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# Wholesale Local Access and Wholesale Broadband Access Market Reviews

Review of competition in the Hull Area

Consultation

Publication date: 22 June 2017

Closing Date for Responses: 14 September 2017

## About this document

We are consulting on proposals for the markets for Wholesale Local Access (WLA, which involves the physical connection of telephone and broadband services to homes and business premises) and Wholesale Broadband Access (WBA, which involves the provision of broadband over those physical connections) in the Hull Area. The consultation presents our provisional conclusion that KCOM continues to have significant market power in each of these markets. It then sets out our proposals for regulations designed to encourage greater competition in the provision of fixed telecoms services for Hull consumers.

The proposed regulations take account of the investments KCOM is making in its new fibre to the premises network and the challenges faced by other operators utilising KCOM's existing networks to provide alternative services to Hull consumers. In particular, we are proposing greater transparency and accountability in KCOM's development and provision of wholesale services, while also recognising the need to move regulation from a focus on copper services to fibre services. We will take all responses to this consultation into account before reaching our final conclusions, which we plan to publish in a statement in March 2018.

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## Section 1

# Executive summary

## Introduction

- 1.1 Broadband has become an increasingly important service for both business and residential consumers in the UK and 78% of all UK premises now access a broadband service.<sup>1</sup> In addition, usage of broadband has grown significantly as consumers access the internet on a growing number of devices for a diverse range of activities, such as watching online content, gaming and video calling. Usage has increased from 58GB to 132GB per month per residential connection in the last two years, and broadband speeds have also increased, on average up from 23Mbit/s to 37Mbit/s over the same period.<sup>2</sup> Effective retail competition has been an important enabler to these changes. Competition drives prices down, making broadband and data more affordable, and propels technological innovation.
- 1.2 The Hull Area is regulated separately from the rest of the UK for most fixed telecommunications markets. This is because KCOM, rather than BT, is the owner of the only universal fixed network in the Hull Area. This consultation concerns the Wholesale Local Access (WLA) and Wholesale Broadband Access (WBA) markets, both of which are wholesale markets that underpin retail broadband services.
- 1.3 There have been positive developments in retail broadband services for consumers in the Hull Area since the last reviews of these markets. At the time the last reviews were concluded in June 2014, KCOM had just started to deploy its fibre network. It has now rolled this out to 137,000 homes and business premises, and is expecting to reach 150,000 premises (equivalent to more than 75% of the Hull Area) by December 2017.<sup>3</sup> This network uses mostly Fibre to the Premises (FTTP) technology, which is capable of delivering broadband at both superfast<sup>4</sup> and ultrafast<sup>5</sup> speeds.
- 1.4 Other telecoms providers have also invested in fibre infrastructure in the Hull Area. MS3, an operator previously focused on providing telecoms services to businesses, has recently begun expanding its FTTP network to offer a residential fibre broadband service. MS3's initial network build is proposed to cover an area of 1,200 homes,

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<sup>1</sup> Ofcom, *Connected Nations Report 2016*, December 2016, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0035/95876/CN-Report-2016.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0035/95876/CN-Report-2016.pdf), page 1.

<sup>2</sup> Ibid and Ofcom, *Connected Nations Report 2015*, 1 December 2015, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0028/69634/connected\\_nations2015.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0028/69634/connected_nations2015.pdf), page 1.

<sup>3</sup> KCOM, *Press release for preliminary results 2016/17*, <http://www.kcomplc.com/media/1622/kcom-preliminary-results-rns-fy17-final.pdf>

<sup>4</sup> Download speeds from 30Mbit/s up to 300Mbit/s

<sup>5</sup> We currently take ultrafast broadband services to be those that offer a minimum download speed of 300 Mbit/s or more (a factor of ten greater than that offered by superfast), but there is no standard definition of ultrafast. The UK Government currently defines ultrafast as 100 Mbit/s or greater. We also consider that the reliability with which the speed is delivered is an important attribute and expect the definition of ultrafast to evolve to take account of the importance of this reliability. These services also offer higher upload speeds than superfast broadband. Over time we expect ultrafast technologies to evolve towards providing gigabit speeds and above – i.e. 1 Gbit/s or more.

followed by another 250 streets by the end of 2017 and then 20,000 homes per year.<sup>6</sup>

- 1.5 In addition, CityFibre, a telecoms operator that owns fibre networks in many cities around the UK, has also built a small fibre network in the Hull Area. This has been rolled out in partnership with Pure Broadband, a Hull-based telecoms operator, and offers local businesses ultrafast broadband via FTTP.<sup>7</sup>
- 1.6 In our Strategic Review of Digital Communications (DCR), we set out the importance of encouraging, where possible, the deployment of new ultrafast broadband networks to help secure the UK's position as a world leader in the availability and capability of its digital networks. We welcome these investments in FTTP networks in the Hull Area. In our view, these investments should provide consumers in the Hull Area with the faster and more reliable broadband connections that are important in the daily lives of individuals and businesses.
- 1.7 While the existence of investment in competitive fibre networks from MS3 and CityFibre, and the presence of other small providers seeking to compete in broadband services, might be seen as offering a prospect for greater competition in the future, the Hull Area still lags significantly behind the rest of the UK from a competition perspective. This is because there is currently limited competition at either the wholesale or the retail level. Specifically, there is no competition from telecoms providers using their own equipment in KCOM's exchanges (an approach commonly used to compete in the rest of the UK), despite regulation being in place since 2004; there is no cable operator; and none of the large national retail providers – Sky, TalkTalk and Vodafone – operate in the Hull Area at all, using KCOM's networks or otherwise. This means that the level of competitive pressure present in the rest of the UK that has resulted in greater choice, higher quality and lower prices is not present to the same extent in the Hull Area. Our objective for this review is, therefore, to ensure that regulation of the WLA and WBA markets builds on the limited competitive growth we have seen, while ensuring that our actions do not undermine incentives for investment in ultrafast networks.

## WLA and WBA markets

- 1.8 The WLA market concerns the fixed telecoms infrastructure (ducts, poles, cables, etc.) that connects a home or business premises to the local exchange (or another appropriate point of aggregation of subscriber lines, such as a street cabinet). Use of inputs from the WLA market enables telecoms providers to deploy their own equipment to offer broadband services to customers. The WBA market relates to wholesale broadband products, which allow telecoms providers to offer retail broadband where they do not have their own equipment to make use of WLA infrastructure. Such products use WLA infrastructure, but also broadband and other equipment owned by the supplier. The WBA market thus enables competitors to provide broadband services with less of their own network investment than if they relied on WLA. Telecoms providers seeking to offer retail broadband services can request to access KCOM's infrastructure via both markets. However, WLA services give providers more control over the retail services they can provide and, after the

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<sup>6</sup> <http://www.ispreview.co.uk/index.php/2017/01/first-homes-live-ms3s-connecthull-ftth-broadband-network-hull-uk.html> [accessed on 8 June 2017].

<sup>7</sup> <https://www.cityfibre.com/news/businesses-offered-choice-as-hull-becomes-a-gigabit-city/> [accessed on 8 June 2017].

initial investment, have lower costs, meaning that WLA services may allow more scope to compete on price.

- 1.9 In the Hull Area both markets are currently regulated due to our previous findings that KCOM has Significant Market Power (SMP), and it is our provisional assessment that KCOM continues to have SMP in these markets. Because of this regulation, KCOM is obliged to provide wholesale services in both markets on reasonable request to competitors.
- 1.10 In the WBA market KCOM provides at least one copper-based service that is used by some telecoms providers to compete in retail broadband services. However, KCOM does not currently offer services in the WLA market, and there is seemingly little demand for such services on KCOM's copper network. In addition, KCOM offers no wholesale services on its new fibre network, notwithstanding the existing general access obligations in this market and despite some evidence of demand from telecoms providers operating in the Hull Area.
- 1.11 Therefore, our primary aim in this review is to increase the take-up of wholesale services based on KCOM's network, thus increasing competition in retail broadband. A key part of this is improving the process for retail providers to request appropriate wholesale access services suitable for their needs. We consider that the measures we are proposing in this consultation (outlined in Section 4) will achieve this by making it easier for telecoms providers to build a business case for the development of new wholesale services and, by improving visibility of the functioning of this process, encourage participation and improve compliance by KCOM.
- 1.12 We have considered whether we should specify a range of specific access products that KCOM must offer, but at this stage we consider that telecoms providers in the Hull Area are themselves best placed to request the services that will meet their needs, provided they have the appropriate avenues to request these services from KCOM with appropriate regulatory safeguards. Given the shift in demand from consumers for higher speeds, we expect these will typically be fibre-based wholesale services.
- 1.13 Finally, in recognition of the shift in consumer demand to superfast broadband services and the lack of wholesale demand for copper-based broadband services by alternative providers in the Hull Area, we are proposing to withdraw regulation of KCOM's copper network at the WLA level (i.e., the requirement to provide Local Loop Unbundling). This is consistent with our strategic aim, set out in the DCR, to deregulate and simplify regulation.<sup>8</sup>

## Proposals

- 1.14 We have defined the Hull Area as a separate geographic market for the provision of WLA and WBA services. Our analysis of these markets has led us provisionally to conclude that KCOM has SMP in both the WLA and WBA markets in the Hull Area.
- 1.15 We are proposing to synchronise much of our regulation across the WLA and WBA markets, making the regulation identical in most instances. In part this reflects our expectation that services will increasingly be provided over fibre in the Hull Area, with the effect that the distinction between the WLA and WBA markets will diminish over

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<sup>8</sup> Ofcom, *Making communications work for everyone: Initial conclusions from the Strategic Review of Digital Communications, Statement*, 25 February 2016, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0016/50416/dcr-statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0016/50416/dcr-statement.pdf), Section 8.

time. This approach should also provide better clarity for KCOM and third parties about the scope of our regulation, consistent with our strategic aim of simplifying regulation.

1.16 The remedies we are proposing are summarised in Table 1.1 below. As well as harmonising both markets to a large extent, our proposals seek to achieve the following outcomes:

- addressing the potential competition concerns we have identified, namely KCOM refusing to supply wholesale services, unduly discriminating in favour of its own retail operations or other selected telecoms providers and charging excessive wholesale charges;
- ensuring that other telecoms providers can obtain the wholesale products they require at fair and reasonable prices from KCOM to compete effectively in retail broadband services, with a transparent process for telecoms providers to use if those products are not yet available;
- greater transparency and accountability in relation to requests for new wholesale services and the functioning of the process by which such requests are submitted and considered by KCOM; and
- greater transparency in relation to KCOM's costs for supplying wholesale services, to ensure that it is complying with its regulatory obligations.

**Table 1.1: Summary of proposed remedies for KCOM by wholesale market**

Wholesale market	Proposed general remedies
Wholesale local access in the Hull Area	<ul style="list-style-type: none"> <li>– Requirement to provide fibre network access on reasonable request</li> <li>– Requirements relating to requests for new forms of network access</li> <li>– Requirement not to discriminate unduly</li> <li>– Requirement to publish a reference offer</li> <li>– Requirement to notify changes to charges, terms and conditions</li> <li>– Requirement to publish quality of service information as directed by Ofcom</li> <li>– Requirement to notify changes to technical information</li> <li>– Accounting separation</li> <li>– Cost accounting</li> </ul>
Wholesale broadband access in the Hull Area	<ul style="list-style-type: none"> <li>– Requirement to provide network access on reasonable request</li> <li>– Requirements relating to requests for new forms of network access</li> <li>– Requirement not to discriminate unduly</li> <li>– Requirement to publish a reference offer</li> <li>– Requirement to notify changes to charges, terms and conditions</li> <li>– Requirement to publish quality of service information as directed by Ofcom</li> <li>– Requirement to notify changes to technical information</li> <li>– Accounting separation</li> <li>– Cost accounting</li> </ul>

## Consultation and next steps

- 1.17 We invite comments from stakeholders on the proposals in this consultation. The consultation runs for 12 weeks and the deadline for responses is 14 September 2017. Annex 1 provides further details of how to respond.
- 1.18 We aim to publish our decisions early in 2018, with the measures taking effect from 1 April 2018.



## Section 2

# Background

- 2.1 This document forms part of our Wholesale Local Access (WLA) and Wholesale Broadband Access (WBA) market reviews. The purpose of these reviews is to assess the state of competition in these markets and consider the extent to which *ex ante* regulation may be required for the provision of these services for the review period (1 April 2018 to 31 March 2021). Where we propose that Significant Market Power (SMP) exists, we consider the appropriate *ex ante* regulation to address our competition concerns.
- 2.2 This document consults on our proposals in relation to the WLA and WBA markets in the Hull Area.<sup>9</sup>
- 2.3 This section contains:
- an overview of the retail services considered in the review and the networks that support those services;
  - a summary of the market analysis process adopted in in this review; and
  - the legal framework relating to the market review process.

## Wholesale local access

- 2.4 Wholesale local access is the fixed connection from the local exchange (or other appropriate point of aggregation of subscriber lines, such as a street cabinet) to a home or business premises, as illustrated in Figure 2.1 below. This connection is an input into a number of retail services, including retail telephony and broadband services.

### Retail services delivered over local access networks

- 2.5 Demand for WLA comes from the demand for downstream retail services, traditionally fixed voice services, but increasingly broadband services. Fixed broadband take-up across the UK is now at 78% of premises<sup>10</sup> and internet access is now seen as important to more customers than voice.<sup>11</sup>

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<sup>9</sup> This document should be read in conjunction with our 2017 WLA market review consultation (published 31 March 2017) and 2017 WBA market review consultation (published 22 June 2017). Of particular relevance to this document and the review of the markets in the Hull Area are our provisional conclusions on how these markets are defined, set out in Sections 3 and 3 to 4 respectively. We discuss this in more detail in Section 3 of this document.

<sup>10</sup> Ofcom, *Connected Nations Report 2016*, 16 December 2016, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0036/95895/CN16-04.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0036/95895/CN16-04.pdf), paragraph 4.55 and Figure 11.

<sup>11</sup> See paragraph 4.13 of Ofcom, 2016, *Narrowband Market Review: Consultation on the proposed markets, market power determinations and remedies for wholesale call termination, wholesale call origination and wholesale narrowband access markets* (2016 NMR Consultation), in turn referencing Ofcom, *Technology Tracker H1 2016*, QC3, <https://www.ofcom.org.uk/consultations-and-statements/category-1/narrowband-market-review>. Among residential consumers who have a line to make or receive calls as well as internet access, only 15% identified making or receiving calls as the

- 2.6 Broadband download speed is prominent in the marketing of fixed line services. In our analysis we make a distinction between broadband services with download speeds as follows:
- standard broadband (SBB): download speeds of up to 30 Mbit/s;
  - superfast broadband (SFBB): download speeds of up to 300 Mbit/s; and
  - ultrafast broadband (UFBB): download speeds of 300 Mbit/s and above.<sup>12</sup>
- 2.7 With copper loop based networks, telecoms providers can offer SBB services. With fibre and cable based networks, telecoms providers can offer SFBB or UFBB services, depending on the technology.<sup>13</sup>
- 2.8 In the Hull Area, SFBB is currently available to over 100,000 premises. KCOM has announced plans that would, by the end of 2017, increase this number to 150,000 — a figure that represents around 75% of premises in the Hull Area.<sup>14</sup> In contrast, around 90% of premises in the UK have access to SFBB.<sup>15</sup>

## Wholesale broadband access

- 2.9 The WBA market sits between retail broadband services and the WLA market.
- 2.10 Building an access network or using LLU and VULA services allow telecoms providers greater flexibility in the services that they offer to consumers. However, this also requires significant investment on behalf of the telecoms provider. Purchasing a WBA product allows telecoms providers to offer retail services without having to undertake the level of investment in infrastructure required to build a network. However, as WBA services aggregate traffic for handover at a limited number of connection points, this means that the telecoms provider taking the service has less flexibility. Therefore, product differentiation among telecoms providers who use WBA services is focussed more on retail level features. Figure 2.1 illustrates WBA products using the current copper access network.

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most important use of their landline. 45% said home internet access was the most important use and the remaining 40% said they were equally important.

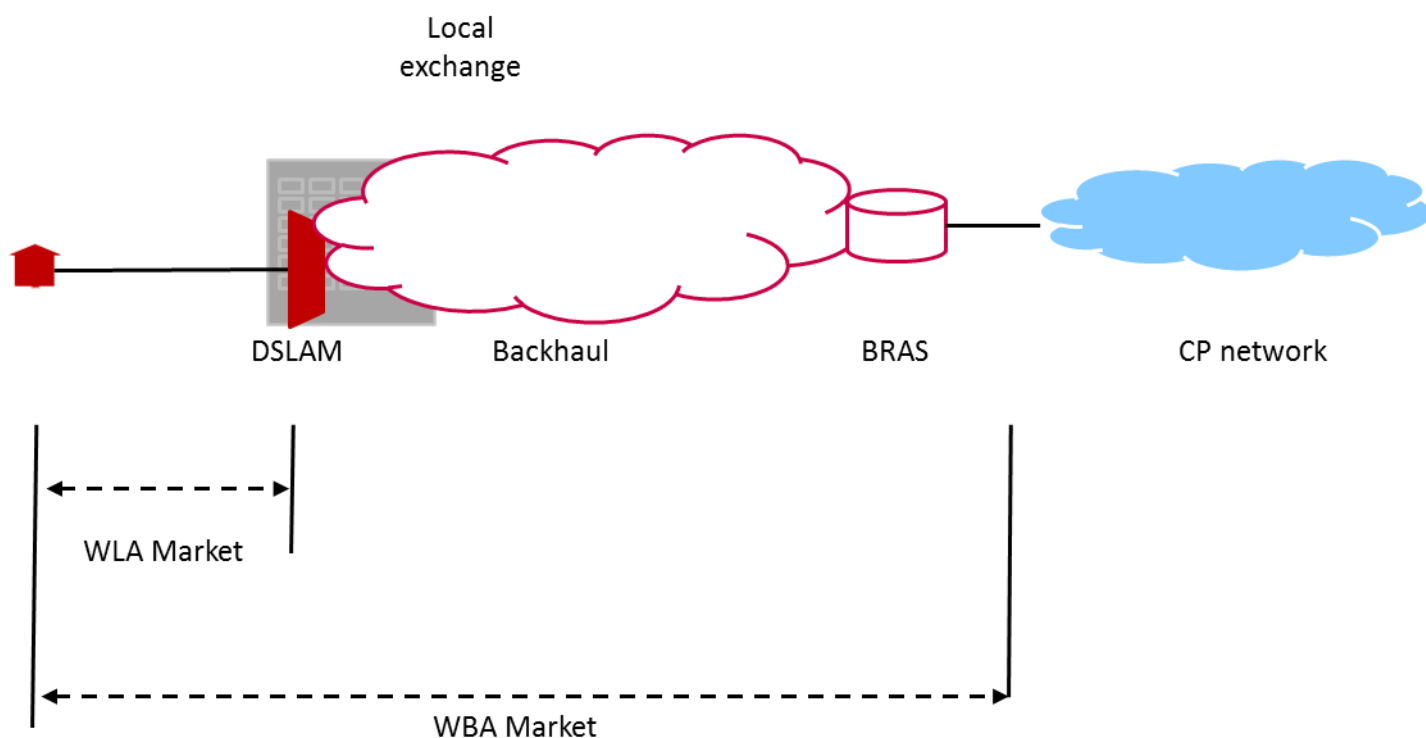
<sup>12</sup> There is no standard definition of ultrafast. The UK Government currently defines ultrafast as 100 Mbit/s or greater.

<sup>13</sup> The European Commission refers to these as Next Generation Access (NGA) networks, which it defines as wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks. In most cases NGAs are the result of an upgrade of an already existing copper or co-axial access network. In the UK, fibre to the cabinet and fibre to the premises networks fall under that characterisation. See Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010H0572&from=EN>.

<sup>14</sup> <http://www.kcomplc.com/media/1610/fy17-interim-results-presentation.pdf>;  
<https://www.kcomhome.com/news/articles/major-milestone-reached-in-ultrafast-broadband-rollout/>

<sup>15</sup> Connected Nations Report 2016, paragraph 4.1.

**Figure 2.1: WLA and WBA services using current generation copper access network**



2.14 The WBA product shown above is built using a number of elements:

- the access network considered in the WLA market review, which includes the connection from the customer's premises to the local exchange;
- the broadband equipment at the local exchange (the Digital Subscriber Loop Access Multiplexor (DSLAM));<sup>16</sup>
- backhaul connectivity across the WBA provider's network; and
- the functionality of the Broadband Remote Access Server (B-RAS) which manages the consumer's internet sessions.

2.15 The principal features of retail broadband offers are determined by the WBA services as offered by the WBA provider.

2.16 The characteristics of WBA services determine the main features of the retail broadband offers that they support.

- The maximum downstream speed is constrained by the specific equipment deployed by the WBA provider. For services that use the copper access network or Fibre to the Cabinet (FTTC), the distance between the customer premises and the local exchange or cabinet respectively is a limiting factor on the speed of connection.

<sup>16</sup> Telecoms providers may provide voice and broadband over the copper access line by deploying a Multi-Service Access Node (MSAN) rather than a DSLAM. However, the broadband service provided over the MSAN is equivalent to that provided via a DSLAM.

- As well as the maximum downstream speed available, retail services can also be differentiated by maximum download limits and, potentially, lower speed during peak hours. The telecoms provider purchases capacity on the WBA provider's network and so can control the quality provided to their end customers by the amount of capacity they purchase.

2.17 The customer access element of the WBA service is controlled by the WBA provider. Retail providers thus have fewer opportunities for innovation e.g. the technology used, than if deploying their own network.

