on BT’s pricing intentions beyond that date.

- 7.3 To achieve its objective on price Yell believes that the costs associated with the provision of OSIS data must be both transparent and cost orientated. Yell accepts that transparency can be achieved by Ofcom having the necessary cost information from OSIS and issuing a public report annually that OSIS charges are indeed cost-oriented.
- 7.4 On the basis that an ex ante regulatory obligation is placed on BT in the form of a universal service, any costs for the provision of the OSIS data should be the marginal costs of onward provision of data rather than for data sourcing and associated overhead allocation from operating the OSIS database. These other costs would be recoverable by BT under the universal service mechanism.
- 7.5 There can be no question of such pricing being royalty based. This would not be cost oriented. Yell has already had the experience of BT seeking to impose royalty-based pricing in the licence negotiations which followed BT’s notice in June 2003 to terminate Yell’s OSIS licence.
- 7.6 In relation to non-price terms, there should be stability compared with the current licence arrangements. In particular, BT must not be able to assert rights in data which users create as a result of using the OSIS database. Yell has already had the experience of BT asserting data base rights in Yell’s database which is created simply from calling business subscribers identified by the OSIS data.

8. Unlikely entry of a third party consolidator

- 8.1 In theory it may be possible for a third party (including a current licensee of the OSIS database) to create an alternative consolidated subscriber database. The threat of such new entrants might (if credible) act as a competitive constraint on BT. This is not something which Ofcom regards as likely given that there has been no entrant to date and that BT is itself the largest user of OSIS data¹³.
- 8.2 Yell shares this view. The entry of a third party consolidator is not plausible. To create an alternative consolidated database would be an expensive, uncertain and lengthy exercise. As

¹³ Consultation para 5.25.

well as being the largest potential customer, BT also has around 70% of the UK's subscribers and would be in a position to extract excessive charges for the provision of data beyond the basic GC19 data set identified in the Determinations. Furthermore, BT's fixed costs for the OSIS database are sunk and BT can be expected to have the ability to price below the level which would need to be applied by a new entrant.

9. Additional information to be included in GC19

9.1 The Determinations take a particularly narrow view of the basic data set covered by GC19.

9.2 This affects the scope of the data which Communications Providers must make available against the payment of delivery costs. The narrow scope of the basic GC19 data gives a Communications Provider the commercial opportunity to charge excessive prices for the provision of non-basic data.

9.3 For Yell it is essential for the basic GC19 data set to include a field which simply identifies the insertion and deletion of a subscriber with a business tariff. Yell has no need of any of the additional fields which Ofcom identifies in the Consultation¹⁴. A distinction between business and residential tariffs is one which appears to be assumed throughout the Determinations¹⁵, though it was not identified as falling within the basic GC19 data set. The general utility of the distinction for OSIS users and its characterisation as substantive data has also been recognised by BT¹⁶.

9.4 This clarification of the basic CG19 data set will also provide greater certainty of the costs which BT will incur in the provision of OSIS data. Through cost orientation and transparency, this certainty will confer a benefit on OSIS users and their customers.

10. Specific consultation questions

10.1 Yell has mainly focused its Response to the Consultation on Ofcom's general obligations (mostly question 3) and more specifically on the need for regulation of OSIS (questions 5.1-5.3). Yell has also commented specifically on a suggested wider scope for the basic GC19 data set (question 4.7); and on the removal of the obligation to provide a paper directory but only contingent on the regulation of consolidated subscriber data at wholesale level (question 3.3).

10.2 Yell has views for inclusion in the Response on only some of the other questions:

¹⁴ Para 4.40.

¹⁵ See e.g. Determinations Table 8.2.

¹⁶ Determinations Annex 2 (letter from BT to Ofcom 13 July 2006 – in particular in its Annexes A and C).

- 4.3 No. Yell is concerned about the proliferation of small Communications Providers to which this would apply.
- 4.4 Yes.
- 4.5 Yes.
- 4.6 Yes.
- 4.9 Yell would like access to mobile numbers which have business users. Yell understands and respects the privacy concerns in relation to non-business mobile use.

