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Office of Communications (Ofcom)
Riverside House – 2a Southwark
Bridge Road
SE1 9HA London
United Kingdom

For the attention of:
Mr Ed Richards
Chief Executive Officer

Fax: +44-20 7981 3504

Dear Mr Richards,

Subject: UK/2008/0859: wholesale terminating and trunk segments of leased lines in the UK – charge control obligation

Comments pursuant to Article 7(3) of Directive 2002/21/EC¹

I. PROCEDURE

On 8 December 2008 the Commission registered a notification from the UK regulatory authority, the Office of Communications ('Ofcom'). It concerns the notification of the details of the price control remedy related to the second review of the wholesale terminating² and trunk segments of leased lines markets.

The national consultation³ runs in parallel with the Community consultation under Article 7 of the Framework Directive. The deadline for both consultations expires on 20 February 2009.

¹ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services ('Framework Directive'), OJ L 108, 24.4.2002, p. 33.

² Market 6 of the Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, OJ L 344, 28.12.2007, p. 65, ('the Recommendation').

³ In accordance with Article 6 of the Framework Directive.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities ('NRAs') and the Commission may make comments on notified draft measures to the NRA concerned.

II. DESCRIPTION OF THE DRAFT MEASURE

Ofcom imposed a charge control obligation concerning low and high bandwidth traditional interface symmetric broadband origination ('TISBO') on BT following the 2004 Leased Lines Market Review. This price control obligation expired at the end of September 2008. However a number of amendments to BT's regulatory financial statements and their implications for charge controls led Ofcom to review its proposals, and the introduction of the new charge controls has therefore been delayed. Ofcom expects to publish a Final Statement on the charge controls in March 2009, such that they will formally take effect from 1 April 2009⁴.

Ofcom now proposes to introduce RPI⁵-X charge controls. These charge controls would apply across six charge control baskets⁶ proposed by Ofcom. Within those baskets Ofcom is also proposing to set sub-caps which would limit any potential increases in respective sub-baskets to RPI.

Ofcom explains that its methodology to determine the charge control is split into five main stages: (i) identification of the appropriate charge control baskets; (ii) the establishment of base year costs⁷; (iii) forecast of costs from base year until 2012/13⁸; (iv) consideration of options for starting charge adjustments; and (v) determination of the proposed range for the values of X⁹.

Ofcom proposes that the leased lines charge controls should apply for the period ending 30 September 2012, that is four years after the recent expiry of the previous charge controls¹⁰. Ofcom also explicitly excludes a mid-term review of the charge control.

III. COMMENTS

The Commission has examined the notification and has the following comment¹¹:

⁴ In view of the delay resulting from the restatement of BT's regulatory accounts, BT Wholesale ('BTW') has given a commitment that: (i) for the period from 1 October 2008 and up to the introduction of the new control, the prices of TISBO and PPC trunk services will not be increased in nominal terms, and (ii) the implementation of the new charge control will be backdated to 1 October 2008.

⁵ Retail Price Index

⁶ A charge control basket is defined as the group of products and services which are subject to the same charge control restrictions.

⁷ Ofcom used Current Cost Accounting with Fully Allocated Costs ('CCA FAC') as the cost basis.

⁸ On the basis primarily of volume changes, the impact of those changes on capital and operating expenditure, asset and other price changes, and anticipated improvements in BT's efficiency.

⁹ Ofcom has developed a cost forecasting model to calculate the ranges of X for the traditional interface and alternative interface basket of services. This model is based on a number of assumptions. The most material ones include the volume forecasts for the services in scope, the underlying base year costs and assumptions around BT's future efficiency gains and cost of capital.

¹⁰ The latest PPC charge controls came into effect for the four years from 1 October 2004 to 30 September 2008.

¹¹ Pursuant to Article 7(3) of the Framework Directive.

Timeframe of the validity of charge control

Pursuant to Article 8(4) of the Access Directive¹², obligations shall be based on the nature of the problem identified, be proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive. According to the Framework Directive, NRAs shall decide on whether to maintain, amend or withdraw obligations on undertakings on the basis of a market analysis¹³. Pursuant to Article 16(3) of the Framework Directive, where a national regulatory authority concludes that the market is effectively competitive it shall not maintain the regulatory obligations imposed. In that respect the Commission notes in particular that in one of the markets concerned BT was found to have SMP with market shares just over 40%¹⁴, and it cannot be excluded that competition conditions could change within the four-year period set by Ofcom.

The Commission therefore invites Ofcom not to exclude a market review before the expiry of the four-year period if the market conditions would justify the removal of the charge control obligation earlier.

Pursuant to Article 7(5) of the Framework Directive, Ofcom shall take the utmost account of comments of other national regulatory authorities and from the Commission, and may adopt the resulting draft measure and, where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take vis-à-vis other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC¹⁵, the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission¹⁶ within three working days following receipt whether you consider that, in accordance with Community and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication. You should give reasons for any such request.

Yours sincerely,
For the Commission,
Fabio Colasanti
Director-General

¹² Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (the 'Access Directive'), OJ L 108, 24.4.2002, p.14.

¹³ Article 16(3) of the Framework Directive.

¹⁴ BT's market share is 45% in the market for high bandwidth TISBO up to 45 Mbit/s in the UK excluding the CELA and the Hull area.

¹⁵ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC, OJ L 301, 12.11.2008, p. 23.

¹⁶ Your request should be sent either by email: INFSO-COMP-ARTICLE7@ec.europa.eu or by fax: +32.2.298.87.82.