## The Hull Area<sup>17</sup>

### Network operators

- 2.18 In the Hull Area, KCOM is the incumbent telecoms provider operating two fixed access networks: a copper network covering the whole of the Hull Area, and a newly deployed Fibre to the Premises (FTTP) network covering around 70% of homes and small businesses in the Hull Area. KCOM has announced that it is accelerating its FTTP plans and has the aim of covering 150,000 homes and businesses by the end of 2017.<sup>18</sup>
- 2.19 Other telecoms providers have also invested in fibre infrastructure in the Hull Area. CityFibre, a telecoms operator that owns fibre networks in many cities around the UK, has also built a small fibre network in the Hull Area. This has been rolled out in partnership with Pure Broadband, a Hull-based telecoms provider, and offers local businesses ultrafast broadband via FTTP. It is in the process of deploying a 62km FTTP network in the Hull Area that is targeted at local businesses. CityFibre also currently provides dark fibre to mobile base stations operated by Mobile Broadband Network Limited (MBNL).<sup>19</sup>
- 2.20 In addition, MS3, an operator previously focused on providing telecoms services to businesses, has recently begun expanding its FTTP network to offer a residential fibre broadband service. MS3's initial network build was set to cover an area of 1,200 homes (due to have been completed by April 2017), followed by another 250 streets by the end of 2017 and then 20,000 homes per year. It has deployed 33km of its FTTP network to date, and has plans to expand its network to cover 200km of the Hull Area over the next three years.<sup>20</sup>
- 2.21 Alongside these FTTP networks, there are three fixed wireless networks providing broadband services in the Hull Area: Connexin, Purebroadband and Quickline. These providers offer speeds between 10Mbit/s and 60Mbit/s and together cover roughly 80% of the Hull Area.<sup>21,22</sup>

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<sup>17</sup> The 'Hull Area' refers to the area where KCOM operates as the incumbent and consists of the Kingston upon Hull City Council area and some parts of the East Riding of Yorkshire Council area.

<sup>18</sup> <http://www.kcomplc.com/business-insight/news-and-media/kcom-announces-major-milestone-in-ultrafast-broadband-rollout/>

<sup>19</sup> <http://www.cityfibre.com/news/2015/3/31/cityfibre-provides-dark-fibre-connectivity-topurebroadbands-wireless-network-in-hull>. MBNL is a network co-owned by EE and Three which they use to deliver mobile services.

<sup>20</sup> <http://www.ms-3.co.uk/pages/about-us.html> [accessed on 20 June 2017]

<sup>21</sup> <http://www.connexin.co.uk/for-home/broadband/fibre-over-wireless/>

<sup>22</sup> <http://www.purebroadband.net/coverage>

- 2.22 In addition, mobile networks also provide broadband access using wireless connections to customers' mobile devices directly (rather than via a router connected in the home or business premises).

### **Wholesale broadband services**

- 2.23 At the WLA level, KCOM does not currently offer services to third party telecoms providers.
- 2.24 In contrast to our approach in the WLA market in the UK excluding the Hull Area, we do not require KCOM to offer a specific access product (such as LLU or Virtual Unbundled Local Access (VULA)).<sup>23</sup> This is because up to now there has not been sufficient evidence of demand for a specific WLA access product to justify the development of such a product.
- 2.25 We similarly have not imposed specific WBA product obligations on KCOM. However, in response to local demand, KCOM has developed two sets of Asymmetric Digital Subscriber Line (ADSL) access products (ADSL being capable of offering a headline speed of up to 8Mb/s downstream). Using these technologies, KCOM offers the following products at the WBA level:
- Connect Broadband Plus; and
  - IPLine, which provides an IP service offering aggregated access for telecoms providers.

### **KCOM's FTTP network**

- 2.26 KCOM is currently in the process of deploying its 'Lightstream' FTTP network in the Hull Area. As mentioned above, KCOM has already deployed FTTP to over 137,000 premises and is planning to cover 150,000 by the end of 2017. KCOM has stated that this Lightstream product can reach speeds of up to 250Mbps and deliver a more reliable, future-proof service.
- 2.27 Given this, our expectation is that services will increasingly be provided over fibre in the Hull Area over the course of this market review period. One likely consequence of this is that the distinction between the WLA and WBA markets in the Hull Area will diminish over time.
- 2.28 As can be seen in Fig 2.1 above, WBA services involve the backhaul from the local exchange to the point of handover for WBA and also the broadband remote access server (BRAS). For a copper WLA network there is typically a very distributed set of local exchanges, but a much more concentrated number of points of handover for WBA services. In other words, not only does WBA save on installing equipment in many exchanges, it avoids the need to rent or build backhaul to each local exchange.
- 2.29 In a fibre network, the number of exchanges can be consolidated, meaning that each (fibre) exchange serves more premises than the previous copper exchanges. As a

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<sup>23</sup> LLU is a process by which a dominant provider's local loops are physically disconnected from its network and connected to a competing provider's networks. This enables operators other than the incumbent to use the local loop to provide services directly to customers. Virtual Unbundled Local Access provides access to FTTC and FTTP network deployments. Telecoms providers connect to the VULA service at a 'local' aggregation point and are provided a virtual connection from this point to the customer premises.

result, the number of points of handover for connecting to a WLA fibre service is much reduced.

- 2.30 In a relatively densely populated area such as the Hull Area, this means that the number of points of handover for WBA and WLA becomes increasingly similar in the case of fibre broadband.
- 2.31 It is for this reason that we consider it appropriate to consider the WLA and WBA markets together.

## Strategic review of digital communications

- 2.32 Our Strategic Review set out a ten-year vision for communications services in the UK. This envisaged the UK becoming a world leader in the availability and capability of its digital networks, with widespread competing networks delivering choice, innovation and affordable prices to homes and businesses.
- 2.33 Our long-term strategy for fixed network competition and investment focuses on three main elements:
- encouraging and enabling network investment by reducing the cost and barriers to that new investment;
  - continuing to regulate access to the incumbent's networks and services where network competition is not effective; and
  - regulating access to superfast and ultrafast services to give both the incumbent and its competitors incentives to invest in new networks while protecting customers from excessive pricing.
- 2.34 The proposals set out in this review are designed to be consistent with this strategy.

## Summary of existing regulation

### Findings of the last WLA market review

- 2.35 In the 2014 Fixed Access Market Review (FAMR)<sup>24</sup> we defined the WLA market as comprising the provision of copper, cable and fibre lines at a fixed location. We defined two geographic markets: the UK excluding the Hull Area and the Hull Area. We found that BT held SMP in the first of these geographic markets and KCOM in the second, and we applied remedies in each accordingly.
- 2.36 Table 2.1 summarises the remedies imposed on KCOM in the WLA market in the Hull Area.

<sup>24</sup> Ofcom, *Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30: Volume 1: Statement on the markets, market power determinations and remedies*, 26 June 2014, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0032/78863/volume1.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0032/78863/volume1.pdf).

**Table 2.1: Remedies imposed in the WLA market in the Hull Area in the 2014 FAMR Statement**

Market	Operator	Remedies
WLA (in the Hull Area)	KCOM	<ul style="list-style-type: none"> <li>– Requirement to provide network access on reasonable request</li> <li>– Requirement to publish a process for new network access</li> <li>– Requirement not to unduly discriminate</li> <li>– Requirement to publish a Reference Offer</li> <li>– Requirement to notify charges, terms and conditions</li> <li>– Requirement to notify technical information</li> </ul>

### Findings of the last WBA market review

2.37 In the 2014 WBA market review we defined three markets: Market A and Market B, which together matched the UK excluding the Hull Area, and the Hull Area. We found that BT held SMP in Market A, KCOM held SMP in the Hull Area, and no operator held SMP in Market B. We applied remedies in Market A and the Hull Area.

2.38 Table 2.2 summarises the remedies imposed on KCOM in the WBA market in the Hull Area.

**Table 2.2: Remedies imposed by market in the 2014 WBA Statement**

Market	Operator	Remedies
WBA (in the Hull Area)	KCOM	<ul style="list-style-type: none"> <li>– Requirement to provide network access on reasonable request</li> <li>– Requirement not to unduly discriminate</li> <li>– Requirement to publish a Reference Offer</li> <li>– Requirement to notify charges, terms and conditions</li> <li>– Transparency as to quality of service</li> <li>– Requirement to notify technical information</li> <li>– Accounting separation</li> </ul>

### Regulatory framework

2.39 The regulatory framework for market reviews is set out in UK legislation and is transposed from five EU Directives. These Directives impose a number of obligations



on national regulatory authorities, such as Ofcom, one of which is to carry out periodic reviews of certain electronic communications markets.<sup>25</sup>

2.40 This market review process is carried out in three stages:

- we identify and define relevant markets;
- we assess whether the markets are effectively competitive, which involves assessing whether any operator has SMP in any of the relevant markets; and
- where we find SMP, we assess the appropriate remedies, based on the nature of the competition problems identified in the relevant markets.

## Relevant documents

### The 2014 EC Recommendation

2.41 The Relevant Markets Recommendation sets out those product and service markets which, at a European level, the Commission has identified as being susceptible to *ex ante* regulation.<sup>26</sup> These markets are identified on the basis of the cumulative application of three criteria:

- the presence of high and non-transitory barriers to entry;
- a market structure which does not tend towards effective competition within the relevant time horizon; and
- the insufficiency of competition law alone to adequately address the market failure(s) concerned.

2.42 We, as the national regulatory authority in the UK, in accordance with competition law and taking due account of the 2014 EC Recommendation, have defined the proposed relevant markets appropriate to our national circumstances in Section 3 of this consultation. The WLA and WBA markets correspond to Markets 3a and 3b in the Commission's Recommendation respectively.

### The EC SMP guidelines

2.43 The EC SMP Guidelines include guidance on market definition, assessment of SMP and SMP designation.<sup>27</sup> In Section 3 of this consultation, we set out how we have taken the EC SMP Guidelines into account in reaching our proposals.

### The NGA recommendation and the costing and non-discrimination recommendation

2.44 The NGA Recommendation aims to foster the development of the single market by enhancing legal certainty and promoting investment, competition and innovation in the market for broadband services, and in particular, the transition to next generation

<sup>25</sup> We set out the applicable regulatory framework and the approach to market definition and SMP assessment in more detail in Annexes 5 and 6.

<sup>26</sup> <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-relevant-product-and-service-markets-within-electronic-communications>

<sup>27</sup> <http://ec.europa.eu/competition/sectors/telecommunications/legislation.html>



access networks.<sup>28</sup> It does so by setting out a common approach for the implementation of remedies with regard to such networks.

- 2.45 The Costing and Non-discrimination Recommendation concerns the application of non-discrimination, price control and cost accounting obligations.<sup>29</sup> It provides further guidance on the regulatory principles established by the NGA Recommendation, in particular the conditions under which regulation of wholesale access prices should or should not be applied.
- 2.46 We must take utmost account of each recommendation, but in the light of particular factors it may be appropriate to depart from them.

### BEREC common position

- 2.47 In December 2012, BEREC adopted a revised Common Position on best practice in remedies on the markets for WLA and WBA.<sup>30,31</sup> BEREC Common Positions are intended to assist national regulatory authorities in designing the most effective remedies to address the competition problems identified in their respective national markets, in pursuit of the objectives of the regulatory framework for electronic communications and services. To the extent that any of our proposals depart from the BEREC Common Position, we have set out our reasons in this document.

### **Relevant legal tests and statutory duties**

- 2.48 Where we propose that a market is not effectively competitive, we identify the undertaking(s) with SMP in that market and propose what we consider to be appropriate SMP obligations. When proposing a specific SMP obligation, we need to demonstrate that the obligation in question is based on the nature of the problem identified, proportionate and justified in the light of the policy objectives as set out in Article 8 of the Framework Directive.<sup>32</sup>
- 2.49 Specifically, we explain why we consider each of the conditions we are proposing satisfies the test set out in section 47 of the Communications Act 2003 (the Act), namely that the obligation is:

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<sup>28</sup> <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-20-september-2010-regulated-access-next-generation-access-networks>

<sup>29</sup> <https://ec.europa.eu/digital-single-market/en/news/commission-recommendation-consistent-non-discrimination-obligations-and-costing-methodologies>

<sup>30</sup> BEREC, *Revised BEREC common position on best practice in remedies on the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location imposed as a consequence of a position of significant market power in the relevant market*, December 2012,

[http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/comm\\_on\\_approaches\\_positions/1127-revised-berec-common-position-on-best-practice-in-remedies-on-the-market-for-wholesale-physical-network-infrastructure-access-including-shared-or-fully-unbundled-access-at-a-fixed-location-imposed-as-a-consequence-of-a-position-of-significant-market-power-in-the-relevant-market](http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/comm_on_approaches_positions/1127-revised-berec-common-position-on-best-practice-in-remedies-on-the-market-for-wholesale-physical-network-infrastructure-access-including-shared-or-fully-unbundled-access-at-a-fixed-location-imposed-as-a-consequence-of-a-position-of-significant-market-power-in-the-relevant-market).

<sup>31</sup> BEREC, *Revised BEREC common position on best practice in remedies on the market for wholesale broadband access (including bitstream access) imposed as a consequence of a position of significant market power in the relevant market*, December 2012,

[http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/comm\\_on\\_approaches\\_positions/1126-revised-berec-common-position-on-best-practice-in-remedies-on-the-market-for-wholesale-broadband-access-including-bitstream-access-imposed-as-a-consequence-of-a-position-of-significant-market-power-in-the-relevant-market](http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/comm_on_approaches_positions/1126-revised-berec-common-position-on-best-practice-in-remedies-on-the-market-for-wholesale-broadband-access-including-bitstream-access-imposed-as-a-consequence-of-a-position-of-significant-market-power-in-the-relevant-market).

<sup>32</sup> See Article 8(4) of the Access Directive.

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

2.50 Additional legal requirements also need to be satisfied depending on the SMP obligation in question. For example, when we propose a charge control, we must consider whether there is a relevant risk of adverse effects arising from price distortion; and the appropriateness of the control for the purpose of promoting efficiency; sustainable competition; and conferring the greatest possible benefits on customers of public electronic communications services.

2.51 We also explain why we consider the performance of our general duties under section 3 of the Act would be secured or furthered by our proposed regulatory intervention. Our principal duty, in this regard, is to further the interests of citizens in relation to communications matters and customers in relevant markets, where appropriate by promoting competition. We explain why we are acting in accordance with the six Community requirements under section 4 of the Act. This is also relevant to our assessment of the likely impact of implementing our proposals.

2.52 Consistent with our duties under section 4A of the Act and under Article 3(3) of the BEREC Regulation, we have also taken due account of the applicable EC recommendations and utmost account of the applicable opinions, common positions, recommendations, guidelines, advice and regulatory best practices adopted by BEREC relevant to the matters under consideration in this consultation document.

## Forward look

2.53 Market reviews look ahead to how competitive conditions may change in the future. For the purposes of the review, we consider the period up to 2020/21, reflecting the characteristics of the relevant retail and wholesale services and the factors likely to influence their development.

## Impact assessment and equality impact assessment

2.54 The analysis presented in this document constitutes an impact assessment as defined in section 7 of the Act.

2.55 Impact assessments provide a valuable way of assessing the options for regulation and showing why the chosen option was preferred. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that, generally, we have to carry out impact assessments in cases where our conclusions would be likely to have a significant effect on businesses or the general public, or where there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out impact assessments in relation to the great majority of our policy decisions.<sup>33</sup>

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<sup>33</sup> For further information, see Ofcom, 2005. *Better Policy Making: Ofcom's approach to Impact Assessment*. Available at: [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0029/45596/condoc.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0029/45596/condoc.pdf).

## **Equality impact assessment (EIA)**

- 2.56 Annex 7 sets out our EIA for this market review. Ofcom is required by statute to assess the potential impact of all our functions, policies, projects and practices on race, disability and gender equality. EIAs also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.
- 2.57 It is not apparent to us that the outcome of our review is likely to have any particular impact on race, disability and gender equality. More generally, we do not envisage the impact of any outcome to be to the detriment of any group of society. Nor do we consider it necessary to carry out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes.

## **Consultation period**

- 2.58 The deadline for responses to this consultation is 14 September 2017.

## **Document structure**

- 2.59 The document structure follows the structure of our analysis. In defining the relevant markets, we draw on our proposals in the 2017 WLA and WBA consultations, where we looked at the downstream services in order to inform upstream market definition, before assessing market power in these upstream markets (Section 3). We then discuss our proposed remedies (Section 4).

## Section 3

# Market definition and significant market power assessment

## Summary

- 3.1 In this section, we set out our assessment of the product and geographic market definition and market power for the Wholesale Local Access (WLA) and Wholesale Broadband Access (WBA) markets in the Hull Area.
- 3.2 In summary, we propose to:
- define the WLA market as a single product market for the supply of copper loop, cable- and fibre-based wholesale local access at a fixed location;
  - define the WBA market as a market for the supply of asymmetric broadband access and any backhaul as necessary to allow interconnection with other telecoms providers, which provides an always-on capability and allows both voice and data services to be used simultaneously;
  - define a geographic market of the Hull Area for both the WLA and WBA product markets, which is distinct from markets defined in the rest of the UK; and
  - conclude that KCOM holds Significant Market Power (SMP) in the supply of WLA and WBA products within the Hull Area over the review period.

## Introduction

- 3.3 The purpose of this section is to define the scope of the relevant product and geographic markets, which in turn structures and informs our assessment of whether SMP exists. Our general approach to market definition is described in more detail in Annex 6.
- 3.4 As described in section 2, the Hull Area has a ubiquitous copper-access network owned and operated by KCOM, built with 13 exchanges around the area. A telecoms provider wanting to compete in retail broadband services could build its own access network, or deploy equipment in KCOM's 13 exchanges and purchase WLA services. Alternatively, a telecoms provider without the means to invest in an access network or equipment in these exchanges could use WBA services, which backhaul traffic to centralised points of handover (see Figure 2.1 in Section 2), to provide retail services to the whole of the Hull Area. It is in the extent to which telecoms providers need their own infrastructure (equipment in the exchanges and backhaul from those exchanges) to offer retail services to the whole area, that creates the distinction between the WLA and WBA markets.
- 3.5 As noted above, KCOM is currently deploying a fibre-access network. Since fibre does not have the same distance limits as copper, it may be that the number of access points to this network will be significantly fewer than the 13 in the copper-access network. If this is the case, it could mean that a WLA service provided over this fibre-access network would offer telecoms providers with a means to compete for

customers in the Hull Area by interconnecting with KCOM at only a very limited number of locations.

- 3.6 If, in future, KCOM provides such a WLA service (and taking into account the extent of take-up by competing providers and the extent to which its fibre-access network covers the whole Hull Area), we would consider whether the WLA service is sufficiently effective so that KCOM no longer has SMP in WBA or, indeed, whether there is any practical difference between WLA and WBA in the Hull Area.

## Product market definition in the Hull Area

- 3.7 Although WBA and WLA are different wholesale markets, the services they contain are ultimately used to provide retail broadband services (and to a greater or lesser extent voice services).<sup>34</sup> In line with our approach to WLA<sup>35</sup> and WBA<sup>36</sup> product market definition used in our review of the rest of the UK, we start by examining the substitutability of retail broadband services and the extent to which these products exert an indirect constraint on wholesale services.<sup>37</sup>
- 3.8 We recently analysed voice and broadband retail markets in the rest of the UK in the WLA 2017 Consultation.<sup>38</sup> We provisionally found that for voice and broadband services provided over copper, and fibre-based fixed lines (our focal product), the indirect constraints from the retail level were sufficient to include cable in the relevant market at the wholesale level. However, the indirect constraints from alternative infrastructure (mobile, satellite, leased lines, fixed wireless) were not sufficient to widen the market definition to include these services.<sup>39</sup> We also provisionally found that Superfast Broadband (SFBB) is likely to constrain Standard Broadband (SBB) during the review period, while SBB is likely to exert a diminishing constraint on SFBB.<sup>40</sup> We did not consider that the extent of substitutability between retail residential and business services would affect our proposed market definition for WLA.<sup>41</sup> For the same reason, we also did not reach a conclusion on whether there is a separate market for retail bundles.<sup>42</sup> Given that both WLA services and WBA services are ultimately used to provide retail broadband products, we also consider that the retail product market analysis conducted in the 2017 WLA Consultation<sup>43</sup> is equally relevant for the reasons set out in the WBA market review consultation.<sup>44</sup>

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<sup>34</sup> For WBA and fibre WLA services, voice services are an overlay where competition is not restricted by access to the exchange or intermediate points of presence.

<sup>35</sup> For a more detailed account of our approach to wholesale product market definition in the WLA market please see volume 1, paragraphs 3.89–3.92 of our recent 2017 WLA consultation, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0033/99636/Vol1-Market-review.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0033/99636/Vol1-Market-review.pdf).

<sup>36</sup> For a more detailed account of our proposed approach to wholesale product market definition in the WBA market please see paragraphs 3.25 – 3.33 in the 2017 WBA market review consultation, <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-broadband-access-market-review>.

<sup>37</sup> For the evidence and analysis underpinning our provisional conclusion on indirect constraints in our Wholesale Local Access Review, see 2017 WLA Consultation, paras 3.8 – 3.88

<sup>38</sup> See 2017 WLA Consultation, Volume 1, paras 3.8 – 3.88. For more detail on our approach to considering retail services prior to wholesale market definition, see Annex 6 paras A6.14 – A6.16.

<sup>39</sup> See 2017 WLA Consultation, paras 3.56 – 3.81.

<sup>40</sup> See 2017 WLA Consultation, paras 3.15 – 3.52.

<sup>41</sup> See 2017 WLA Consultation, paras 3.11 – 3.13.

<sup>42</sup> See 2017 WLA Consultation, paras 3.82 – 3.84.

<sup>43</sup> See 2017 WLA Consultation, paras 3.8 – 3.88.

<sup>44</sup> We have set out our reasoning for this in detail in our 2017 WBA Consultation, paras 3.10 – 3.24.

- 3.9 We now briefly consider whether, for both the WLA and WBA markets in the Hull Area, there are any constraints at the retail level in the Hull Area that differ from those in the rest of the UK. In general, we would tend to consider that the same product market applies across the UK, because voice and broadband services can be used to perform the same functions regardless of where they are delivered geographically. However, the retail market in the Hull Area is served by different providers to the rest of the UK and the products available are somewhat different. For this reason, although many of the retail level constraints that apply in the rest of the UK are likely to apply in the Hull Area, we now briefly consider whether there are any constraints at the retail level in the Hull Area that differ from those in the rest of the UK.
- 3.10 We consider the potential differences to the rest of the UK first from a demand-side perspective and then from a supply-side perspective.
- 3.11 Demand-side:
- **Socio-economic factors** – Different income levels may affect consumers' willingness or ability to pay for higher priced services. In the Hull Area, average gross weekly earnings are £494, which is below the UK average of £538.<sup>45</sup> We do not consider that this difference is sufficient to significantly affect the substitutability of higher speed products relative to the rest of the UK. Indeed, there are many other areas of the UK with average earnings below the national average (and lower than those in the Hull Area) which we proposed to include within a single market for the rest of the UK within the 2017 WLA Consultation.
  - **Data usage** – The extent to which consumers use data gives an indication of their demand for broadband services, which may affect the extent to which they consider services with usage limitations to be substitutes. Fixed data consumption in the Hull Area is around 100GB per month.<sup>46</sup> This is lower than the average in the rest of the UK of 132GB in the same year, although higher than the UK average in the preceding year (which was 97 GB per month in 2015).<sup>47</sup> However, this is still significantly higher than the allowances offered by most mobile tariffs suggesting that mobile broadband is unlikely to be a stronger substitute in the Hull Area than in the rest of the UK.<sup>48</sup>
- 3.12 Supply-side (retail offering):
- **Pricing** - voice and broadband services in the Hull Area tend to be priced at a comparable but slightly higher level than the rest of the UK, although some of

<sup>45</sup> Data taken from ONS, 26 October 2016,

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/annualsurveyofhoursandearnings/2016provisionalresults#regional-earnings>. Hull gross weekly earnings taken from

<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/dataset/placeofworkbylocalauthorityasetable7>

<sup>46</sup> From Ofcom, Connected Nations 2016,

[https://www.ofcom.org.uk/\\_data/assets/file/0028/97552/2016\\_fixed\\_laua\\_r01.csv](https://www.ofcom.org.uk/_data/assets/file/0028/97552/2016_fixed_laua_r01.csv).