Yell Group plc

30 June 2008

Annex 1

BT wholesale

**BT Directory Solutions
PP3EW5
Telecom House
Church Street
Wolverhampton WV2 4BA**

REF No: 150	DATE: 26/06/2008
STATUS: For Information	
TO: All Contacts	FROM: Sue Irving and Dolores Currie E-MAIL: susan.irving@bt.com or dolores.currie@bt.com TEL: 0800 085 3127 Option 2
Subject: Ofcom Directories Determination and Policy Consultation	

Having issued the recent statement dated 2 June 2008 on BT's commitment to continue to make the OSIS dataset available, I was asked to confirm whether BT would do so on "fair, objective, cost-orientated and non-discriminatory" terms as referred to in Universal Service Condition 7 (USC7). At a meeting held on 19 June 2008, DIF presented its views on the potential impact of the Ofcom consultation on the Directory Industry. BT was asked to respond to four questions (shown below) related to our commitment to continue to supply OSIS. This supplementary briefing is therefore being issued to ensure that our position is clear to all Licensees.

Firstly, I think it important to note that USC7 does not oblige BT to provide the OSIS dataset on terms that are fair, objective, cost oriented and not unduly discriminatory; this obligation relates to Directory Information only and which is a sub-set of the information contained within the OSIS database. Secondly, as Ofcom has determined that USC7 is unlawful BT envisages that on conclusion of the consultation process, the obligation to provide USC7 Directory Information will fall away and the only information that BT will be required to provide on cost oriented terms will be its own General Condition 19 Directory Information.

However, as you are aware, the term of the current BT OSIS licence is being extended for six months to 31 December 2008. It is BT's intention to extend the licence for an additional six month period ending 30 June 2009, to enable BT to commence consultation and negotiation on the new OSIS dataset licence following the publication of the outcome of Ofcom's current consultation.

During this period BT's charges will be cost oriented. However BT reserves the right to alter its prices bearing in mind that the OSIS cost stack is influenced by the cost of acquiring information from others.

In summary:

- (1) BT will continue to offer the OSIS dataset on the same licence terms for a period of 12 months, through two six month extensions to the licence, ending 30 June 2009, subject to the continued supply of information to BT and charge changes;
- (2) BT is in the process of drafting a new BT OSIS licence, which will be circulated to industry in December 2008, for discussion;
- (3) BT intends to commence a consultation and negotiation process in January 2009 and will circulate details of this process in due course; and
- (4) It is BT's intention to offer the new negotiated BT OSIS licence to Industry, to take effect from 1 July 2009.

Finally I would reassure you that BT understands the concerns expressed by DIF and is committed to working with Ofcom and Industry over the coming months to develop a sustainable framework for the provision of directory services in the UK. We would also like to take the opportunity once again to reassure you that BT is committed to continuing to provide a wholesale directory information database and look forward to continuing to work with you in the future.

Kind Regards

Sue Irving
Head of BT Wholesale Directory Solutions

Annex 2

BT wholesale

**BT Directory Solutions
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Wolverhampton WV2 4BA**

REF No: 148	DATE: 2/06/2008
STATUS: For Information	
TO: All Contacts	FROM: Sue Irving E-MAIL: susan.irving@bt.com TEL: 0800 085 3127 Option 2
Subject: Ofcom Directories Determination and Policy Consultation.	

Details:

Over the past week we have received a number of calls and emails from Licensees who are concerned about the impact that the recently published Ofcom Directories Determination, and Policy consultation, might have on the licensing of OSIS data. In some cases Licensees have expressed a concern that BT is about to stop supplying OSIS data.

We're therefore writing to reassure you of BT's position and reiterate the commitment we have given to Ofcom throughout the dispute investigation period, and to which Ofcom has made reference in each of its published documents. So that it is absolutely clear to all Licensees, BT's position is that despite the changes that may occur to GC19 and USC7 as a result of the Ofcom determination and policy consultation, we recognise that demand for the OSIS dataset will continue. We do not intend to deliberately disrupt the marketplace or behave in such a way as to raise competition concerns.

Therefore please be assured that BT is committed to continuing to provide the broader OSIS dataset and if you would like to discuss this further please feel free to contact me via phone on 07801 320927 or via email at susan.irving@bt.com or the Directory Solutions General Manager, Dolores Currie, on 07710 070630 or via email at dolores.currie@bt.com

Kind Regards

Sue Irving

Head of BT Wholesale Directory Solutions