<sup>47</sup> From Ofcom, Connected Nations 2016,

[https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0035/95876/CN-Report-2016.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0035/95876/CN-Report-2016.pdf), para 2.15

<sup>48</sup> See 2017 WLA consultation, Volume 1, figure 3.14.



KCOM's tariffs with lower data usage allowances are cheaper than the equivalent speed packages in the rest of the UK.<sup>49</sup>

- **Lack of unlimited residential broadband packages** – In our recent WLA consultation we noted that fixed broadband packages in the rest of the UK tend to have unlimited data allowances, in contrast to mobile packages which typically have limited data allowances. This is not the case in the Hull Area, where most (but not all) of KCOM's retail packages have a limited data allowance.<sup>50</sup> Despite this, most of KCOM's retail packages offer a monthly data allowance of 200GB or higher, which is sufficient for 88% of households in the Hull Area based on current data consumption.<sup>51</sup>
- Greater proportionate coverage of fixed-wireless access - we consider fixed-wireless access in more detail below. On balance, we consider that fixed-wireless broadband is unlikely to act as a material constraint on fixed-line broadband over the period of this review.

### Fixed-wireless access

- 3.13 The Hull Area is well covered by fixed-wireless providers who can provide services to a significant majority of households in the Hull Area. This contrasts with the rest of the UK where fixed-wireless coverage is very localised and does not cover a high proportion of the rest of the UK.
- 3.14 Fixed-wireless broadband offerings can be used for much the same purposes as fixed-line services and as such they could be considered alternatives to fixed-line broadband. In some locations fixed-wireless access may be functionally equivalent to fixed broadband access, particularly where premises are close to the broadcasting router, or in areas where fixed broadband speeds are particularly low.
- 3.15 For consumers with lower data usage requirements, fixed-wireless prices are comparable (or in some cases cheaper) than some of KCOM's cheaper packages, particularly those provided over copper.<sup>52</sup> For consumers with higher data usage, some fixed wireless providers offer unlimited data usage at comparable prices to KCOM.<sup>53</sup>
- 3.16 Despite these factors, there are other aspects of pricing and service quality which suggest the fixed-wireless providers may not impose a strong constraint on fixed-line (copper and fibre) broadband at the retail level. Consumers may not find fixed-wireless services to be substitutes because:

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<sup>49</sup> Headline prices in the Hull Area are typically comparable to headline prices in the rest of the UK, although introductory discounts in the rest of the UK can make those services significantly cheaper than equivalent services in the Hull Area. Furthermore, tariffs in the rest of the UK tend to have unlimited data allowances, which is often not the case for KCOM's products.

<sup>50</sup> Nine of KCOM's sixteen broadband packages offer a data allowance of at least 200GB per month. See <https://www.kcomhome.com/products/broadband/>

<sup>51</sup> Data collected for Connected Nations 2016.

<sup>52</sup> For example, three fixed-wireless providers we reviewed offered packages for between £15-22 per month, comparable to KCOM's cheapest package of £19.99/month ("Home Starter Local", 10GB allowance).

<sup>53</sup> For example, at least three fixed wireless providers offer packages with data allowances of more than 250GB/month for under £32/month, cheaper than the £40.99/month for the most comparable KCOM package ("Home Xtra", 350GB allowance).

- fixed-wireless providers in the Hull Area charge their customers set-up fees of around £100-300. These are significantly greater than up-front fees charged by KCOM, which are £50 for its Lightstream tariffs and nothing for other tariffs; and
  - it is unclear to what extent the quality of service of fixed-wireless broadband is comparable with fixed broadband, with fixed-wireless broadband performing less well on latency<sup>54</sup> and contention<sup>55</sup> in some cases.
- 3.17 In many parts of the Hull Area, fixed-wireless providers only offer speeds which are comparable with SBB speeds and not SFBB speeds. We also note that all the providers we reviewed that offer fixed-wireless in the Hull Area also offer fixed-line broadband services in other parts of the UK. This suggests that fixed-wireless could be a step on the ladder of investment for these providers, and that providers offering fixed-wireless broadband in the Hull Area may be well-placed to take advantage of access to a fixed-line network. This indicates that fixed-wireless may be seen as an in-fill solution, until satisfactory access to a fixed-line network is achievable.
- 3.18 Fixed-wireless providers having been present in the Hull Area for many years, and there is a higher coverage of fixed-wireless providers in the Hull Area relative to the rest of the UK. Despite this, fixed-wireless providers have a small share of connected premises, at only [x%].<sup>56</sup> This suggests that, in practice, only a limited number of consumers have in practice found these services to be substitutes to fixed-line services.
- 3.19 On balance, we consider that fixed-wireless broadband is unlikely to act as a material constraint on fixed-line broadband over the period of this review. Even if we were to consider fixed-wireless providers to be in the same market as fixed-line services, the low combined market share of fixed-wireless providers in the Hull Area would mean that KCOM's share of the market would still be very high. We recognise that future technological developments could affect this view in the longer term.

### Wholesale product market definition

- 3.20 Our focus for defining the WLA and WBA markets in the Hull Area is demand-side substitutability between retail services delivered by our focal products and retail services delivered by other access networks. Where products are deemed to be strongly substitutable at the retail level it is generally appropriate to include them within the same wholesale market on the basis of the indirect constraints that they exert. As such our analysis of these retail services forms the basis of our wholesale product market definition.<sup>57</sup>
- 3.21 Where demand-side and supply-side features in the Hull Area differ from those in the rest of the UK,<sup>58</sup> we have analysed whether these features have a sufficiently

<sup>54</sup> Latency is the time it takes a packet of data to travel to a third-party server and back. A connection with low latency will feel more responsive for simple tasks like web browsing and certain applications perform far better with lower latency.

<sup>55</sup> Contention is the degree to which bandwidth is shared between different end users at the same network node.

<sup>56</sup> Although this is higher than the [x%] share of connected premises by fixed-wireless providers in the rest of the UK.

<sup>57</sup> This is the same approach as that set out for WLA in the UK excluding the Hull Area in our March 2017 consultation (see paras 3.89 – 3.92) and for WBA in the UK excluding the Hull Area (see para 3.5).

<sup>58</sup> As set out 2017 WLA Consultation, paras 3.8 – 3.88.



material impact on retail-level constraints to widen our market definition for the WLA and WBA markets in the Hull Area. Overall, we do not consider demand-side and supply-side features in the Hull Area suggest that the retail-level constraints differ to the rest of the UK.

- 3.22 Given that the retail constraints in the Hull Area do not differ from those in the rest of the UK, and that the analysis of these constraints forms the basis of our wholesale market definition, we do not consider that our wholesale product market definition for WLA and WBA in the Hull Area should differ from that in the rest of the UK.

### Provisional conclusion on product market definition in the Hull Area

- 3.23 Because we identify much the same constraints as in the rest of the UK, we propose to adopt product market definitions consistent with those proposed in the WLA review and the WBA review for the rest of the UK.

- 3.24 For WLA in the Hull Area, we propose a market definition of:

*a single product market for the supply of copper loop, cable- and fibre-based wholesale local access at a fixed location.*<sup>59</sup>

- 3.25 For WBA in the Hull Area, we propose a market definition of:

*a market for the supply of asymmetric broadband access and any backhaul as necessary to allow interconnection with other telecoms providers, which provides an always-on capability, and allows both voice and data services to be used simultaneously.*

## **Geographic market definition in the Hull Area**

- 3.26 As explained in the 2017 WLA consultation<sup>60</sup> and 2017 WBA consultation<sup>61</sup> we consider that the Hull Area exhibits different characteristics to the rest of the UK. In the Hull Area the incumbent operator is KCOM, which operates the local access network (as opposed to BT in the rest of the UK) and is by far the largest supplier at the retail level in the Hull Area. There has been no unbundling of KCOM's exchanges and no roll-out of competing cable infrastructure.
- 3.27 Given these markedly different characteristics to the rest of the UK, we consider that competitive conditions are unlikely to be homogenous between the Hull Area and the rest of the UK given that they are served by different providers. In line with our longstanding practice, we consider that the Hull Area and the rest of the UK are separate geographic markets, for both the WLA and WBA markets.

## **SMP assessment for the Hull Area in the WLA market**

- 3.28 Market definition is not an end in itself. Rather it is a tool to help assess whether any telecoms provider possesses market power. Below we set out our assessment of whether KCOM is expected to hold a position of SMP in the WLA market in the Hull Area over the forthcoming review period. In making that assessment we have taken

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<sup>59</sup> Consistent with 2017 WLA Consultation, Volume 1, paragraph 3.3.

<sup>60</sup> For a more detailed account of our approach to geographic market definition in the WLA market in the rest of the UK, see 2017 WLA Consultation, paras 3.93 – 3.110.

<sup>61</sup> For a more detailed account of our approach to geographic market definition in the WBA market in the rest of the UK, see section 4 of the 2017 WBA Consultation.

due account of the EC SMP Guidelines including the criteria for assessing SMP (in particular, market share, barriers to entry and countervailing buyer power) and the guidance on market definition.

### Market shares

- 3.29 KCOM has historically enjoyed a 100% share of the WLA market in the Hull Area, however, there are now signs that there are prospects of competition emerging in this market.
- 3.30 A recent development has been the entry of MS3, a fibre operator, into the Hull Area. In September 2016, MS3 announced that it would be launching a residential FTTP service in Hull which would initially be available to 1,200 homes. MS3 subsequently announced that it was formulating plans to roll out fibre to “in excess of 20,000 homes per year from 2017 onwards”.<sup>62</sup> It has commenced the rollout of an FTTP network in the Hull Area and has announced that its focus lies in providing services to both business and residential customers.
- 3.31 MS3 has also informed us that initially it is only offering retail services, but it plans to offer wholesale access in the near future.
- 3.32 As a result of the development of MS3’s network in the market, we recognise that there may be some reduction in KCOM’s market share in the WLA market within the period covered by this review, particularly if MS3 is successful in meeting its coverage targets. However, we consider that despite MS3’s plans of rolling out an extensive FTTP network, it is unlikely to gain significant market share over the review period. This is due to the timescales involved in deploying an FTTP network and the additional time we would expect it to take to develop interconnection processes that would facilitate third party telecoms providers’ use of its FTTP network.
- 3.33 We therefore do not expect MS3 alone to exert a sufficiently strong competitive constraint to prevent KCOM from being able (given KCOM’s market share) to act independently in its pricing or quality of service delivery in the WLA market in the Hull Area during the period covered by this review. In particular:
- MS3’s rollout of its FTTP network is currently limited to a trial rollout 1,200 premises, which constitutes less than 1% of households in the Hull Area; and,
  - Even by its own projections, MS3’s network will cover less than half of the Hull Area during the review period.
- 3.34 In addition to MS3’s entry, CityFibre has rolled out a 62km fibre network in Hull<sup>63</sup>, and its partner, Pure Broadband, is offering fibre services using this network, albeit these services are offered only to business customers at the present time.<sup>64</sup>
- 3.35 In summary, despite the deployment of rival infrastructure in the Hull Area, KCOM currently holds a near 100% share of the WLA market. We consider that its market

<sup>62</sup> MS3 press release, 15 September 2016.

<sup>63</sup> See Cityfibre press release, <https://www.cityfibre.com/gigabit-cities/hull/>, 26 August 2016.

<sup>64</sup> Currently, Pure Broadband are only offering business connectivity services using CityFibre’s network. See Pure Broadband, <https://www.pure-speed.net/products/internet/pure-light>

share is likely to remain at a sufficiently high level to be indicative of KCOM holding SMP for the duration of the period covered by this market review.

### Barriers to entry and expansion

- 3.36 The barriers to entry and expansion in the WLA market in the Hull Area are similar to those discussed in our 2017 WLA Consultation in relation to the rest of the UK.<sup>65</sup> Specifically, to enter the market in the Hull Area in any significant way a telecoms provider would need to build a network to premises in the Hull Area. This would require a provider to make a significant investment.
- 3.37 In this respect, we note that the Hull Area has a relatively small population from which an infrastructure operator can recover systems integration costs and the large outlay in infrastructure costs that would be required to enter the market.
- 3.38 Additionally, it would take time for any new entrant to gain market share through competition with KCOM, and any competitor would likely only be able to gain part of the market. These factors mean that there is a large structural barrier to entry and expansion, including for providers who are already present in the market, such as MS3 and CityFibre.<sup>66</sup>
- 3.39 We note that, while outside the market, fixed-wireless services and mobile services may provide a limited constraint on KCOM over the review period. While we do not take these providers into account when considering market shares (since we consider them to be outside the market), we recognise that their presence may mean that the size of the market available to KCOM is smaller than if there were no alternative infrastructure capable of providing broadband services in the Hull Area.
- 3.40 In conclusion, we consider the barriers to entry and expansion remain sufficiently high such that they will not have a material effect on KCOM's market share, which will remain high over the review period.

### Countervailing buyer power

- 3.41 Given the high barriers to entry that we have outlined, countervailing buyer power is likely to be weak given the lack of alternative WLA suppliers. We recognise that entry by certain providers with their own infrastructure may provide some wholesale customers with an alternative to KCOM in the medium to long term. However, given the current and anticipated extent of their networks over the review period, and our view that substantial entry barriers remain, wholesale customers are likely to have limited outside options in access discussions with KCOM (including the credibility of self-supply). Therefore, countervailing buyer power is likely to be insufficient to constrain KCOM during the period covered by this review.

### Provisional conclusion on market power assessment in the Hull Area

- 3.42 While MS3's planned rollout of an FTTP fibre network is likely to reduce KCOM's market share over time, it seems unlikely that KCOM will experience a substantial decline in its market share during the period covered by this market review given the current limited reach of alternative fixed-line access networks and the limited scope for further entry into the market. As a result of KCOM's high market share and the lack of strong constraints from current or future competitors or from customers, we

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<sup>65</sup> 2017 WLA Consultation, paras 3.120 – 3.122.

<sup>66</sup> See discussion above, paragraphs 3.29 – 3.35.

provisionally conclude that KCOM will have SMP in the WLA market in the Hull Area for the duration of the forthcoming review period.

### **Market power assessment for the Hull Area in the WBA market**

- 3.43 The absence of competitors using WLA services means that there is not existing or potential competition to KCOM in WBA to any significant extent in the Hull Area. Therefore, the SMP analysis for WBA is much the same as for WLA given that WBA sits immediately downstream of WLA. The reasoning set out above in terms of market shares, barriers to entry and expansion, and countervailing buyer power apply equally to the WBA market as they do to the WLA market in the Hull Area. Specifically, KCOM has a near 100% market share and there is a lack of strong constraints from current or future competitors or customers.
- 3.44 We therefore provisionally conclude that KCOM will have SMP in the market for the provision of WBA services in the Hull Area for the duration of the forthcoming review period.

### **Consultation questions**

**Question 3.1:** *Do you agree with our proposed market definition? Please provide reasons and evidence in support of your views.*

**Question 3.2:** *Do you agree with our proposal that KCOM holds SMP in the supply of WLA and WBA products in the Hull Area? Please provide reasons and evidence in support of your views.*

## Section 4

# Proposed remedies

## Introduction

4.1 In this section, we cover the following:

- our proposed approach to assessing what remedies are appropriate to address the competition concerns we have identified;
- our assessment of the current remedies package in terms of promoting competition in the Hull Area, including:
  - our engagement with stakeholders and the matters raised with us;
  - a consideration of the competitive outcomes at the retail level; and
- following on from these, our proposals for remedies to address these concerns.

4.2 We consider that the proposed remedies would achieve our statutory duties and would satisfy the relevant legal tests. In reaching these proposals, we have taken account of our regulatory experience from previous market reviews, recent developments in these markets, and expected developments over the course of the market review period. We also reflect our long-term vision for ensuring the quality and availability of communication services in the Hull Area, as set out in our Strategic Review.

## Assessment of competition concerns

4.3 In light of our assessment of these markets and our proposed SMP determinations for KCOM in each of the WLA and WBA markets in the Hull Area, we consider that in the absence of *ex ante* regulation, KCOM would have the ability and incentive in each of these markets to:

- refuse to provide network access to other providers (or access on reasonable terms, conditions and charges), which could restrict competition in the provision of retail services to the detriment of consumers;
- discriminate in favour of its downstream retail businesses to the detriment of competition in retail broadband services (including by price and/or non-price discrimination, such as in the handling of requests for new network access) and ultimately to the detriment of consumers;
- reduce the quality of its services to the detriment of consumers; and
- fix and maintain some or all of its charges for WLA or WBA services at an excessively high level.

4.4 We set out in more detail below why we consider that each of the remedies that make up the package of *ex ante* remedies we are proposing helps to address the competition problems we have identified. Consistent with Article 8(4) of the Access Directive, our package of *ex ante* remedies must be based on the nature of the

competition problems identified and must be proportionate and justified in light of the objectives in Article 8 of the Framework Directive.

### Effectiveness of competition law

- 4.5 Prior to imposing any *ex ante* remedies in a market where we have found a telecoms provider to have SMP, we first need to consider whether the competition concerns we have identified could be sufficiently addressed through competition law. To do this we have considered whether competition law would be effective in responding to the competition concerns identified above.
- 4.6 First, competition law would focus on preventing the abuse of a dominant position, and may not place sufficient obligations on KCOM to facilitate effective downstream competition. In contrast, our experience is that *ex ante* regulation at the wholesale level can better promote effective downstream competition. Second, *ex ante* regulation can be better tailored to the particular circumstances in the market and services provided in order to address the competition concerns during the review period.
- 4.7 Third, we consider that providing greater certainty in the wholesale market is of paramount importance, both to KCOM and to its competitors, as this underpins competition in retail services, which delivers benefits for consumers. We consider this is best achieved through *ex ante* regulation which, in comparison to reliance on *ex post* competition law remedies alone, would:
- provide greater clarity on the type of behaviour that is/is not allowed; and
  - can facilitate more timely enforcement due to the greater certainty and specificity provided by *ex ante* obligations.
- 4.8 In the present circumstances of the Hull Area, we consider that competition law remedies alone would be insufficient to address the competition problems we have identified.

### Provisional conclusion following assessment of the competition concerns

- 4.9 In light of our market analysis, in particular our SMP assessment, and the anticipated insufficiency of competition law, we consider that SMP regulation is necessary in order to address the competition concerns identified. We next turn to our assessment of the appropriate remedies.

### Current remedies assessment

- 4.10 Given our assessment of competition concerns set out above, we have considered what remedies are required to address these concerns. Since both the WLA and WBA markets in the Hull Area have been regulated for several years, to inform this consideration we have assessed the extent to which the current remedies package has been effective in promoting competition in the Hull Area. We have undertaken this analysis by reference to both discussions with third party telecoms providers in the Hull Area and observed market outcomes in each market in the Hull Area.

### Stakeholder discussions

- 4.11 To enhance our understanding of the state of competition in the Hull Area and the concerns of potential competitors to KCOM, we have spoken with ten telecoms

providers that operate in the Hull Area.<sup>67</sup> We discuss the key themes raised by these providers below.

#### Demand for a wholesale fibre access product

- 4.12 All the providers with whom we engaged have a strong interest in a fibre access product, and many of these operators also informed us that they had asked KCOM for some form of wholesale access to KCOM's fibre network since Lightstream (KCOM's retail fibre broadband service) was launched.
- 4.13 A couple of telecoms providers ([redacted]) expressed a preference for a product similar to BT's GEA service (the BT product developed in response to our Virtual Unbundled Local Access (VULA) obligation imposed on BT in the WLA market in the rest of the UK).<sup>68</sup> Another ([redacted]) suggested that although it would not purchase such a product itself, it would benefit from a GEA-type product as it would expect that other providers would consume it and offer wholesale services using it, which it could then purchase.
- 4.14 On the other hand, four providers ([redacted]), [redacted], informed us that their preference would be for a WBA-type product. [redacted].

#### Level of competition with KCOM

- 4.15 As the table below illustrates, KCOM faces some competition in the Hull Area, most significantly from fixed-wireless operators. Yet, given that there are likely to be approximately 150,000 broadband connections in the Hull Area, KCOM still has the vast majority (over 90%) of broadband customers in the Hull Area.<sup>69</sup>

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<sup>67</sup> [redacted]

<sup>68</sup> VULA provides access to BT's FTTC and FTTP network deployments. Telecoms providers connect to the VULA service at a 'local' aggregation point and are provided a virtual connection from this point to the customer premises.

<sup>69</sup> The figure of 150,000 is based on the assumption that the national take-up level of 78% is applied to the 192,000 total premises in the Hull Area.

**Table 4.1: Customer volumes of KCOM's competitors in the Hull Area**

	CP	Approx. customer volumes for telephony and/or broadband	
		Wholesale	Retail
Fixed access operator ([X]) and resellers	[X]	[X]	[X]
	[X]	[X]	[X]
	[X]	[X]	[X]
	[X]	[X]	[X]
	[X]	[X]	[X]
	[X]	[X]	[X]
	<b>Total</b>	[X]	[X]
Fixed-wireless operators <sup>1</sup> and a reseller ([X])	[X]	[X]	[X]
	[X]	[X]	[X]
	[X]	[X]	[X] <sup>2</sup>
	[X]	[X]	[X]
	<b>Total</b>	[X]	[X]

<sup>1</sup> confirmed by s135 information requests, with the exception of [X].

<sup>2</sup> [X] customers are served with fixed-wireless services, while [X] are serviced with fixed fibre services.

4.16 Among fixed-access CPs, competition appears to be purely for business customers.

4.17 [X]

4.18 One operator ([X]) claimed that fixed-wireless operators are reaching their limits in terms of the number of customers they can serve in the urban areas of Hull. This is due to the number of wireless networks operating in the metropolitan areas of Hull and the limited availability of spectrum.

### Observed outcomes

4.19 As part of our assessment of the remedies currently imposed in each of the WLA and WBA markets in the Hull Area, we have considered the extent to these have been successful in promoting retail competition in downstream market in the Hull Area.

4.20 There have been positive developments in the retail broadband market for consumers in the Hull Area since the last reviews of these markets. We have seen significant investment in fibre networks in the Hull Area by both the incumbent and by third party telecoms providers.

4.21 At the time the last reviews were concluded in June 2014, KCOM was at the outset of its fibre network deployment, having passed only 15,000 premises. Three years on, KCOM is in the latter stages of this roll-out, having passed 137,000 homes and business premises and is expecting to reach 150,000 premises passed (equivalent to more than 75% of the Hull Area) by December 2017.<sup>70</sup> This network uses mostly Fibre to the Premises (FTTP) technology, which is capable to delivering broadband at both superfast and ultrafast speeds.

4.22 Other telecoms operators have also invested in fibre infrastructure in the Hull Area. MS3, an operator previously focused on providing telecoms services to businesses, has recently begun expanding its FTTP network to offer a residential fibre broadband

<sup>70</sup> KCOM, *Press release for preliminary results 2016/17*, <http://www.kcomplc.com/media/1622/kcom-preliminary-results-rns-fy17-final.pdf>



service under the ConnectHull brand. MS3's initial network build was set to cover a trial area of 1,200 homes ([><]), followed by another 250 streets by the end of 2017 and 20,000 homes per year from then onwards.<sup>71</sup>

- 4.23 In addition, CityFibre, a telecoms operator that owns fibre networks in many cities around the UK, has also built a fibre network. Rolled out in partnership with Pure Broadband, a Hull-based telecoms operator, this network also offers local businesses ultrafast broadband via FTTP.<sup>72</sup>
- 4.24 In our Strategic Review of Digital Communications (DCR), we explained our strategic shift to encourage, where possible, the deployment of new ultrafast broadband networks to help secure the UK's position as a world leader in the availability and capability of its digital networks. These investments in FTTP networks in the Hull Area are therefore welcome and should provide consumers in the Hull Area with the faster and more reliable broadband connections that are important in the daily lives of individuals and businesses.
- 4.25 However, despite these developments, the Hull Area still lags significantly behind the rest of the UK from a competition perspective, as there is limited competition at either the wholesale or the retail level. There is no competition from telecoms providers using their own equipment in KCOM's exchanges (an approach commonly used to compete in the rest of the UK), despite regulation being in place since 2004 via an obligation on KCOM to provide such access upon reasonable request; there is no cable operator; and none of the large national retail providers – Sky, TalkTalk and Vodafone – operate in the Hull Area at all, using KCOM's networks or otherwise.
- 4.26 As we have considered in Section 3, the very limited competition comes largely from fixed-wireless operators and very small telecoms providers using KCOM's wholesale services. The three largest fixed-wireless operators serve both business and residential customers, but combined have a market share of less than 10%. These shares are also in danger of shrinking as their customers are likely to seek more reliable and faster connections on KCOM's fibre network. This is the root of their interest in wholesale access to KCOM's fibre network.
- 4.27 The very small telecoms providers using KCOM's network only serve business customers and use predominantly retail-minus, white label services – although there is some use of WBA services. Retail-minus services are broadband packages that can simply be resold to retail customers. The virtue of retail-minus services for a provider is that they require very little investment, even less than using WBA services. The downside, from a competition perspective, is that they offer very little scope of innovation (the purchaser simply resells what they buy) and very limited scope to compete on price. The lack of a wholesale fibre broadband product is also damaging to these competitors, as they are unable to offer equivalent services and are losing customers as a result.
- 4.28 This illustrates that the level of competitive pressure present in the rest of the UK to offer greater choice, higher quality and lower prices is not present to the same extent in the Hull Area.

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<sup>71</sup> <http://www.ispreview.co.uk/index.php/2017/01/first-homes-live-ms3s-connecthull-ftth-broadband-network-hull-uk.html> [accessed on 8 June 2017]

<sup>72</sup> <https://www.cityfibre.com/news/businesses-offered-choice-as-hull-becomes-a-gigabit-city/> [accessed on 8 June 2017]

- 4.29 This very limited competition appears to be showing through in the form of higher retail prices. Our preliminary research indicates that KCOM's retail prices for standard and superfast broadband appear to be higher than those of the largest providers in the rest of the UK, especially when introductory discounts, which are very common in the rest the UK but not from KCOM, are taken into account.
- 4.30 That said, the existence of competing fibre investments from MS3 and CityFibre, and the presence of several small providers seeking to compete, offers a prospect of there being greater competition in the future, at least at the retail level. In particular, our discussions with providers has confirmed a significant level of interest in making greater use of KCOM's fixed network to expand their geographic coverage and retail broadband offerings. We therefore consider it necessary to ensure that regulations support competitive growth, while ensuring that our actions do not undermine the incentives for telecoms providers to continue to invest.
- 4.31 In this regard, our focus is on KCOM's fibre network. KCOM is obliged to provide access on reasonable request in both the WLA and WBA markets, but as yet there are no wholesale fibre services available to other telecoms providers. We understand that CPs have expressed an interest to KCOM for such access, including through the formal Statement of Requirements (SoR) process, but that these have so far not been accepted by KCOM. KCOM has told us in the past that it was considering engaging with CPs to understand what fibre access they wanted, with the expectation being that it would offer a retail-minus, white label product. However, we do not believe that this has yet taken place.
- 4.32 Moreover, in our view KCOM's new fibre network presents a realistic opportunity for the small telecoms providers operating in the Hull Area to compete effectively in retail broadband services, more so than the legacy copper network and Local Loop Unbundling (LLU). This is because using KCOM's copper network via LLU requires significant investment on the part of the competing providers to be present in every copper exchange. While this was clearly viable for the likes of Sky and TalkTalk in the rest of the UK, no form of LLU was taken up by operators in the Hull Area. On the other hand, Virtual Unbundled Local Access (VULA), the access by which competitors can offer superfast or ultrafast broadband products to customers on KCOM's fibre network, requires less investment. This is because they will only need to interconnect with KCOM at a few locations to offer such services across the whole fibre network.
- 4.33 Our view is that telecoms providers operating in the Hull Area are best placed to steer the development of a wholesale fibre broadband product, as this would ensure that any product(s) developed would meet their needs. Therefore, our primary aim in this review is to improve the process for retail providers to request appropriate wholesale access services suitable for their needs. Our view is that increasing the current, very limited, take-up of wholesale services based on KCOM's network will increase competition in retail broadband services.

### **Approach to Remedies**

- 4.34 Following on from the above, our objectives for the remedies package we are proposing are, broadly, to:
- empower CPs to monitor KCOM's compliance and bring complaints to us, by requiring KCOM to provide public KPIs about SoR requests received, time taken and numbers accepted;

- improve transparency and accountability in relation to requests for new network access and the SoR process, by requiring KCOM to publish information on SoR requests, allowing other CPs the opportunity to add their demand to the request, and to inform Ofcom of when it publishes these details on its website; and
- Improve accessibility to information about KCOM's wholesale services and the SoR process.

## Summary of proposals

4.35 Table 4.2 summarises the remedies that we propose to impose on KCOM in the WLA and WBA markets.

Table 4.2: Summary of current and proposed remedies for KCOM

Wholesale market	Current remedies	Proposed general remedies (changes are <i>italicised</i> )
Wholesale local access in the Hull Area	<ul style="list-style-type: none"> <li>– Requirement to provide network access on reasonable request</li> <li>– Requirements relating to requests for new forms of network access</li> <li>– Requirement not to discriminate unduly</li> <li>– Requirement to publish a reference offer</li> <li>– Requirement to notify changes to charges, terms and conditions</li> <li>– Requirement to notify changes to technical information</li> </ul>	<ul style="list-style-type: none"> <li>– Requirement to provide network access on reasonable request, <i>excluding services that use exchange side components of the copper network</i></li> <li>– Requirements relating to requests for new forms of network access</li> <li>– Requirement not to discriminate unduly</li> <li>– Requirement to publish a reference offer</li> <li>– Requirement to notify changes to charges, terms and conditions</li> <li>– <i>Requirement to publish quality of service information as directed by Ofcom</i></li> <li>– Requirement to notify changes to technical information</li> <li>– <i>Accounting separation</i></li> <li>– <i>Cost accounting</i></li> </ul>
Wholesale broadband access in the Hull Area	<ul style="list-style-type: none"> <li>– Requirement to provide network access on reasonable request</li> <li>– Requirement not to discriminate unduly</li> <li>– Requirement to publish a reference offer</li> <li>– Requirement to notify changes to charges, terms and conditions</li> <li>– Requirement to notify changes to technical information</li> <li>– Requirement to publish quality of service information as directed by Ofcom</li> <li>– Accounting separation</li> </ul>	<ul style="list-style-type: none"> <li>– Requirement to provide network access on reasonable request</li> <li>– <i>Requirements relating to requests for new forms of network access</i></li> <li>– Requirement not to discriminate unduly</li> <li>– Requirement to publish a reference offer</li> <li>– Requirement to notify changes to charges, terms and conditions</li> <li>– Requirement to publish quality of service information as directed by Ofcom</li> <li>– Requirement to notify changes to technical information</li> <li>– Accounting separation</li> <li>– <i>Cost accounting</i></li> </ul>

- 4.36 We explain in detail below the basis for our provisional view that each of these remedies addresses our competition concerns in each of the WLA and WBA markets.

### **Assessment of appropriate remedies**

- 4.37 In this subsection, we set out our proposed remedies for the WLA and WBA markets. In most cases the current remedies and our proposals are the same for each market given that the competition concern we are addressing is the same; however, where there are differences in either the remedy proposed or the basis for proposing a remedy, we highlight the relevant differences between the two markets.
- 4.38 We assess each potential remedy in turn by setting out:
- the existing regulation (if any);
  - the aim and effect of regulation;
  - our proposals; and
  - our consideration of the relevant legal tests for imposing the proposed regulation.
- 4.39 The draft legal instruments that would give effect to our proposed remedies are set out in Annex 4.

### **Requirement to provide network access on reasonable request and to provide such access on fair and reasonable terms, conditions and charges**

#### Current remedies

- 4.40 In both the WLA and WBA markets in the Hull Area, KCOM is currently required to provide network access on reasonable request and to provide such access as soon as it is reasonably practicable and on fair and reasonable terms, conditions and charges. These obligations apply equally to KCOM's copper and fibre networks in each market.

#### Aim and effect of regulation

- 4.41 The level of investment required by a third party to replicate a dominant provider's network in order to compete is a significant barrier to entry. In our view, an obligation requiring KCOM to provide access to third parties on reasonable request is necessary to promote effective competition in the relevant retail market. This regulation relates to both new and existing forms of access. We consider that, in the absence of such a requirement, KCOM would have both the incentive and ability to refuse access to services in each of the WLA and WBA markets, thereby favouring its own retail operations. This would hinder sustainable competition in the corresponding retail markets, ultimately against retail customers' interests.
- 4.42 An obligation to provide access on reasonable request could be rendered meaningless if KCOM could set unfair terms and conditions for such access, as this would deter third parties.

Our proposals

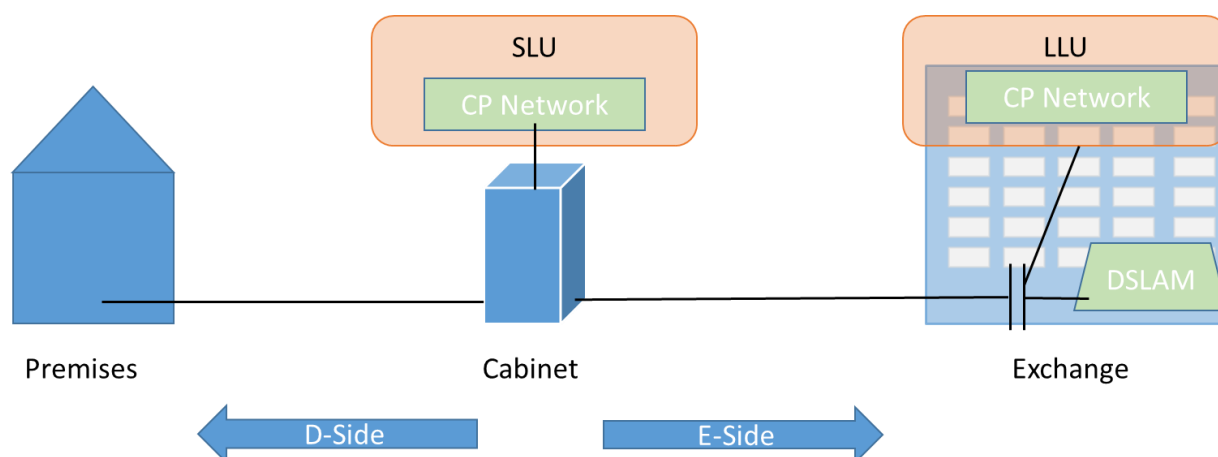
- 4.43 We are therefore proposing an SMP obligation in each of the WLA and WBA markets requiring KCOM to provide network access on reasonable request and on fair and reasonable terms, conditions and charges. Such an obligation will, in our provisional view, promote effective competition in the relevant downstream services. In addition, we propose that KCOM provide such access in accordance with such terms, conditions and charges as Ofcom may from time to time direct and comply with any direction Ofcom might make under this condition.
- 4.44 We propose in Section 3 above that the WLA and WBA markets in the Hull Area are defined as covering wholesale services regardless of whether these are ultimately used to serve business or residential consumers. Therefore, the requirement to provide access on reasonable request, in addition to the other SMP conditions proposed below, will apply equally to both categories of customers. As such, were a telecoms provider to request network access to serve residential customers in the Hull Area, we would expect KCOM to treat such a request in the same way as if it were to serve business customers.

*Requirement to provide network access on reasonable request in the WLA market*

- 4.45 We have considered whether there is a case for proposing to impose a requirement on KCOM to provide a specific form of network access, namely Virtual Unbundled Local Access (VULA). While we have had expressions of interest for access to KCOM's fibre, it is not clear to us what should be the priority for KCOM when developing an alternative access product (i.e. whether access should be through a VULA-like product or one more closely aligned to WBA-type products). Accordingly, we consider that it would be preferable for the precise specifications of a fibre access product to come out of local industry demand. We consider that an obligation to grant reasonable requests for network access, alongside a requirement to publish guidelines about how telecoms providers can obtain new forms of network access, strikes the right balance between ensuring that telecom providers have access to the wholesale services they need to compete, and not requiring KCOM to develop products which would be expensive to develop and which might not meet the needs of local telecoms providers.
- 4.46 When assessing whether a request is reasonable, particularly where such a request is for new network access that requires development, we would expect KCOM to assess the costs involved in the development and subsequent provision of such access. We currently consider that such an assessment should be strictly limited to the costs directly associated with the development and provision of the service requested and we welcome stakeholders' views on this.
- 4.47 KCOM's current obligation in the WLA market effectively requires it to provide access to both its copper and fibre networks on reasonable request. However, given that there are no WLA copper-based products available or consumed at present, and KCOM is rolling out an extensive FTTP network, our provisional view is that an obligation requiring unlimited access to KCOM's copper network on reasonable request is no longer necessary.
- 4.48 Consequently, we are proposing to remove the requirement for KCOM to provide services that use e-side (exchange side) components of the copper network; specifically, we propose to implement this by excluding LLU from the network access requirement proposed in the WLA market. In our view, it is unlikely to be commercially viable for telecoms providers to utilise LLU in the Hull Area, considering

that the use of copper-based broadband is declining. We therefore, consider that it is unnecessary to continue to impose such a requirement on KCOM. We are, however, leaving available the option for a telecoms provider to request a service that uses d-side (distribution side) copper components, i.e. Sub-Loop Unbundling (SLU). We consider that there may be demand for such access in areas where KCOM has invested in FTTC rather than FTTP, or where KCOM has not deployed fibre at all.

**Figure 4.3: The e-side and d-side components of a network**



*Requirement to provide network access on reasonable request in the WBA market*

- 4.49 We have considered imposing a specific network access remedy on KCOM in the WBA market in the Hull Area. However, as explained in Section 2, in an FTTP environment there is little difference between a VULA and a WBA fibre remedy. Therefore, the same concerns over uncertainty about where demand from telecoms providers will be greatest and product specification outlined above apply.
- 4.50 Telecoms providers operating in the Hull Area currently purchase copper-based WBA services to compete in retail broadband services. The fact that access to KCOM's fibre network is currently unavailable makes copper access vital for protecting current levels of competition in retail broadband services in the Hull Area, in advance of fibre access being granted by KCOM. As such, we propose to retain the obligation on KCOM to provide access to its copper network on reasonable request. We note, however, that access to KCOM's copper network is likely to become less important once telecoms providers are able to compete using fibre-based access services, and at that point this obligation in relation to copper broadband services may no longer be necessary (as we now propose for LLU specifically in the WLA market in the Hull Area).

*Requirement for charges to be fair and reasonable*

- 4.51 As identified in Section 3, we have provisionally found that KCOM has SMP in both the WLA and WBA markets in the Hull Area. We believe that, as a result of this lack of effective competition, there is a risk that KCOM could fix and maintain prices at an excessively high level in each of these markets. Where such prices are offered to wholesale customers this would have adverse consequences end-users through elevated retail prices. We also consider that KCOM would have reduced incentives to reduce costs and improve efficiency.

- 4.52 To address this risk of excessive pricing we consider that some regulatory constraint on KCOM's WLA and WBA prices is appropriate. However, in formulating our proposals we have taken account of the extent of KCOM's investment. In particular, we recognise that KCOM has been investing in an FTTP network since 2012 and should be permitted to benefit from sufficient upside potential from its investment to offset the downside risk of failure.
- 4.53 We therefore propose to impose on KCOM a fair and reasonable charges obligation in each of the WBA and WLA markets. In considering whether charges are fair and reasonable, we will consider if charges in these markets are set on the basis of Long-Run Average Incremental Cost Plus (LRIC+) basis, including a reasonable rate of return and a reasonable contribution to common costs.
- 4.54 In terms of monitoring compliance with this proposed obligation, we would expect to consider how the charges for KCOM's wholesale products compare to BT's charges for wholesale products of comparable bandwidths in the rest of the UK. If KCOM's charges were in excess of these benchmarks, we are likely to give further scrutiny to those prices in order to ascertain whether they are consistent with efficiently incurred LRIC+ as described above.<sup>73</sup> We welcome stakeholders' views on whether our proposed approach to interpreting 'fair and reasonable' and benchmarking is an appropriate approach.

### Legal tests

- 4.55 For the reasons set out below, we are satisfied that the proposed conditions for KCOM in the WLA and WBA markets in the Hull Area meet the various tests set out in the Act.
- 4.56 Section 87(3) of the Act authorises Ofcom to set SMP service conditions requiring the dominant provider to provide such network access as Ofcom may from time to time direct. These conditions may, pursuant to section 87(5), include provision for securing fairness and reasonableness in the way in which requests for network access are made and responded to and for securing that the obligations in the conditions are complied with within periods and at times required by or under the conditions. Section 87(9) of the Act authorises Ofcom to set SMP services conditions to be imposed on a dominant provider in relation to price controls and rules on the recovery of costs and cost orientation regarding the provision of network access, subject to the conditions of section 88 of the Act being satisfied.
- 4.57 When considering the imposition of such conditions in a particular case, we must take into account the following six factors set out in section 87(4):
- the technical and economic viability (including the viability of other network access products, whether provided by the dominant provider or another person), having regard to the state of market development, of installing and using facilities that would make the proposed network access unnecessary;
  - the feasibility of the provision of the proposed network access;

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<sup>73</sup> This would be used as benchmark to inform our enforcement priorities. For the avoidance of doubt, we are not proposing to raise a presumption that that prices above that level are not fair and reasonable, nor that prices below that level are fair and reasonable.



- the investment made by the person initially providing or making available the network or other facility in respect of which an entitlement to network access is proposed (taking account of any public investment made);
  - the need to secure effective competition (including, where it appears to Ofcom to be appropriate, economically efficient infrastructure based competition) in the long term;
  - any rights to intellectual property that are relevant to the proposal; and
  - the desirability of securing that electronic communications services are provided that are available throughout the Member States.
- 4.58 In reaching our proposal that KCOM should be subject to requirements to provide network access on reasonable request, we have taken each of the above six factors into account. In particular, having considered the economic viability of building access networks within this review period to achieve ubiquitous coverage that would make the provision of network access unnecessary, we consider that the SMP conditions are required to secure effective competition, including economically efficient infrastructure based competition, in the long term in each of the WLA and WBA markets. The requirements for KCOM to meet only reasonable network access requests also ensure that due account is taken of the feasibility of the proposed network access, and of the investment made by KCOM initially in providing the network.
- 4.59 We are also required to ensure that the proposed conditions satisfy the tests set out in section 88 of the Act as the requirements place controls on network access pricing, insofar as charges are required to be fair and reasonable. Section 88(1)(a) of the Act requires that Ofcom must not impose pricing conditions unless it appears from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion. We have discussed above that we consider that, in the absence of price regulation requiring prices to be 'fair and reasonable,' KCOM may fix or maintain some or all of its prices at an excessively high level so as to have adverse consequences for end-users of public electronic communications services.
- 4.60 Section 88(1)(b) of the Act requires that the pricing conditions should be appropriate for the purposes of promoting efficiency, promoting sustainable competition and conferring the greatest possible benefits on the customers of public electronic communications services.
- 4.61 In the cases where we propose fair and reasonable charges obligations, we consider that they will prevent KCOM from setting charges that are excessively high or that impact other wholesale providers' ability to compete with KCOM in downstream markets and so will support the aim of promoting improved efficiency.
- 4.62 We also consider that the provision of network access on fair and reasonable terms will promote sustainable competition by ensuring that other telecoms providers can effectively compete downstream. We consider this to be the appropriate approach for the purposes of conferring the greatest benefits on customers of downstream services.
- 4.63 We are also required, under Section 88(2) of the Act, to take account of KCOM's investment in matters to which the condition relates. We believe that fair and reasonable charges will allow KCOM's costs to be taken into account and will also

provide for common cost recovery. These conditions are therefore an appropriate basis upon which to control KCOM's prices.

- 4.64 We have considered our duties under section 3 and all the Community requirements set out in section 4 of the Act. The conditions are aimed at promoting competition and securing efficient and sustainable competition for the maximum benefit of consumers by facilitating the development of competition in downstream markets.
- 4.65 Section 47(2) requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. In our view, the proposed conditions are:
- objectively justifiable, in that they facilitate and encourage access to KCOM's network in the WLA market and in the WBA market, and therefore promote competition to the benefit of consumers;
  - not unduly discriminatory, in that we are only proposing to impose the requirements on KCOM. We have not provisionally identified any other telecoms providers as holding a position of SMP in the WLA or WBA markets in the Hull Area;
  - proportionate, in that they are targeted at addressing the market power that we propose KCOM holds in the WLA and WBA markets and do not require it to provide access if it is not technically feasible or reasonable, in that we are not requiring KCOM to provide access to its e-side copper network at the WLA level; and
  - transparent, in that the conditions are clear in their intention to ensure that KCOM provides access to its network in order to facilitate effective competition.
- 4.66 In addition, we consider that the proposed condition is consistent with the BEREC Common Positions on WBA and WLA.
- 4.67 For the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified in each of the WLA and WBA markets, in line with section 87(1) of the Act.

## **Requests for new forms of network access**

### Current remedies

- 4.68 KCOM is currently required, in the WLA market, to publish guidelines that set out a process by which it will address requests for new forms of network access, and to deal with any request in accordance with those guidelines. This process is known as the Statement of Requirements (SoR) process, with a request for new network access being known as an SoR. This obligation is not currently imposed in the WBA market.

### Aim and effect of regulation

- 4.69 Vertically integrated telecoms providers have the ability to favour their own downstream business over third party telecoms providers. One form of discrimination is in relation to the handling of requests for new forms of network access. This has the potential to distort competition at the retail level by placing third party telecoms providers at a disadvantage compared with the downstream retail business of the vertically integrated operator in terms of their ability to introduce new services to

meet their customers' needs and in terms of their ability to offer innovative services in order to compete more effectively.

- 4.70 Therefore, the aim of this regulation is to support access seekers (that is a party that has requested access) in ensuring that there is a fair, reasonable and transparent process for assessing reasonable requests for new forms of network access. To make such a request, the telecoms provider must provide the dominant provider with a SoR against which the reasonableness of the request can be assessed.
- 4.71 In the absence of such a requirement, KCOM would have the incentive and ability to refuse to provide new forms of network access at the wholesale level, thereby favouring its own retail operations with the effect of hindering sustainable competition in the corresponding downstream markets, ultimately against the interests of customers.

### Our proposals for the WLA market

- 4.72 We are proposing to re-impose an SMP obligation in the WLA market requiring KCOM to publish guidelines that would set out a process by which it will address requests for new forms of network access, and deal with any request in accordance with those guidelines. In addition, we propose that KCOM must comply with any direction Ofcom might make under this condition.
- 4.73 We consider this obligation to be vital in bringing effective competition to the WLA market in the Hull Area, and therefore to the retail market, resulting in benefits to customers in the form of increased choice of service and lower prices. This SMP condition will enable telecoms providers to request access to KCOM's fibre network to compete with next generation broadband products; this is particularly important given that we are not proposing to impose a specific network access remedy, such as VULA, in this market review.
- 4.74 The proposed obligation includes all the requirements set out in the current SMP condition, but also includes some additional requirements.
- We are proposing to require KCOM to publish information (redacted to protect the commercial confidentiality of the access seeker) on each SoR request it receives, sufficient to enable other telecoms providers to consider whether they are interested in such access. To support this, we are proposing that KCOM implements a process that enables an access seeker to identify to KCOM the information in the SoR that is to be treated as confidential.
  - We are proposing to require KCOM to publish prominently on its website non-confidential SoR data in the form of Key Performance Indicators (KPIs).
  - We are proposing a requirement on KCOM to include in any response rejecting a request for new network access, information about the avenues of redress.
  - We are proposing to require KCOM to be transparent where its SoR process applies to any particular request for new network access.
- 4.75 We explain these changes and our rationale for proposing them below. Given the extent of the changes we are proposing, we are also proposing that KCOM should have 56 days before these revised requirements come into force. This will give KCOM 56 days from the date of our statement to implement the necessary changes, including revising its SoR guidelines.

*Publication of SoR requests*

- 4.76 The Hull Area includes only 0.7% of UK premises, equivalent to approximately 194,000 business and residential locations that could be served with a fixed line and/or broadband service. This fact, alongside the small size of telecoms providers operating in the Hull Area (with the exception of KCOM), means that certain types of access that would benefit many telecoms providers and help create effective retail competition might not be developed as the requests might not be reasonable given the volume forecasts provided in individual requests.
- 4.77 To mitigate this risk we are proposing to require KCOM to publish information about all SoR requests it receives on its website. The requirement would be for KCOM to publish sufficient information to allow a third-party telecoms provider to consider whether it is also interested in such access. We envisage that this will allow other telecoms providers to express an interest for the same network access while KCOM is considering the request, so that KCOM's consideration of the request is based upon all the telecoms providers that want this type of access and their collective forecast demand. KCOM would be required to publish this information within five days of receiving an SoR and to allow other telecoms providers adequate time to review this information and make expressions of interest before making its decision in relation to the SoR.
- 4.78 We consider that it is vital to the success of this new approach that this information about SoR requests is published prominently on KCOM's website. To enable us to monitor how this information is published, we are also proposing that KCOM is required to inform Ofcom each time it receives an SoR request. This requirement will also ensure that we are familiar with the demand for new services by telecoms providers in the Hull Area.
- 4.79 Alongside this, we are proposing to require KCOM to comply with any direction Ofcom might make under this SMP condition. Should we consider that this information is not being displayed prominently enough, we will consider issuing a direction specifying more detail on where and how this information must be published.
- 4.80 We consider that these obligations will increase transparency and accountability, which will be beneficial to facilitating the development of new network access products. We recognise that while this proposal does remove a first-mover advantage from providers seeking access, in our view this obligation on KCOM is proportionate to assist the development of effective retail competition.
- 4.81 We also appreciate that there may be aspects of SoR requests that the requesting parties consider to be confidential and should not be published by KCOM in meeting this obligation. We have therefore also proposed to require that KCOM have in place a process to determine with the access seeker what information requesting parties consider, if any, to be confidential. Our proposed obligation is not intended to require KCOM to publish any information which would breach the commercial confidentiality of a requesting party.

*Publication of KPIs*

- 4.82 KCOM is currently under an obligation to satisfy any reasonable request for new forms of network access. We are proposing to impose a requirement on KCOM to publish KPIs on certain aspects of its SoR process on its website in order to provide transparency. We consider that it is necessary for KCOM to publish SoR KPIs to

enable Ofcom and other telecoms providers to monitor how the SoR process is functioning. Specifically, it will allow Ofcom and other telecoms providers to observe how effectively the SoR process is working. It will also allow both Ofcom and telecoms providers to monitor the extent to which it might be discriminating between telecoms providers.

4.83 The KPIs we are proposing are:

- the number of SoR requests received by KCOM;
- the number of requests that are unanswered by KCOM 25 working days or more after receipt;
- the number of requests that are unanswered by KCOM 75 working days or more after receipt;
- the number of requests accepted;
- the number of requests rejected;
- the number of requests for which KCOM took longer than 25 working days to reject<sup>74</sup>;
- the number of requests for which KCOM took longer than 45 working days to reject;
- the number of project plans agreed between KCOM and access seekers;
- the number of project plans agreed between KCOM and access seekers more than 80 days the SoR request was received; and
- the number of project plans agreed between KCOM and access seekers more than 95 days the SoR request was received.

We propose that KCOM be required to publish this data every six months for the preceding six-month period (in respect of April to September, and October to March).

#### *Options of redress for rejected SoRs*

4.84 We propose to require that in the event that it rejects an SoR application, KCOM must inform the CP responsible for submitting the SoR what avenues of redress are available. Such avenues will include any dispute resolution process that KCOM has, in addition to the dispute resolution process under the Act.

4.85 As previously stated, many of the competing providers in the Hull Area are relatively small in size and may not have the resources to fully understand the options available to them should KCOM reject their SoR request. By requiring KCOM to provide this information, the options available to telecoms providers would be transparent should they disagree with KCOM's decision or the reasons given by KCOM for reaching that decision.

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<sup>74</sup> This measure is intended to capture all requests that are unanswered that reach the 25 day threshold during the relevant reporting period, irrespective of whether the requests was made during or before the reporting period. This is also the case for the equivalent 45 day measure.

*Transparency as to when SoRs relate to regulatory obligations*

- 4.86 Within its current published guidelines KCOM distinguishes between those services that fall within regulated markets in which it is required to grant network access on reasonable request, and those that do not. KCOM explains that SoRs not required by regulation are still considered as commercial propositions, but states that it is “*under no obligation to comply with the process or timescales set out below, or to meet the rest on regulated terms*”.
- 4.87 The distinction between SoRs that relate to KCOM’s regulatory obligations and those that do not is important because:
- for products which KCOM is not obliged to provide under an SMP condition, KCOM is likely to have greater scope as to how it considers a request; that is, subject to any requirements of competition law, it can assess the SoR on the basis of its fit with its assets, skills and resources, its commercial attractiveness, and the opportunity cost to KCOM; but
  - for products which KCOM is obliged to supply as a result of an SMP finding, KCOM is obliged to provide network access where there is a reasonable request.
- 4.88 The effect of this is that KCOM is likely to take into account different considerations depending on whether or not an SoR concerns network access in a regulated market.
- 4.89 From this perspective, understanding whether an SoR relates to KCOM’s regulatory obligations is vital for requesting telecoms providers to understand their position. For example, where an initial request is classified as not relating to KCOM’s regulatory obligations for particular reasons, a telecoms provider can consider whether to submit a different SoR which would fall under KCOM’s regulatory obligations; this SoR may have a greater chance of being accepted. Additionally, knowing the classification of an SoR can provide transparency on whether or not there is an option of bringing a complaint or referring a dispute to Ofcom.
- 4.90 We are therefore proposing to add a requirement for KCOM to provide transparency on whether an SoR falls within the scope of the guidelines which apply to new requests for regulated access. This will add clarity as to the status, process and timings that apply to a telecoms provider’s request.
- 4.91 Requiring that KCOM provide this level of detail to telecoms providers will ensure that telecoms providers are able to identify whether their request is for a service that falls within the regulated WLA or WBA markets and is therefore subject to the formal SoR process, or whether it falls outside of the regulated markets and is therefore being considered as a commercial proposition.

Proposals for the WBA market

- 4.92 We are proposing to impose the same SMP condition in the WBA market as we are proposing to impose in the WLA market. Given that there are currently no wholesale fibre access products available from KCOM, we consider that it is vital that there is a clear and transparent process for telecoms providers to request new network access in the WBA market. This is so that telecoms providers obtain the access to KCOM’s fibre network that they need to compete effectively in the provision of retail services.

The fact that the process will be the same in both the WLA and WBA markets will, in our view, also assist providers seeking access.

### Legal tests

- 4.93 For the reasons set out below, we are satisfied that the proposed conditions for KCOM in the WLA and WBA markets in the Hull Area meet the relevant tests set out in the Act.
- 4.94 Section 87(3) of the Act authorises the setting of SMP services conditions in relation to the provision of network services and these conditions may, pursuant to section 87(5) of the Act, include provision for securing fairness and reasonableness in the way in which requests for network access are made and responded to, and for securing that the obligations in the conditions are complied with within the periods and at the times required by or under the conditions. We consider that the proposed conditions will assist in securing fairness and reasonableness in the way in which requests for network access are made and responded to, as provided for under section 87(5)(a). Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish, in such manner as Ofcom may direct, all such information for the purpose of securing transparency.
- 4.95 In making our proposals, we have also taken into account the factors set out in section 87(4) of the Act. In particular, having considered the economic viability of building access networks to achieve ubiquitous coverage that would make the provision of network access unnecessary, we consider that the SMP condition is required in each of the WLA and WBA markets to secure effective competition, including economically efficient infrastructure-based competition, in the long term.
- 4.96 We have considered our duties under section 3 of the Act. We consider that, in ensuring access seekers are able to make requests for new forms of network access based on an agreed SoR process, the proposed conditions would in particular further the interests of consumers in relevant markets by the promotion of competition, investment and innovation. In this regard we have taken particular account of section 3(4)(d) of the Act, which highlights the desirability of encouraging investment and innovation in relevant markets.
- 4.97 We have considered the Community requirements as set out in section 4 of the Act. We consider that the proposed conditions will promote competition in relation to the provision of electronic communications networks and encourage the provision of network access for the purpose of securing efficiency and sustainable competition in the markets for electronic communications networks and services.
- 4.98 We also consider that the proposed conditions meet the criteria set out in section 47(2) of the Act. The proposed conditions are:
- objectively justifiable, in that their purpose is to support the provision of access to KCOM's network and non-discrimination obligations in the processing of requests for new network access;
  - not unduly discriminatory, in that they apply to KCOM which is the only telecoms provider that we propose to have found has SMP in the WLA and WBA markets in the Hull Area;
  - proportionate, in that they set out the general process for requests for new forms of network access and thus encourage competition at the retail level, while

allowing the detail of the process to be agreed between the dominant provider and industry; and

- transparent, in that they are clear the intention to support the provision of access to KCOM's WLA and WBA networks in order to facilitate downstream competition.

4.99 For the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

## **Requirement not to discriminate unduly**

### Current remedies

4.100 KCOM is currently prohibited from unduly discriminating in relation to the provision of network access in both the WLA and WBA markets in the Hull Area.

### Aim and effect of regulation

- 4.101 A non-discrimination obligation is intended as a complementary remedy to the network access obligation, principally to prevent the dominant provider from discriminating in favour of its own downstream divisions and to ensure that competing providers are placed in an equivalent position. Without such an obligation, KCOM would have an incentive to provide the requested wholesale network access service on terms and conditions that discriminate in favour of its own retail divisions. For example, KCOM could decide to strategically provide the same services but within different delivery timescales. This behaviour could have an adverse effect on competition.
- 4.102 Discriminatory behaviour by KCOM in the supply of WLA and WBA products and services could undermine a level playing field in the relevant downstream markets to the detriment of competition and consumers. A non-discrimination remedy would help to maintain a level playing field between KCOM's downstream businesses and other telecoms providers who wish to use KCOM's WLA and WBA services in the Hull Area.
- 4.103 Non-discrimination can have different forms of implementation. A strict form of non-discrimination – i.e. a complete prohibition of discrimination – would result in the SMP operator providing exactly the same products and services to all telecoms providers (including its own downstream divisions) on the same timescales, terms and conditions (including price and service levels), by means of the same systems and processes and by providing the same information. Essentially, the inputs available to all telecoms providers (including the SMP telecoms provider's own downstream divisions) would be provided on a truly equivalent basis, an arrangement which has become known as Equivalence of Input (EOI). An EOI obligation removes any degree of discretion to the provision of access as between provision for self-supply and to third parties. The concept of EOI was first identified in Ofcom's Strategic Review of Telecoms in 2004/05 as one of our key policy principles to ensure that regulation of telecommunication markets is effective. Following on from this review, a specific form of EOI was implemented in various markets in the UK excluding the Hull Area in 2005 by means of the BT Undertakings.
- 4.104 On the other hand, a less strict implementation of non-discrimination than EOI – for example, a requirement not to discriminate unduly against particular persons or



classes of persons – may allow for flexibility and result in a more practical and cost-effective implementation of wholesale inputs in cases where it is economically justified. Such a form of more flexible non-discrimination obligation does, by its very nature, allow for certain discriminatory conduct provided that the discrimination in question is not undue. Whether specific conduct amounts to a breach of the undue discrimination obligation can only be determined on a case-by-case basis.

### Our proposals

- 4.105 We consider that KCOM continues to have the ability and incentive to unduly discriminate against other telecoms providers in favour of its own retail divisions. We therefore propose a requirement not to unduly discriminate in the provision of WLA and WBA services in the Hull Area in order to address these concerns.
- 4.106 Based on the particular characteristics of the Hull Area, we do not consider that it would be appropriate to impose a requirement on KCOM to provide network access on an EOI basis, given there is limited uptake of WLA and WBA products by competing providers in the Hull Area and the absence of a pre-existing EOI, such as that BT is subject pursuant to under the BT Undertakings. Imposing an EOI requirement as an SMP condition in the Hull Area would in this review be unduly onerous as it would require KCOM to significantly re-engineer existing systems and processes in order to comply with it.
- 4.107 In circumstances where we rely on the proposed no undue-discrimination requirement (rather than an EOI obligation) to remedy the incentive and ability for an operator with SMP to engage in discriminatory pricing and/or non-pricing practices, we refer propose to interpret this obligation in a manner consistent with Chapter 3 of our Access Guidelines. In this chapter, we explain that the aim of a no undue-discrimination condition is to ensure that a vertically integrated SMP operator does not treat itself in a way that benefits itself, its subsidiaries or its partners in such a way as to have a material adverse effect on competition. Furthermore, we explain in the Access Guidelines that:
- “In order to ensure compliance with its obligations as regards non-discrimination under the AID [Access and Interconnection Directive], in general, an SMP operator should ensure that:
- a) it applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners; and
- b) it can objectively justify any differentiation.”
- 4.108 We have also taken due account of the EC’s Costing and Non-discrimination Recommendation in formulating our proposal to impose a no undue discrimination condition on KCOM.<sup>75</sup> There are three recommendations relevant in this regard:

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<sup>75</sup> EC, September 2013. *Commission recommendation of 11.9.2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment*, [http://ec.europa.eu/smart-regulation/impact/ia\\_carried\\_out/docs/ia\\_2013/c\\_2013\\_5761\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/ia_carried_out/docs/ia_2013/c_2013_5761_en.pdf).

- that NRAs should ensure that the SMP operator provides wholesale inputs on at least an Equivalence of Output (EOO) basis;
- that NRAs should ensure that when a non-discrimination obligation is imposed, access seekers can use the relevant systems and processes with the same degree of reliability and performance as the SMP operators' own downstream retail arm; and
- that NRAs should require SMP operators subject to a non-discrimination obligation to provide access seekers with regulated wholesale inputs that allow the access seekers to effectively replicate technically new retail offers of the downstream retail arm of the SMP operator, in particular where EOI is not fully implemented.

4.109 We consider that the no undue discrimination obligation which we are proposing to re-impose is consistent with the Costing and Non-discrimination Recommendation. The Costing and Non-discrimination Recommendation (Recommendation 10) makes clear that we should ensure that whatever the systems and processes used by access seekers, the end result provides the same degree of reliability and performance to that enjoyed by the SMP operator's own downstream retail division(s).

4.110 We note that the Costing and Non-discrimination Recommendation also provides for the application of a technical replicability test, whether undertaken by the SMP operator and provided to the NRA or undertaken by the NRA itself, to ensure that access seekers can technically replicate new retail offers of the downstream business of the SMP operator.

4.111 We stated in the 2014 FAMR and the 2014 WBA that, having taken utmost account of the Costing and Non-discrimination Recommendation, it was neither appropriate nor proportionate to impose specific technical replicability requirements on KCOM.

4.112 Having taken utmost account of the Costing and Non-discrimination Recommendation in relation to technical replicability, we propose to maintain this approach – i.e. that the additional imposition of a technical replicability test in these markets is not appropriate or proportionate. There remains little appetite amongst other providers to offer services to consumers in the Hull Area. This is the case notwithstanding that KCOM has been and will continue to be subject to a package of SMP remedies including a general network access, no undue discrimination and certain transparency obligations. Given this absence of any material demand for network access from KCOM in the Hull Area, we consider that it is premature to consider imposing detailed technical replicability test requirements on KCOM and to do so would increase the regulatory burden (and potentially pass costs on to Hull Area consumers) without any significant prospect that it would result in benefits to competition. This is the same reason why we have decided not to impose specific network access remedies and other remedies such as EOI on KCOM at this time.

### Legal tests

4.113 For the reasons set out below, we are satisfied that the proposed conditions on KCOM in the WLA and WBA markets in the Hull Area meet the various tests set out in the Act.

4.114 Section 87(6)(a) of the Act authorises the setting of SMP services conditions requiring the dominant provider not to discriminate unduly against particular persons,

or against a particular description of persons, in relation to matters connected with the provision of network access.

4.115 We have considered our duties under section 3 and all the Community requirements set out in section 4 of the Act. In particular, the conditions are aimed at promoting competition and securing efficient and sustainable competition for the maximum benefit of consumers by preventing KCOM from leveraging its SMP through discriminatory behaviour into related downstream markets.

4.116 We also consider that the proposed conditions meet the criteria in Section 47(2) of the Act which require conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. The proposed conditions are:

- objectively justifiable, in that they provide safeguards to ensure competitors, and hence consumers, are not disadvantaged by KCOM discriminating in favour of its own downstream activities or between competing providers;
- not unduly discriminatory, in that the no undue-discrimination conditions are proposed to apply to KCOM which is the only telecoms provider which we propose to find has SMP in the WLA and WBA markets in the Hull Area;
- proportionate, in that they seek to prevent discrimination that would adversely affect competition and ultimately cause detriment to consumers rather than requiring strict equivalence; and
- transparent, in that the conditions are clear in what they are intended to achieve.

4.117 For the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

### The EC recommendations and BEREC common positions

4.118 We have explained above how we have taken into consideration the EC Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.<sup>76</sup>

4.119 We have also taken utmost account of the BEREC Common Positions relevant to each of the WLA<sup>77</sup> and WBA<sup>78</sup> markets. In relation to achieving the objective of a

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<sup>76</sup> September 2013 EC Recommendation on non-discrimination obligations.

<sup>77</sup> BEREC, *Revised BEREC Common Position on best practice in remedies on the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location imposed as a consequence of a position of significant market power in the relevant market*, BoR (12) 127, December 2012, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/1127-revised-berec-common-position-on-best-pr\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1127-revised-berec-common-position-on-best-pr_0.pdf).

<sup>78</sup> BEREC, *Revised BEREC Common Position on best practice in remedies on the market for wholesale broadband access (including bitstream access) imposed as a consequence of a position of significant market power in the relevant market*, BoR (12) 128, December 2012, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/1126-revised-berec-common-position-on-best-pr\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1126-revised-berec-common-position-on-best-pr_0.pdf)

level playing field, the BEREC Common Positions identify, amongst other things, as best practice that:<sup>79,80</sup>

“NRAs should impose an obligation on SMP CPs requiring equivalence, and justify the exact form of it, in light of the competition problems they have identified.

...NRAs are best placed to determine the exact application of the form of equivalence on a product-by-product basis. For example, a strict application of EOI is most likely to be justified in those cases where the incremental design and implementation costs of imposing it are very low (because equivalence can be built into the design of new processes) and for certain key legacy services (where the benefits are very high compared to the material costs of retro-fitting EOI into existing business processes). In other cases, EOO would still be a sufficient and proportionate approach to ensure non-discrimination (e.g. when the wholesale product already shares most of the infrastructure and services with the product used by the downstream arm of the SMP operator).”

## Transparency and notification obligations

4.120 We propose that KCOM should be subject to a set of obligations designed to promote transparency, reduce the risk of undue discrimination and ensure that telecoms providers are able to make effective use of the dominant provider’s network access. The proposed obligations, which are discussed in more detail below, are:

- a requirement to publish a reference offer;
- a requirement to notify changes to charges, terms and conditions;
- a requirement to publish quality of service information; and
- a requirement to notify changes to technical information at least 90 days in advance.

## Requirement to publish a Reference Offer

### Current remedies

4.121 KCOM is currently required to publish a reference offer in relation to the provision of network access in both the WLA and WBA markets. In both markets the Reference Offer (RO) must set out (at a minimum):

- a clear description of the services on offer, including technical characteristics;
- terms and conditions for the provision of network access, including charges, terms of payment and billing procedures, ordering and provisioning procedures,

<sup>79</sup> In this respect, the BEREC Common Positions identify the following competition issues which arise frequently: SMP players having an unfair advantage; having unmatchable advantage, by virtue of their economies of scale and scope, especially if derived from a position of incumbency; discriminating in favour of their own group business (or between its own wholesale customers), either on price or non-price issues; and exhibiting obstructive and foot-dragging behaviour.

<sup>80</sup> BP 19 and 19a for WLA and BP13 and BP 13a for WBA.

dispute resolution procedures, details of relevant intellectual property rights, details of duration and renegotiation of agreements and confidentiality provisions;

- information relating to technical standards for network access, interfaces and points of interconnection and conditions for access to ancillary, supplementary and advanced services; and
- conditions relating to maintenance and quality, e.g. service level agreements (SLAs) and guarantees (SLGs), timescales for acceptance or refusal of a request for supply and delivery of services and support services, compensation payable and provisions on limitation of liability and indemnity and procedures for service alterations.

4.122 In the WLA market the reference offer must also set out:

- details of traffic and network management; and
- details of measures to ensure compliance with requirements for network integrity.

### Aim and effect of regulation

4.123 The main reasons for requiring the publication of a RO are:

- to assist transparency for the monitoring of potential anti-competitive behaviour; and
- to give visibility to the terms and conditions on which other providers will purchase wholesale services.

4.124 The requirement on KCOM to publish a RO would ensure stability in these markets as, without it, incentives to invest might be undermined and market entry less likely.

4.125 The publication of a RO would potentially allow for quicker negotiations, avoid possible disputes and give confidence to those purchasing wholesale services that they are being provided on non-discriminatory terms. Without this, market entry might be deterred to the detriment of the long term development of competition and hence consumers.

### Our proposals

4.126 We propose to retain the condition on KCOM to publish a RO for the provision of WLA and WBA services in the Hull Area.

4.127 We also propose that in the WBA market KCOM's ROs must set out:

- details of traffic and network management; and
- details of measures to ensure compliance with requirements for network integrity,

4.128 We consider that, given the downstream nature of WBA services, that information relating to traffic and network management will be important to telecoms providers in determining how the network is run, particularly in relation to when a customer exceeds their monthly data limit. Similarly we consider that telecoms providers will find details of measures to ensure compliance with requirements for network integrity useful in ensuring that KCOM's network is being properly maintained and operated.

This will mean that the RO requirements in the WBA market will match the requirement in the WLA market.

- 4.129 For the avoidance of doubt, we expect KCOM to publish a RO only where it is offering services in a market.

### Legal tests

- 4.130 For the reasons set out below, we are satisfied that the proposed conditions for KCOM in the WLA and WBA markets within the Hull Area meet the various tests set out in the Act.
- 4.131 Section 87(6)(c) of the Act authorises the setting of SMP services conditions requiring the dominant provider to publish, in such a manner as Ofcom may direct, the terms and conditions on which it is willing to enter into an access contract. Section 87(6)(d) also permits the setting of SMP services conditions requiring the dominant provider to include specified terms and conditions in an access contract. Finally, section 87(6)(e) permits the setting of SMP services conditions requiring the dominant provider to make such modifications to the reference offer as may be directed from time to time.
- 4.132 We consider that the proposed conditions meet our statutory obligations and the Community requirements under sections 3 and 4 of the Act.
- 4.133 The requirements to publish a RO would, in combination with requirements not to unduly discriminate, facilitate service interoperability and allow telecoms providers to make informed decisions about future entry into downstream markets. Further, the proposed obligations would enable purchasers to adjust their downstream offerings in competition with KCOM, in response to changes in KCOM's terms and conditions. Finally, the proposed obligations would make it easier for Ofcom and other telecoms providers to monitor any instances of discrimination. Therefore, we consider that the proposed conditions in particular further the interests of consumers in relevant markets by the promotion of competition in line with section 3 of the Act.
- 4.134 We consider that the proposed conditions meet the Community requirements set out in section 4 of the Act. In particular, the proposed conditions promote competition and encourage the provision of network access and service interoperability for the purpose of securing efficient and sustainable competition for the maximum benefit of consumers. The publication of a RO would mean that other telecoms providers would have the necessary information readily available to allow them to make informed decisions about entry into downstream markets.
- 4.135 We also consider that this proposal meets section 47(2) of the Act which requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. We consider the proposed conditions are:
- objectively justifiable, in that they encourage competition, provide market stability and help us to monitor discriminatory behaviour through the publication of terms and conditions;
  - not unduly discriminatory, in that they are proposed only for KCOM which is the only telecoms provider that we propose to find has SMP in the WLA and WBA markets in the Hull Area;

- proportionate, in that only information that is necessary to allow telecoms providers to make informed decisions about competing in downstream markets is required to be provided; and
- transparent, in that the conditions are clear in their intention that KCOM publish details of its WLA and WBA offerings.

4.136 Article 9(4) of the Access Directive requires that where network access obligations are imposed, NRAs shall ensure the publication of a RO containing at least the elements set out in Annex II to that Directive. We are satisfied that the requirements we are imposing will ensure that this requirement is met.

4.137 For the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

### The EC recommendation and BEREC common positions

4.138 We have taken due account of the EC Recommendation in relation to SLAs and SLGs. The EC Recommendation provides that NRAs should require SMP operators to implement SLAs alongside KPIs, which should include SLGs in the case of a breach of the SLA. The EC Recommendation also indicates that payment of financial penalties should, in principle, be made automatic and be sufficiently dissuasive.

4.139 We have also taken utmost account of the BEREC Common Positions relevant to each of the WLA and WBA markets. In relation to the objective of achieving reasonable quality of access products (operational aspects), the BEREC Common Positions identify, among other things, as best practice that:<sup>81,82</sup>

“NRAs should require SMP operators to provide a reasonable defined level of service.

...Service Level Agreements (SLAs) should cover specific service areas. Services areas when SLAs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).

...SLAs should be made available to wholesale operators. To ensure maximum transparency and comparability of the terms provided by SMP operators to alternative operators and their downstream arm, all SLAs could be made available to all relevant wholesale customers (including those outside from a specific Member State). For example, SMP operators could make them available on demand or automatically publish these on their website (as part of their RO).

...NRAs should take oversight for the process of setting SLAs. NRAs should determine the level of their involvement in this process by

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<sup>81</sup> In this respect the BEREC Common Positions identify as a competition issue that SMP operators may have an incentive to discriminate in favour of their own downstream operations in relation to the quality of wholesale access products. As a result, access products may not be of reasonable quality and service levels may not be comparable with those provided by the SMP operators to their own downstream businesses.

<sup>82</sup> BP32, BP32a-32c, BP33 and BP33a-33c for WLA and BP25, BP25a-25c, BP25 and BP25a-25c for WBA.

taking into account specific market circumstances and particular concerns for discriminatory behaviour.

...NRAs should impose a generic requirement on SMP operators to provide Service Level Guarantees (SLGs).

...SLGs should cover all necessary specific service areas. Service areas where SLGs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).

...SLG payments should be made without undue delay and should be proactive in nature. That is, with a pre-established process for the payment and billing of the SLGs among operators and without the need for alternative operators to request the intervention of any third party i.e. NRAs or courts.

...NRAs should take oversight for the process of setting SLGs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.”

4.140 We consider that our proposals are consistent with the best practice set out in the BEREC Common Positions.

## **Requirement to notify changes to charges, terms and conditions**

### Current remedies

4.141 KCOM is currently required to give notice before making changes to its charges or terms and conditions for the provision of existing or new network access in the WLA and WBA markets.

4.142 In the WLA market, KCOM is required to give no less than 28 days' notice before making any change:

- involving new network access;
- that reduces the price, either permanently and temporarily, of existing network access; or
- that raises the prices following the end of the temporary price reduction.

4.143 For any other change KCOM is required to give no less than 90 days' notice.

4.144 In the WBA market, KCOM is required to give no less than 28 days' notice before making any change.

### Aim and effect of regulation

4.145 This remedy would complement the proposed network access and non-discrimination requirements to address the competition concerns arising from our proposed finding that KCOM has SMP in the WLA and WBA markets in the Hull Area.

4.146 Notification of changes to charges at the wholesale level would have the joint purpose of assisting transparency for the monitoring of potential anti-competitive



behaviour, and giving advanced warning of charge changes to competing providers who buy WLA and WBA services. The latter purpose ensures that competing providers have sufficient time to plan for such changes, as they may want to restructure the prices of their downstream offerings in response to charge changes at the wholesale level. Notification of changes therefore helps to ensure stability in markets, without which incentives to invest might be undermined and market entry made more difficult.

4.147 In certain circumstances, it may also be appropriate to require the notification of changes to terms and conditions where this will also ensure transparency and provide advance warning of changes, in order to allow competing providers sufficient time to plan for them. Again, this assists in providing stability in markets, without which incentives to invest might be undermined and market entry made more difficult.

### Our proposals

4.148 We propose that it is appropriate for KCOM to be subject to an obligation to notify (by means of a written notice – an ACCN) changes to charges for wholesale network access products and services in the WLA and WBA markets in the Hull Area.

4.149 Requiring the notification of changes to terms and conditions will ensure transparency and provide advance warning of changes to allow competing providers sufficient time to plan for them. This assists in providing stability in markets, without which incentives to invest might be undermined and market entry made more difficult. We therefore propose that it is appropriate to re-impose a requirement on KCOM to give advance notice of changes to terms and conditions (as well as charges) in relation to the provision of network access in the WLA and WBA markets.

4.150 We propose that an ACCN must include the following:

- a description of the network access in question;
- a reference as to where the terms and conditions associated with the network access in question can be found in the dominant provider's Reference Offer;
- the date on which the new charges take effect (or the period over which the new charges will apply);
- the current and proposed charge; and
- other charges for services that would be directly affected by the proposed charge.

4.151 We consider that the notification period should allow sufficient time for other telecoms providers to make necessary changes to their downstream products and services, and are of the view that 56 days would ordinarily be an appropriate notification period for existing products and services in both the WLA and WBA markets. We recognise that this is a lengthening of the notification period in the WBA market. However, given our view that WBA access services over KCOM's fibre network will be very similar to WLA fibre access services, we consider that this warrants there being the same notification period in both markets.

4.152 We also propose that 28 days is an appropriate notification period for price reductions for access products and services in both the WLA and WBA markets.

Price reductions can often be part of a special offer to which conditions are attached, so the shorter notice period would also apply to such conditions.<sup>83</sup>

- 4.153 We consider that modifications to these notification periods may be permissible on a case-by-case basis. Therefore, if there is a general industry need to have a shorter notice period in a given situation, we may be able to accommodate this.
- 4.154 We also propose that the prior notification period for new products and services should reflect the lesser administrative impact of changes to charges for new products and services. We propose that 28 days remains an appropriate notification period for new products and services in both the WLA and WBA markets.
- 4.155 There may be some disadvantages to having prior notification of changes to charges, terms and conditions, particularly in markets where there is significant competition. It can lead to a 'chilling' effect where other telecoms providers follow the dominant provider's prices rather than act dynamically to set competitive prices. We do not consider that on the circumstances prevailing in these markets (i.e. near monopoly on the part of KCOM), however, that this consideration undermines the rationale for imposing a notification of charges condition, and we consider that the competition benefits identified above justify the imposition of the proposed condition.

### Legal tests

- 4.156 For the reasons set out below, we are satisfied that the proposed conditions for KCOM in the WLA and WBA markets in the Hull Area meet the various tests set out in the Act.
- 4.157 Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish, in such manner as Ofcom may direct, all such information for the purpose of securing transparency. Section 87(6)(c) of the Act authorises the setting of SMP services conditions requiring the dominant provider to publish, in such a manner as Ofcom may direct, the terms and conditions on which it is willing to enter into an access contract.
- 4.158 We have also considered our duties under the Act, including our general duties under section 3, and all the Community requirements set out in section 4, of the Act. We note in particular that the condition is aimed at promoting competition and securing efficient and sustainable competition for the maximum benefits of consumers by ensuring that telecoms providers have the necessary information about changes to terms, conditions and charges sufficiently in advance to allow them to make informed decisions about competing in downstream markets.
- 4.159 Section 47(2) of the Act requires SMP conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. The proposed SMP conditions are:
- objectively justifiable, in that there are clear benefits from the notification of changes in terms of ensuring that providers are able to make informed decisions within an appropriate timeframe about competing in downstream markets;

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<sup>83</sup> We further propose that a 28-day notice period should apply to any increase in prices that may occur at the end of a special offer (where the price immediately following the end of the special offer is no higher than the price immediately before the start of the special offer).

- not unduly discriminatory, in that it is proposed only for KCOM in respect of the WLA and WBA markets in the Hull Area, where we propose to find that it holds a position of SMP, and not to any other telecoms provider;
- proportionate, in that only information that other telecoms providers would need to know in order to adjust for any changes would have to be notified. Proposed notification periods are the minimum required to allow changes to be reflected in downstream offers which are appropriate to the competitive conditions we find in each wholesale market; and
- transparent, in that the conditions are clear in their intention and implementation.

4.160 For the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

## **Requirement to publish quality of service information**

### Current remedies

4.161 In the WBA market KCOM is currently required to publish such Quality of Service (QoS) information that Ofcom may from time to time direct for the purpose of securing transparency. KCOM is not currently under the same obligation in the WLA market.

### Aim and effect of regulation

4.162 Vertically integrated operators have the ability to favour their own downstream business over third party telecoms providers by discriminating on price or non-price factors such as the terms and conditions of access. The latter could involve variations in quality of service (either in service provision and maintenance or in the quality of network service provided by the dominant provider to external providers compared to its own retail operations). This has the potential to distort competition at the retail level by placing third party telecoms providers at a disadvantage in terms of the services they can offer consumers to compete with the downstream retail business of the vertically integrated operator. The publication of QoS information by the dominant provider, in this case KCOM, allows other telecoms providers to ensure that the service they receive is equivalent to that provided by the dominant provider to its own retail divisions.

4.163 Additionally, a dominant provider has the ability and incentive to reduce QoS where such action would reduce its costs (thus increasing its profits). This consumer harm is a direct result of the dominant provider's market power, as in a competitive market providers are driven to maximise QoS to obtain and retain customers. The publication of QoS information by the dominant provider, in this case KCOM, allows us to monitor QoS and ensure that the QoS received by consumers in the Hull Area is equivalent to that received by consumers in the rest of the UK, which is competitive at the retail level.

4.164 This obligation will require KCOM to publish information as directed by Ofcom, rather than requiring KCOM to publish specific information from the date of the imposition of the obligation. This is the same as the condition imposed in previous WBA reviews and is designed to support transparency as to QoS in the Hull Area.

## Our proposals

- 4.165 In previous reviews, we have imposed an obligation on KCOM in the WBA market requiring QoS information to be published as directed by Ofcom, however we have not previously imposed the same obligation in the WLA market. This approach reflects that KCOM offers WBA services that are used by third party telecoms providers to compete in retail broadband services, therefore increasing KCOM's incentive to discriminate on QoS in favour of its own retail service. Our approach in the WBA market mirrored the approach taken for BT in the UK excluding the Hull Area.
- 4.166 We consider that there remains a risk of discrimination in relation to QoS, and a risk that KCOM might simply reduce its QoS to inflate its profits, to the detriment of consumers. KCOM's FTTP network nears completion and our expectation is that KCOM will soon offer fibre access products in one or both of these markets, given there is greater scope for use of WLA products on an FTTP network. As such, we are proposing a QoS transparency obligation in both the WLA and WBA markets to address the risk of QoS discrimination and intentionally poor QoS in relation to legacy copper and new fibre services. This proposal would require KCOM to publish information as directed by Ofcom, rather than requiring KCOM to publish specific information from the date of the imposition of the obligation.
- 4.167 We consider that our proposal is in line with the BEREC common positions that apply in each of the WLA and WBA markets, each of which states that: 'SMP operators may have an incentive to discriminate in favour of their own downstream operations in relation to the quality of wholesale access products.' The common position goes on to recommend that '[National Regulatory Authorities] should impose a generic requirement on SMP operators to provide Key Performance Indicators (KPIs) as a means to monitor compliance with a non-discrimination obligation'.<sup>84</sup>

## Legal tests

- 4.168 For the reasons set out below, we are satisfied that the proposed conditions for KCOM in the WLA and WBA markets in the Hull Area meet the various tests set out in the Act.
- 4.169 Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish, in such manner as Ofcom may direct, all such information for the purpose of securing transparency.
- 4.170 Ofcom has considered its duties under section 3 of the Act. We consider that, in ensuring the network access telecoms providers receive from KCOM is equal to that provided by KCOM to its own retail divisions, the proposed conditions in particular

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<sup>84</sup> BEREC, *BEREC common position on best practice in remedies on the market for wholesale (physical) network infrastructure access (including shared or full unbundled access) at a fixed location imposed as a consequence of a position of significant market power in the relevant market, BoR (12) 127*, 8 December 2012, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/1127-revised-berec-common-position-on-best-pr\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1127-revised-berec-common-position-on-best-pr_0.pdf), pages 14-16 and *BEREC common position on best practice in remedies on the market for wholesale broadband access (including bitstream access) imposed as a consequence of a position of significant market power in the relevant market, BoR (12) 128*, 8 December 2012, [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/1126-revised-berec-common-position-on-best-pr\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1126-revised-berec-common-position-on-best-pr_0.pdf), pages 13-15

further the interests of citizens and further the interests of consumers in relevant markets by the promotion of competition.

4.171 Further, we consider that the proposed conditions meet the Community requirements in section 4 of the 2003 Act and in particular promote competition in relation to the provision of electronic communications networks and encourage the provision of network access for the purpose of securing efficiency and sustainable competition in downstream markets for electronic communications networks and services, resulting in the maximum benefit for retail consumers of broadband internet access services.

4.172 We consider that the proposed conditions meet the criteria set out in section 47(2) of the Act. The proposed conditions are:

- objectively justifiable in that they enable competing operators to make full and effective use of network access and to ensure that, in purchasing this access, they are not unduly discriminated against and where concerns arise about quality of service provide by KCOM, they allow Ofcom to react quickly to impose additional transparency requirements;
- not unduly discriminatory as they are imposed on KCOM and KCOM is the only operator which we propose has SMP in the WLA and WBA markets in the Hull Area;
- proportionate as they only require KCOM to publish information as directed by Ofcom in line with the aim of this obligation; and
- transparent in that they are clear that the intention of the conditions is to require KCOM to publish quality of service information related to the WLA and WBA markets in the Hull Area, as directed from time to time.

4.173 For all the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified, in accordance with section 87(1) of the Act.

## **Requirement to notify changes to technical information**

### Current remedies

4.174 KCOM is currently required in both the WLA and WBA markets to publish any new or modified technical characteristics, points of network access and technical standards within a reasonable time period and at least 90 days in advance of KCOM entering into a contract to provide new network access or making changes to existing network access, unless Ofcom consents otherwise.

### Aim and effect of regulation

4.175 The aim of the proposed condition, which complements the proposed requirement to publish a RO which includes technical information, is to ensure that telecoms providers buying WLA and WBA services in the Hull Area are provided with appropriate advance notification of changes to technical characteristics. This is to ensure that telecoms providers have sufficient time to respond to changes that affect them. For example, a telecoms provider may need to introduce new equipment, or modify existing equipment or systems, to support a new or changed technical interface. Similarly, a telecoms provider may need to make changes to its network in order to support changes in the points of network access or configuration.

4.176 We consider this remedy is important in the WLA and WBA markets to ensure that telecoms providers who compete in downstream markets are able to make effective use of existing or, where applicable, new wholesale services provided by KCOM. Technical information therefore includes: new or amended technical characteristics, including information on network configuration, locations of the points of network access and technical standards (including any usage restrictions and other security issues).

### Our proposals

4.177 We consider the existing requirement to notify technical information allows providers sufficient time to prepare for such changes. We therefore propose to retain the requirement on KCOM to publish technical information at least 90 days in advance, as set out above. We consider that 90 days is the minimum time that competing providers would need to modify their network to support a new or changed technical interface, or support a new point of access or network configuration.

### Legal tests

4.178 For the reasons set out below, we are satisfied that the proposed conditions for KCOM in the WLA and WBA markets in the Hull Area meet the various tests set out in the Act.

4.179 Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish, in such manner as Ofcom may direct, all such information for the purpose of securing transparency. Section 87(6)(d) also permits the setting of SMP services conditions requiring the dominant provider to include specified terms and conditions in the RO.

4.180 We have also considered our statutory obligations and the Community requirements under sections 3 and 4 of the Act.

4.181 We consider that, by ensuring that other telecoms providers are given sufficient time to make any changes to technical specifications that might affect their businesses, the proposed conditions in particular further the interests of customers in relevant markets by the promotion of competition in line with section 3 of the Act. Further, we consider that, in line with section 4 of the Act, the proposed conditions in particular promote competition in relation to the provision of electronic communications networks and encourage the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in downstream markets for electronic communications networks and services, resulting in the maximum benefit for retail consumers.

4.182 We consider that the proposed condition meet the criteria set out in section 47(2) of the Act. We propose that they are:

- objectively justifiable, in that it enables competing telecoms providers to make full and effective use of network access. The period allows telecoms providers time to react to proposed changes without imposing an unnecessarily long notification period on KCOM that may restrict its ability to develop and deploy new features or products;
- not unduly discriminatory, in that it is only imposed on KCOM, which is the only telecoms provider that we propose to find holds SMP in the WLA and WBA markets in the Hull Area;

- proportionate, in that 90 days is considered the minimum period necessary to allow competing telecoms providers to modify their networks; and
- transparent, in that it is clear in its intention that KCOM notify technical information.

4.183 We consider that the proposed condition is consistent with the BEREK Common Positions on WBA and WLA, including the best practice remedies falling under the objective “Transparency”. We consider that it is also consistent with BP 16 (WBA)/BP22 (WLA) requiring the timely availability of relevant information according to lead times relating to new wholesale products.

4.184 For the reasons set out above, we consider that the proposed condition is appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

### **Proposals regarding regulatory financial reporting requirements**

4.185 As explained in the following sub-sections, we propose to impose cost accounting and accounting separation obligations on KCOM in both the WLA and WBA markets. These obligations result in KCOM producing regulatory financial statements covering these markets. This proposed approach differs from the approach taken in the last reviews of these markets, in which we only imposed an accounting separation in the WBA market. Our rationale for applying each of these remedies is set out below, but broadly it is that we consider that there is a need for more reliable financial information for these markets to support our monitoring of the effectiveness of the obligations we are proposing, especially given that KCOM is likely to begin offering new wholesale services on its fibre network during the review period. We have considered the appropriate form of SMP conditions that are appropriate in the light of our market analysis.

4.186 As identified above, previously Ofcom would update the regulatory financial reporting obligations imposed on KCOM by amending the July 2004 Statement. Now, Ofcom is (to the extent still extant) proposing to revoke the SMP conditions referred to in the July 2004 Statement (as amended) in relation to each of the WLA and WBA markets and to impose regulatory financial reporting obligations through SMP condition 8. For the avoidance of doubt, this does not represent a change to the substance of the accounting separation and cost accounting conditions as set out in the July 2004 Statement; it can be considered as a ‘structural’ change to the way in which the financial reporting obligations are imposed, and is aimed at clarifying KCOM’s obligations. The structural nature of this change can be seen in the table below, where we set out the equivalent conditions in the July 2004 Statement and SMP condition 8. There are no substantive changes to the text, only textual updates aimed at consistency with the other SMP conditions.

**Figure 4.4: Equivalence table, July 2004 Statement and SMP Condition 8**

Number in July 2004 Statement	Number in SMP Condition 8
OB1	A1
OB2	A2
OB3	A3
OB4	A4
OB5	A5
OB6	A6
OB7	A7
OB8	A8
OB9	A9
OB10	A10
OB11	A11
OB12	A12
OB13	A13
OB14	A14
OB15	A15
OB16	A16
OB17	A17
OB18	A18
OB19	A19
OB20	A20
OB21	A21
OB22	A22
OB23	A23
OB24	A24
OB25	A25
OB26	A26
OB27	A27
OB31	A28
OB32	A29

4.187 We set out below the basic requirements for these proposed accounting separation and cost accounting obligations and our rationale for proposing to impose them. However, these obligations are underpinned by detailed requirements for regulatory financial reporting which specify what information we require KCOM to provide in each of these markets. These detailed requirements are currently being reviewed and a new regime will be consulted on later in 2017.

### **Requirements for accounting separation**

#### Current remedies

4.188 KCOM is currently subject to an accounting separation obligation in the WBA market in the Hull Area, but is not currently subject to the same obligation in the WLA market in the Hull Area.



## Aim and effect of regulation

4.189 Paragraph 3 of Point 1 of the European Commission's 2005 Recommendation on accounting separation stated that:

“The purpose of imposing an obligation regarding accounting separation is to provide a higher level of detail of information than that derived from the statutory financial statements of the notified operator, to reflect as closely as possible the performance of parts of the notified operator's business as if they had operated as separate businesses, and in the case of vertically integrated undertakings, to prevent discrimination in favour of their own activities and to prevent unfair cross-subsidy”.

4.190 In practice these obligations would require KCOM to produce financial statements that reflect the performance of the regulated wholesale markets as though they were separate businesses.

4.191 In the 2014 Regulatory Reporting Statement, in connection with BT, we considered the purposes of regulatory reporting which is supported by the imposition of an accounting separation obligation. In that statement we said that regulatory reporting “should provide us with the information necessary to make informed regulatory decisions, monitor compliance with SMP conditions, ensure that those SMP conditions continue to address the underlying competition issues and investigate potential breaches of SMP conditions and anti-competitive practices”.<sup>85</sup> In addition, we said that it “should provide reasonable confidence to stakeholders that the SMP provider has complied with its SMP conditions and add credibility to the Regulatory Financial Reporting Regime”.<sup>86</sup> We consider that the same regulatory objectives apply to the Hull market as they do to the rest of the UK and that our proposal to impose an accounting separation obligation, together with a cost accounting obligation, will help ensure that these regulatory reporting objectives are met in relation to KCOM.

4.192 In order to carry out our duties it is important that financial information is available on the services and markets that we regulate. The availability of this information helps us understand the volumes, revenues, costs and returns of services and markets, which allows us to monitor the impact and effectiveness of, and (for certain remedies) compliance with, the remedies imposed as part of a market review.

4.193 The accounting separation obligation also requires KCOM to account separately for internal and external sales which allows Ofcom and stakeholders to monitor the activities of KCOM to ensure that, where relevant, in the WLA and WBA markets in the Hull Area it does not discriminate unduly in favour of its own downstream business. In practice this obligation requires KCOM to produce a financial statement that reflects the performance of the WLA and WBA markets in the Hull Area as though it was a separate business.

4.194 Requiring KCOM to produce financial statements for the WLA and WBA markets in the Hull Area, combined with an obligation to attribute costs in a fair, objective and transparent way (via the cost accounting obligation) will help us to ensure that costs

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<sup>85</sup> Paragraph 2.28, 2014 Regulatory Reporting Statement.

<sup>86</sup> Paragraph 2.41, 2014 Regulatory Reporting Statement.

are not inappropriately loaded onto one set of regulated products to the benefit of another set of regulated products or unregulated products.

### Our proposals

- 4.195 We propose an accounting separation obligation on KCOM in the WLA and WBA markets in the Hull Area. We consider that this obligation is necessary to monitor the overall impact and effectiveness of the remedies proposed in this section and in particular, to monitor KCOM's activities regarding its non-discrimination obligations. The proposed obligations are also necessary to support transparency by providing a greater detail of information on the relevant markets than that derived from KCOM's statutory financial statements and give visibility, and thus reassurance, to stakeholders that KCOM has complied with its SMP conditions and allow them to contribute to the regulatory regime.
- 4.196 In respect of the specific form of accounting separation requirements we are proposing for KCOM in these markets, we will consult on this issue later in 2017.

### Legal tests

- 4.197 For the reasons set out below, we are satisfied that our proposal to impose accounting separation requirements on KCOM in the WLA and WBA markets in the Hull Area meets the various tests set out in the Act.
- 4.198 Sections 87(7) and (8) of the Act authorise the SMP conditions we propose to make. We consider that this proposal meets our duties under sections 3 and 4 of the Act.
- 4.199 We have considered our duties under section 3 of the Act. The imposition of accounting separation obligations would protect competition in relation to the provision of electronic communications networks and services, ensuring the provision of network access and service interoperability for the purposes of securing efficient and sustainable competition and the maximum benefit for the persons who are customers of telecoms providers. This is because the imposition of the obligations would ensure that other obligations designed to curb potentially damaging leverage of market power, in particular the fair and reasonable charging obligation (where it applies) and the requirements not to unduly discriminate, can be effectively monitored.
- 4.200 With regard to the Community requirements set out in section 4 of the Act, we believe that the proposed conditions meet the requirements. Specifically, we believe section 4(8) is met, where the obligations have the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by helping to ensure that dominant providers comply with other obligations in particular non-discrimination requirements.
- 4.201 We also consider that this proposal meets Section 47(2) of the Act which requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. We consider the proposed conditions are:
- objectively justifiable, given they relate to the need to ensure competition develops fairly to the benefit of consumers;
  - not unduly discriminatory, as we have only imposed the obligations on KCOM, as the only telecoms provider that we propose to find has SMP in the WLA and WBA markets in the Hull Area;

- proportionate, in that they are the least onerous obligation we could apply as a mechanism which enables us and third parties to monitor the effectiveness of pricing remedies; and
- transparent, in that they are clear the intention is to monitor the impact and effectiveness of the remedies proposed.

4.202 For the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

## **Requirements for cost accounting**

### Current remedies

4.203 KCOM is not currently required to provide cost accounting information.

### Aim and effect of regulation

4.204 Recital 2 of the 2005 Recommendation stated that the purpose of imposing the accounting separation and cost accounting obligations is “to make transactions between operators more transparent and/or to determine the actual costs of services provided”. Also, paragraph 2 of Point 1 of the 2005 Recommendation stated that:

“The purpose of imposing an obligation to implement a cost accounting system is to ensure that fair, objective and transparent criteria are followed by notified operators in allocating their costs to services in situations where they are subject to obligations for price controls or cost-oriented prices.”

4.205 Cost accounting obligations require the dominant provider to maintain a cost accounting system (a set of processes and systems) to capture the costs, revenues, assets and liabilities associated with the provision of services and to attribute them in a fair, objective and transparent manner to individual services in order that the costs of individual services may be determined. The imposition of cost accounting obligations on dominant providers is an important means of ensuring that:

- We have the necessary information to support the monitoring of the effectiveness of remedies, in particular to ensure that the pricing remedies we impose continue to address the competition problems identified and to enable our timely intervention should such intervention ultimately be needed.
- Wholesale costs are attributed across the wholesale markets (and the individual services within them) in a consistent manner. This mitigates in particular against the risk of double recovery of costs or that costs might be loaded onto particular products or markets.
- Publication (i.e. reporting) of cost accounting information aids transparency, providing reasonable confidence to stakeholders about compliance with SMP obligations, allowing stakeholders to monitor compliance and more generally enabling stakeholders to make better informed contributions to the development of the regulatory framework.
- The dominant provider records all information necessary for the purposes listed above at the time that relevant transactions occur, on an ongoing basis. Absent

such a requirement, there is a strong possibility that the necessary information would not be available when it is required and in the necessary form and manner.

### Our proposals

- 4.206 We propose to impose cost accounting requirements on KCOM in the WLA and WBA markets in the Hull Area. We consider that the proposed obligations are necessary to ensure that the processes and rules used by KCOM to attribute revenues and costs to individual markets and services are fair, objective and transparent.
- 4.207 In respect of the specific form of cost accounting requirements we are proposing for KCOM in these markets, we will consult on this issue later in 2017.

### Legal tests

- 4.208 For the reasons set out below, we are satisfied that the proposed cost accounting requirements for KCOM in respect of the WLA and WBA markets in the Hull Area meet the various tests set out in the Act. As explained below, sections 87(9), (10) and (11) authorise the SMP conditions we propose to make.
- 4.209 Section 87(9)(c) authorises conditions imposing such rules as we may make for the purposes of matters connected with the provision of network access to the relevant network, or with the availability of relevant facilities about the use of cost accounting systems. Such conditions include requiring the application of presumptions in the fixing and determination of costs and charges for the purposes of the price controls, rules and obligations imposed by virtue of that subsection (section 87(10)). Where such conditions are imposed, section 87(11) imposes a duty on us to also set an SMP condition which imposes an obligation:
- to make arrangements for a description to be made available to the public of the cost accounting system used in pursuance of that condition; and
  - to include in that description details of (i) the main categories under which costs are brought into account for the purposes of that system and (ii) the rules applied for the purposes of that system with respect to the allocation of costs.
- 4.210 We consider that the proposed conditions fulfil our duty under section 87(11) in that the cost accounting conditions require the publication of a description of the cost accounting system used and the main categories of cost and the cost allocation rules applied.
- 4.211 In setting such conditions, we must also ensure that the network access pricing conditions set out in section 88 are also satisfied.
- 4.212 We consider that imposing a cost accounting obligation is consistent with section 88. We also consider that imposing a cost accounting obligation is necessary for our price regulation obligations to be effective.
- 4.213 We have considered our statutory obligations and the Community requirements set out in sections 3 and 4 of the Act. In particular, we consider that imposing the proposed cost accounting obligations is justifiable and proportionate to promote competition in relation to the provision of electronic communications networks and services, and to ensure the provision of network access (including supporting ancillary services) and service interoperability for the purpose of securing efficient and sustainable competition and the maximum benefit for the persons who are

customers of telecoms providers. This is because imposing the obligations ensures that other obligations designed to curb the potentially damaging leverage of market power – including the setting of prices at excessive levels – can be effectively monitored and enforced.

4.214 We consider that the proposed conditions meet the criteria set out in section 47(2) of the Act because they are:

- Objectively justifiable, in that they are necessary to ensure the appropriate maintenance and provision of accounts in order to monitor KCOM's activities with regard to the pricing remedies we propose. They also relate to the need to ensure competition develops fairly, to the benefit of consumers, by providing transparency of KCOM's compliance with rules set to address the risk of exploitative or anti-competitive pricing.
- Non-discriminatory, in that KCOM is the only telecoms provider on which we propose to impose pricing remedies, and is the only telecoms provider which we propose to find holds SMP in the WLA and WBA markets in the Hull Area.
- Proportionate, in that we propose to require only the minimum information necessary to monitor KCOM's pricing activities.
- Transparent, in that they are clear in their intention to ensure the appropriate maintenance and provision of accounts for the purposes set out above and the particular accounting separation requirements of KCOM are clearly documented.

4.215 For the reasons set out above, we consider that the proposed conditions are appropriate to address the competition concerns identified, in line with section 87(1) of the Act.

## Consultation question

**Question 4.1:** *Do you agree with the remedies that we propose to impose? Please provide reasons and evidence in support of your views.*

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom would like to receive views and comments on the issues raised in this document, **by 5pm on 14 September 2017**.
- A1.2 We strongly prefer to receive responses via the online form at <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-local-broadband-access-market-reviews-hull>. We also provide a cover sheet <https://www.ofcom.org.uk/consultations-and-statements/consultation-response-coversheet> for responses sent by email or post; please fill this in, as it helps us to maintain your confidentiality, and speeds up our work. You do not need to do this if you respond using the online form.
- A1.3 If your response is a large file, or has supporting charts, tables or other data, please email it to [Hull.Review2018@ofcom.org.uk](mailto:Hull.Review2018@ofcom.org.uk), as an attachment in Microsoft Word format, together with the cover sheet (<http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>). This email address is for this consultation only, and will not be valid after 14 September 2017.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- Hull Review 2018  
FOA Markham Sivak  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.5 If you would like to submit your response in an alternative format (e.g. a video or audio file), please contact Markham Sivak on 020 7783 4659, or email [Markham.Sivak@ofcom.org.uk](mailto:Markham.Sivak@ofcom.org.uk).
- A1.6 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A1.7 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A1.8 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The questions are listed at Annex 3. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A1.9 If you want to discuss the issues and questions raised in this consultation, please contact Markham Sivak on 020 7783 4659, or by email to [Markham.Sivak@ofcom.org.uk](mailto:Markham.Sivak@ofcom.org.uk).

## Confidentiality

- A1.10 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that everyone who is interested in an issue can see other respondents' views, we usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), as soon as we receive them.
- A1.11 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A1.12 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it, but sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.13 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further at <https://www.ofcom.org.uk/about-ofcom/website/terms-of-use>.

## Next steps

- A1.14 Following this consultation period, Ofcom plans to publish a statement in March 2018.
- A1.15 If you wish, you can register to receive mail updates alerting you to new Ofcom publications; for more details please see <https://www.ofcom.org.uk/about-ofcom/latest/email-updates>.

## Ofcom's consultation processes

- A1.16 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 2.
- A1.17 If you have any comments or suggestions on how we manage our consultations, please call our consultation helpdesk on 020 7981 3003 or email us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk). We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.

A1.18 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact Steve Gettings, Ofcom's consultation champion:

Steve Gettings  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA

Tel: 020 7981 3601

Email: [steve.gettings@ofcom.org.uk](mailto:steve.gettings@ofcom.org.uk)



## Annex 2

# Ofcom's consultation principles

## Ofcom has seven principles that it follows for every public written consultation:

### Before the consultation

- A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

### During the consultation

- A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English/Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A2.6 If we are not able to follow any of these seven principles, we will explain why.

### After the consultation

- A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

**Cover sheet for response to an Ofcom consultation**

**BASIC DETAILS**

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

**CONFIDENTIALITY**

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing  Name/contact details/job title

Whole response  Organisation

Part of the response  If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 3

# Consultation questions

**Question 3.1:** *Do you agree with our proposed market definition? Please provide reasons and evidence in support of your views.*

**Question 3.2:** *Do you agree with our proposal that KCOM holds SMP in the supply of WLA and WBA products in the Hull Area? Please provide reasons and evidence in support of your views.*

**Question 4.1:** *Do you agree with the remedies that we propose to impose? Please provide reasons and evidence in support of your views.*

## Annex 4

# Draft legal instruments: proposals for SMP services conditions

## NOTIFICATION OF PROPOSALS UNDER SECTIONS 48A AND 80A OF THE COMMUNICATIONS ACT 2003

### Proposals for identifying markets, making market power determinations and setting SMP conditions to be imposed on KCOM under section 45 of the Communications Act 2003

#### Background

1. On 26 June 2014, OFCOM published a regulatory statement entitled “*Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30 Volume 1: Statement on the markets, market power determinations and remedies*”<sup>87</sup> (the “**2014 FAMR Statement**”). The 2014 FAMR Statement identified among others a market for wholesale local access services<sup>88</sup> in the Hull Area, made a determination that KCOM had significant market power (SMP) in that market, and determined that appropriate SMP conditions should be imposed on KCOM. The relevant SMP conditions, together with provisions modifying and revoking certain SMP conditions previously imposed, were contained in a notification dated 26 June 2014 (Annex 29 to the 2014 FAMR Statement) (the “**2014 FAMR Notification**”).
2. On 26 June 2014, OFCOM published a regulatory statement entitled “*Review of the wholesale broadband access markets – Statement on market definition, market power determinations and remedies*”<sup>89</sup> (the “**2014 WBA Statement**”). OFCOM identified among others a market for wholesale broadband access provided in the Hull Area<sup>90</sup>, made a determination that KCOM had significant market power in that market, and determined that appropriate SMP conditions should be imposed on KCOM. The relevant SMP conditions, together with provisions modifying and revoking certain SMP conditions

<sup>87</sup> <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/narrowband-broadband-fixed/fixed-access-market-reviews-2014/statement>

<sup>88</sup> The supply of copper loop-based, cable-based and fibre-based wholesale local access at a fixed location.

<sup>89</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0021/57810/WBA-Final-statement.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0021/57810/WBA-Final-statement.pdf)

<sup>90</sup> The three geographic markets were: Market A, which related to the area covered by the BT exchanges set out at Appendix 1 to Annex 2 of the 2014 WBA Statement; Market B, which related to the area covered by the BT exchanges set out at Appendix 2 to Annex 2 of the 2014 WBA Statement; and the Hull Area.

previously imposed, were contained in a notification dated 26 June 2014 (Schedule 2 to Annex 2 of the 2014 WBA Statement) (the “**2014 WBA Notification**”).

3. On 22 July 2004, OFCOM published a statement entitled “*The Regulatory Financial Reporting Obligations on BT and Kingston Communications – Final Statement and Notification*”<sup>91</sup> (the “**July 2004 Statement**”), which imposed various regulatory financial reporting obligations on BT and KCOM (for KCOM, in the notification at Annex 3 of the July 2004 Statement (“**July 2004 (KCOM) Notification**”), and which has subsequently been amended on various occasions.

### **Proposals for service market identifications and market power determinations**

4. OFCOM is proposing to identify the following markets for the purpose of making market power determinations:
  - a) the supply of copper loop-based, cable-based and fibre-based wholesale local access at a fixed location in the Hull Area; and
  - b) wholesale broadband access provided in the Hull Area.
5. OFCOM is proposing to make market power determinations that KCOM has significant market power in relation to the markets set out in paragraph 4 above.
6. The effect of, and OFCOM’s reasons for, making the proposals to identify the markets and making the market power determinations set out in paragraphs 4 and 5 above are set out in the explanatory consultation accompanying this Notification.

### **Proposals to set and apply, and revoke SMP services conditions**

7. OFCOM is proposing to set, in relation to each of the services markets referred to in paragraph 4 above, the SMP conditions set out in Schedule 1 to this Notification to be applied to KCOM to the extent specified in that Schedule.
8. The SMP conditions referred to in paragraph 7 above shall, unless otherwise stated in that Schedule, take effect from 1 April 2018 or such other date specified in any notification under sections 48(1) and 79(4) of the Act adopting the proposals set out in this notification and shall have effect until the publication of a notification under section 48(1) of the Act revoking such conditions.

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<sup>91</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0034/55969/finance\\_report.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0034/55969/finance_report.pdf)

9. OFCOM is (to the extent still extant) proposing to revoke the SMP conditions in relation to each of the services markets referred to in paragraph 4 (and any subsequent modifications to those SMP conditions) set out in:

- (a) the 2014 FAMR Notification,
- (b) the 2014 WBA Notification, and
- (c) the July 2004 (KCOM) Notification,

in accordance with paragraph 10 below.

10. The proposed revocations in paragraph 9 above will take effect on 1 April 2018 or such other date specified in any subsequent notification under sections 48(1) and 79(4) of the Act adopting the proposals set out in this notification except for Condition 2 set out in the 2014 FAMR Notification which shall be revoked 56 days following such date. We propose that section 16 of the Interpretation Act 1978 shall apply as if this revocation were a repeal of an enactment by an Act of Parliament.

11. The effect of, and OFCOM's reasons for making, the proposals in relation to the SMP conditions referred to in paragraphs 7 and 9 above are set out in the explanatory consultation document accompanying this notification.

### **OFCCOM's duties and legal tests**

12. In identifying and analysing the markets referred to this notification, and in considering whether to make the corresponding proposals set out in this notification, OFCOM has, in accordance with section 79 of the Act, taken due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of the provisions of a European Union instrument, and which relate to market identification and analysis or the determination of what constitutes significant market power.

13. OFCOM considers that the proposed SMP conditions in Schedule 1 comply with the requirements of sections 45 to 47, 87 and 88 of the Act, as appropriate and relevant to each such SMP condition, and further that the proposed revocations of the SMP conditions referred to above comply with the requirements of sections 45 to 47, 87 and 88 of the Act as appropriate and relevant to them.

14. In making all of the proposals referred to in this Notification, OFCOM has considered and acted in accordance with its general duties set out in section 3 of the Act and the six Community requirements in section 4 of the Act. In accordance with section 4A of the Act. OFCOM has also taken due account of all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive. OFCOM has also, pursuant to Article 3(3) of Regulation (EC) No 1211/2009, taken utmost account of any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by the Body of European Regulators for Electronic Communications (BEREC).

### **Making representations**

15. Representations may be made to OFCOM about the proposals set out in this notification and the accompanying consultation document by no later than 14 September 2017.

16. Copies of this notification and the accompanying consultation document have been sent to the Secretary of State in accordance with sections 48C(1) and 81(1) of the Act.

### **Interpretation**

17. For the purpose of interpreting this notification (which for the avoidance of doubt includes the Schedule)—

- (a) except in so far as the context otherwise requires, words or expressions have the meaning assigned to them in paragraph 18 below, and otherwise any word or expression has the same meaning as it has in the Act;
- (b) headings and titles shall be disregarded;
- (c) expressions cognate with those referred to in this notification shall be construed accordingly; and
- (d) the Interpretation Act 1978 (c. 30) shall apply as if this notification were an Act of Parliament.

18. In this notification:

- (a) “**2014 WBA Statement**” means the statement described in paragraph 2 above;
- (b) “**2014 WBA Notification**” means the notification described in paragraph 2 above;

- (c) “**2014 FAMR Statement**” means the statement described in paragraph 1 above;
- (d) “**2014 FAMR Notification**” means the notification described in paragraph 1 above;
- (e) “**the Act**” means the Communications Act 2003 (c. 21);
- (f) “**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 known as KCOM);
- (g) “**Framework Directive**” means 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, as amended;
- (h) “**July 2004 (KCOM) Notification**” means the notification described in paragraph 3 above;
- (i) “**July 2004 Statement**” means the statement described in paragraph 3 above;
- (j) “**KCOM**” means KCOM Group plc, whose registered company number is 02150618, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006 (c.46);
- (k) “**OFCOM**” means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (c.11);
- (l) “**United Kingdom**” has the meaning given to it in the Interpretation Act 1978 (c.30).



19. The Schedules to this Notification shall form part of this Notification.

**Signed**

A handwritten signature in blue ink, reading "D. Clarkson.", is displayed within a white rectangular box. The signature is written in a cursive style.

**Dave Clarkson**

Competition Policy Director, OFCOM

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

22 June 2017

**SCHEDULE 1****[DRAFT] SMP conditions imposed on KCOM in the Hull Area****Part 1: Application**

1. The SMP conditions in Part 3 of this Schedule 1 shall, except where specified otherwise, apply to the Dominant Provider in each of the relevant markets listed in Column 1 of Table 1 below to the extent specified in Column 2 of Table 1. Save as otherwise specified in any condition, each condition will enter into force on 1 April 2018 or such other date specified in any notification under sections 48(1) and 79(4) of the Act adopting the proposals set out in the above notification and shall have effect until the publication of a notification under section 48(1) of the Act revoking such conditions.

**Table 1: Relevant markets for the purposes of this Schedule**

<b>Column 1: Relevant market</b>	<b>Column 2: Applicable SMP conditions as set out in Part 3 of this Schedule 1</b>
The supply of copper loop-based, cable-based and fibre-based wholesale local access at a fixed location in the Hull Area	Conditions 1 (except 1.1B); 2; 3; 4 (except 4.2B; 4.3B; 4.4B); 5; 6; 7; 8
The supply of wholesale broadband access provided in the Hull Area	Conditions 1 (except 1.1A); 2; 3; 4 (except 4.2A; 4.3A; 4.4A); 5; 6; 7; 8

2. The conditions referred to in paragraph 1 above are entitled as follows—

Condition 1	Network access on reasonable request
Condition 2	Requests for new forms of network access
Condition 3	No undue discrimination
Condition 4	Publication of a Reference Offer

Condition 5	Notification of charges and terms and conditions
Condition 6	Notification of technical information
Condition 7	Quality of service
Condition 8	Regulatory Financial Reporting

## Part 2: Definitions and Interpretation

1. In addition to the definitions set out above in this notification and in each condition below (where relevant), in this Schedule 1—
  - (a) “**Access Agreement**” means an agreement entered into between the Dominant Provider and a Third Party for the provision of network access in accordance with condition 1;
  - (b) “**Access Charge Change**” means any amendment to the charges, terms and conditions on which the Dominant Provider provides network access or in relation to any charges for new network access;
  - (c) “**Access Charge Change Notice**” means a notice given by the Dominant Provider of an Access Charge Change;
  - (d) “**Access Request**” means a request from a Third Party to the Dominant Provider for new forms of network access;
  - (e) “**Dominant Provider**” means KCOM;
  - (f) “**Reference Offer**” means the terms and conditions on which the Dominant Provider is willing to enter into an Access Agreement;
  - (g) “**Special Offer**” means a temporary price reduction for a particular product or service, applicable to all customers on a non-discriminatory basis, which is stated to apply for a limited and predefined period and where the price immediately on expiry of that period is no higher than the price immediately before the start of that period; and
  - (h) “**Third Party**” means a person providing or seeking to provide a public electronic communications network or a person providing a public electronic communications service.

### Part 3: The SMP conditions

#### Condition 1 – Network access on reasonable request

- 1.1A The Dominant Provider must provide network access to a Third Party where that (WLA) Third Party, in writing, reasonably requests it except in relation to a request for network access comprising Local Loop Unbundling, in which case the Dominant Provider may reject such a request.
- 1.1B The Dominant Provider must provide network access to a Third Party where that (WBA) Third Party, in writing, reasonably requests it.
- 1.2 The provision of network access by the Dominant Provider in accordance with this condition must:
- (a) take place as soon as reasonably practicable after receiving the request from the Third Party;
  - (b) be on:
    - (i) fair and reasonable terms, conditions and charges; and
    - (ii) such terms, conditions and charges as OFCOM may from time to time direct.
- 1.3 The provision of network access by the Dominant Provider in accordance with this condition must also include such associated facilities as are reasonably necessary for the provision of network access and such other entitlements as OFCOM may from time to time direct.
- 1.4 The Dominant Provider must comply with any direction OFCOM may make from time to time under this condition.
- 1.5 In this condition 1, “**Local Loop Unbundling**” means the provision of a form of network access involving the Dominant Provider’s local loops to the exchange being physically disconnected from its network and connected to a competing provider’s network.

## **Condition 2 – Requests for new forms of network access**

This condition 2 will enter into force 56 days following the date of publication of this notification and shall have effect until the publication of a notification under section 48(1) and 79(4) of the Act revoking such a condition.

2.1 The Dominant Provider must, for the purposes of transparency, publish guidelines, in relation to Access Requests made to it. Such guidelines must set out:

- a) the form in which Access Requests should be made;
- b) the information that the Dominant Provider requires in order to consider Access Requests;
- c) the timescales in which Access Requests will be handled by the Dominant Provider; and
- d) any provisions directed by OFCOM.

2.2 The guidelines must meet the following principles:

- e) the process for consideration of Access Requests shall be documented end-to-end;
- f) the timescales for each stage of the process shall be reasonable, including providing (where relevant) adequate time for interested persons other than the person making the Access Request to make representations;
- g) the criteria by which Access Requests will be assessed shall be clearly identified;
- h) the process for determining, with a Third Party that has made an Access Request, the information in that Access Request that is to be treated as confidential, shall be documented end-to-end;
- i) the reasons for rejecting any Access Request shall be clear and transparent;

- j) the avenues of redress for rejected Access Requests shall be clearly identified; and
- k) any changes to the guidelines shall be agreed between the Dominant Provider and other Third Parties in an appropriate manner.

2.3 The Dominant Provider must, upon reasonable request from a Third Party considering making an Access Request, provide that Third Party with such information as may be reasonably required to enable that Third Party to make an Access Request. Such information must be provided within a reasonable period.

2.4 Except in so far as OFCOM may from time to time otherwise consent in writing, where the Dominant Provider receives an Access Request the Dominant Provider must:

- (a) deal with the Access Request in accordance with the guidelines described in condition 2.1 above;
- (b) inform the party making the Access Request that the Access Request falls within the scope of the guidelines described in condition 2.1 above; and
- (c) publish the non-confidential elements of the Access Request no later than 5 days after receipt of the Access Request.

2.5 Publication pursuant to condition 2.4(c) shall be effected by the Dominant Provider:

- (a) placing a copy of the non-confidential elements of the Access Request on any relevant publicly accessible website, which for the avoidance of doubt shall not require password access, operated or controlled by the Dominant Provider:
  - (i) prominently;
  - (ii) in such form and/or manner as OFCOM may from time to time direct; and

(b) sending a copy of the Access Request to OFCOM which shall include the confidential elements of that Access Request.

- 2.7 A modification of an Access Request which has previously been submitted to the Dominant Provider, and rejected by the Dominant Provider, must be considered as a new request.
- 2.8 The Dominant Provider must in accordance with the requirements of condition 2.10 below publish in relation to Access Requests the information specified in KPIs (i) to (x) below, and any such additional information as OFCOM may from time to time direct.

**KPI(i) – Total number of requests received**

the total number of Access Requests that were received by the Dominant Provider during the corresponding Relevant Period;

**KPI(ii) - Total number of 25-day Unanswered Requests**

for the corresponding Relevant Period, the total number of Access Requests received by the Dominant Provider in respect of which the Dominant Provider has not provided a response within 24 calendar days of that Access Request having been received;

**KPI(iii) - Total number of 75-day Unanswered Requests**

for the corresponding Relevant Period, the total number of Access Requests received by the Dominant Provider in respect of which the Dominant Provider has not provided a response within 74 calendar days of that Access Request having been received;

**KPI(iv) – Total number of Accepted Requests**

the total number of Access Requests that were accepted by the Dominant Provider during the corresponding Relevant Period;

**KPI(v) – Total number of Rejected Requests**



the total number of Access Requests that were rejected by the Dominant Provider during the corresponding Relevant Period;

**KPI(vi) – Total number of 25-day Rejected Requests**

the total number of Access Requests that were rejected by the Dominant Provider more than 25 calendar days after being received by the Dominant Provider;

**KPI(vii) – Total number of 45-day Rejected Requests**

the total number of Access Requests that were rejected by the Dominant Provider more than 45 calendar days after being received by the Dominant Provider;

**KPI(viii) – Total number of Project Plans**

the total number of Project Plans agreed between the Dominant Provider and the Third Party making the Access Request during the corresponding Relevant Period;

**KPI(ix) – Total number of 80-day Project Plans**

the total number of Project Plans agreed between the Dominant Provider and the Third Party making the Access Request more than 80 calendar days after being received by the Dominant Provider; and

**KPI(x) – Total number of 95-day Project Plans**

the total number of Project Plans agreed between the Dominant Provider and the Third Party making the Access Request more than 95 calendar days after being received by the Dominant Provider.

- 2.9 The information required to be published under condition 2.8 above must be published by the Dominant Provider no later than one month after the end of each Relevant Period.
- 2.10 Publication referred to in condition 2.8 shall be effected by the Dominant Provider:

- (a) placing the information prominently (including in such form as OFCOM may from time to time direct) on any relevant publicly accessible website operated or controlled by the Dominant Provider, which for the avoidance of doubt shall not require password access; and

sending a copy of the information to OFCOM.

2.11 In this condition 2:

- (a) **“Project Plan”** means an agreed plan between the Dominant Provider and a Third Party on project execution and project control for the development for a new form of network access. For the avoidance of doubt, Project Plans are agreed between the Dominant Provider and a Third Party with a view to concluding an Access Agreement; and

- (b) **“Relevant Period”** means the following periods of six months beginning either (as applicable) on:

- a. 1 April and ending on 30 September; and

- b. 1 October and ending on 31 March.

2.12 The Dominant Provider must comply with any direction OFCOM may make from time to time under this condition.

**Condition 3 – No undue discrimination**

- 3.1 The Dominant Provider must not unduly discriminate against particular persons or against a particular description of persons, in relation to the provision of network access in accordance with condition 1.
- 3.2 In this condition, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place one or more Third Parties at a competitive disadvantage in relation to activities carried on by the Dominant Provider.

#### **Condition 4 – Publication of a Reference Offer**

- 4.1 Except in so far as OFCOM may from time to time otherwise consent in writing, the Dominant Provider must publish a Reference Offer in relation to the provision of network access pursuant to condition 1 and act in the manner set out below.
- 4.2A Subject to condition 4.8, the Dominant Provider must ensure that a Reference Offer (WLA) in relation to the provision of network access pursuant to Condition 1 includes, where applicable, at least the following—
- a) a description of the network access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of network access);
  - b) the locations at which network access will be provided;
  - c) any relevant technical standards for network access (including any usage restrictions and other security issues);
  - d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
  - e) any ordering and provisioning procedures;
  - f) relevant charges, terms of payment and billing procedures;
  - g) details of interoperability tests;
  - h) details of traffic and network management;
  - i) details of maintenance and quality as follows—
    - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);

- (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- j) details of measures to ensure compliance with requirements for network integrity;
  - k) details of any relevant intellectual property rights;
  - l) a dispute resolution procedure to be used between the parties;
  - m) details of duration and renegotiation of agreements;
  - n) provisions regarding confidentiality of the agreements
  - o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts); and
  - p) the standard terms and conditions for the provision of network access.

4.2B (WBA) Conditions 4.2B(h) and 4.2B(j) shall enter in force 56 days following date of publication of this notification under sections 48(1) and 79(4) of the Act.

Subject to condition 4.8, the Dominant Provider must ensure that a Reference Offer in relation to the provision of network access pursuant to condition 1 includes, where applicable, at least the following—

- a) a description of the network access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of network access);
- b) the locations at which network access will be provided;

- c) any relevant technical standards for network access (including any usage restrictions and other security issues);
- d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- e) any ordering and provisioning procedures;
- f) relevant charges, terms of payment and billing procedures;
- g) details of interoperability tests;
- h) details of traffic and network management;
- i) details of maintenance and quality as follows—
  - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- j) details of measures to ensure compliance with requirements for network integrity;
- k) details of any relevant intellectual property rights;
- l) a dispute resolution procedure to be used between the parties;

- m) details of duration and renegotiation of agreements;
- n) provisions regarding confidentiality of the agreements
- o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts); and
- p) the standard terms and conditions for the provision of network access.

4.3A To the extent that the Dominant Provider provides to itself network access that—  
(WLA)

- a) is the same, similar or equivalent to that provided to any other Third Party;  
or
- b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party;

in a manner that differs from that detailed in a Reference Offer in relation to network access provided to any Third Party, the Dominant Provider must ensure that it publishes a Reference Offer in relation to the network access that it provides to itself which includes, where relevant, at least those matters detailed in conditions 4.2A(a) to (p).

4.3B To the extent that the Dominant Provider provides to itself network access that—  
(WBA)

- a) is the same, similar or equivalent to that provided to any other Third Party;  
or
- b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party;

in a manner that differs from that detailed in a Reference Offer in relation to network access provided to any Third Party, the Dominant Provider must ensure that it publishes a Reference Offer in relation to the network access that it provides to itself which includes, where relevant, at least those matters detailed in conditions 4.2B(a) to (p).

- 4.4A The Dominant Provider must, on the date that this condition enters into force, (WLA) publish a Reference Offer in relation to any network access that it is providing as at the date that this condition enters into force.
- 4.4B The Dominant Provider must publish a Reference Offer in relation to: (WBA)
- (a) any network access that it is providing as at the date that this condition enters into force, on the date that this condition enters into force; and
  - (b) any network access it is providing as at the date that conditions 4.2B(h) and 4.2B(j) enter into force, on the date that those conditions enter into force.
- 4.5 The Dominant Provider must update and publish the Reference Offer in relation to any amendments or in relation to any further network access provided after the date that this condition enters into force.
- 4.6 Publication referred to above shall be effected by the Dominant Provider placing a copy of the Reference Offer on any relevant publicly accessible website operated or controlled by the Dominant Provider, which for the avoidance of doubt shall not require password access, prominently and in such form as OFCOM may from time to time direct.
- 4.7 The Dominant Provider must send a copy of the current version of the Reference Offer to any person at that person's written request (or such parts as have been requested).
- 4.8 The Dominant Provider must make such modifications to the Reference Offer as OFCOM may direct from time to time.
- 4.9 The Dominant Provider must provide network access at the charges, terms and conditions in the relevant Reference Offer and must not depart therefrom either directly or indirectly.
- 4.10 The Dominant Provider must comply with any direction OFCOM may make from time to time under this condition.



## **Condition 5 – Notification of charges and terms and conditions**

- 5.1 Except in so far as OFCOM may from time to time otherwise consent in writing, the Dominant Provider must publish charges, terms and conditions and act in the manner set out in this condition.
- 5.2 Where it proposes an Access Charge Change, the Dominant Provider must send to every person with whom it has entered into an Access Agreement pursuant to condition 1, an Access Charge Change Notice.
- 5.3 The obligation in condition 5.2 shall not apply where the Access Charge Change is directed or determined by OFCOM or is a consequence of such direction or determination (including pursuant to the setting of an SMP services condition under the power in section 45 of the Act) or required by a notification or enforcement notification issued by OFCOM under sections 96A or 96C of the Act.
- 5.4 An Access Charge Change Notice must:
- (a) in the case of an Access Change involving new network access, be sent not less than 28 days before any such amendment comes into effect;
  - (b) in the case of an Access Change relating solely to a reduction in the price of existing network access (including, for the avoidance of doubt, a Special Offer), be sent not less than 28 days before any such amendment comes into effect;
  - (c) in the case of an Access Change relating to the end of a temporary price reduction in accordance with the terms of the Special Offer, be sent not less than 28 days before any such amendment comes into effect; and
  - (d) in the case of any other Access Change involving existing network access, be sent not less than 56 days before any such amendment comes into effect.
- 5.5 The Dominant Provider must ensure that an Access Charge Change Notice includes—

- (a) a description of the network access in question;
- (b) a reference to the location in the Dominant Provider's current Reference Offer of the terms and conditions associated with the provision of that network access;
- (c) the current and proposed new charge and/or current and proposed new terms and conditions (as the case may be); and
- (d) the date on which, or the period for which, the Access Charge Change will take effect (the "**effective date**").

5.6 The Dominant Provider must not apply any Access Charge Change identified in an Access Charge Change Notice before the effective date.

5.7 To the extent that the Dominant Provider provides to itself network access that—

- (a) is the same, similar or equivalent to that provided to any Third Party;  
or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any Third Party,

in a manner that differs from that detailed in an Access Charge Change Notice in relation to network access provided to any Third Party, the Dominant Provider must ensure that it sends to OFCOM a notice in relation to the network access that it provides to itself which includes, where relevant, at least those matters detailed in conditions 5.5(a) to (d) and, where the Dominant Provider amends the charges, terms and conditions on which it provides itself with network access, it must ensure it sends to OFCOM a notice equivalent to an Access Charge Change Notice.

## Condition 6 – Notification of technical information

6.1 Except in so far as OFCOM may from time to time otherwise consent in writing, where the Dominant Provider provides network access pursuant to condition 1 and proposes new or amended terms and conditions relating to the following—

- (a) technical characteristics (including information on network configuration, where necessary, to make effective use of the network access provided);
- (b) the locations at which network access will be provided; or
- (c) technical standards (including any usage restrictions and other security issues),

the Dominant Provider must publish a written notice (the “**Notice**”) of the new or amended terms and conditions within a reasonable time period but not less than 90 days before either the Dominant Provider enters into an Access Agreement to provide the new network access or the amended terms and conditions of the existing Access Agreement come into effect.

6.2 The obligation in condition 6.1 shall not apply where the new or amended charges or terms and conditions are directed or determined by OFCOM or are a consequence of such direction or determination (including pursuant to the setting of an SMP services condition under the power in section 45 of the Act) or are required by a notification or enforcement notification issued by OFCOM under sections 96A or 96C of the Act.

6.3 The Dominant Provider must ensure that the Notice includes—

- (a) a description of the network access in question;
- (b) a reference to the location in the Dominant Provider’s Reference Offer of the relevant terms and conditions; and
- (c) the date on which or the period for which the Dominant Provider may enter into an Access Agreement to provide the new network access or any amendments to the relevant terms and conditions will take effect (the “**Effective Date**”).

- 6.4 The Dominant Provider must not enter into an Access Agreement containing the terms and conditions identified in the Notice or apply any new relevant terms and conditions identified in the Notice before the Effective Date.
- 6.5 Publication referred to in condition 6.1 must be effected by the Dominant Provider—
- (a) placing a copy of the Reference Offer on any relevant publicly accessible website operated or controlled by the Dominant Provider, which for the avoidance of doubt shall not require password access prominently and in such form as OFCOM may from time to time direct;
  - (b) sending a copy of the Notice to OFCOM;
  - (c) where the Notice identifies a modification to existing relevant terms and conditions, sending a copy of the Notice to every person with which the Dominant Provider has entered into an Access Agreement pursuant to condition 1; and
  - (d) sending a copy of the Notice to any person at that person's written request. The provision of such a copy of the Notice by the Dominant Provider may be subject to a reasonable charge.

### **Condition 7 – Quality of service**

- 7.1 The Dominant Provider must publish all such information as to the quality of service in relation to network access provided by the Dominant Provider pursuant to condition 1 in such manner and form, and including such content, as OFCOM may from time to time direct.
- 7.2 The Dominant Provider must comply with any direction OFCOM may make from time to time under this condition 7.

## **Condition 8 – Regulatory Financial Reporting**

8.1 A1 Except in so far as Ofcom may consent otherwise in writing, the Dominant Provider shall act in the manner set out in this Condition 8.

A2 Ofcom may from time to time make such directions as they consider appropriate in relation to the Dominant Provider's Cost Accounting System, Accounting Separation System and its obligations under this Condition 8.

A3 the Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition 8.

A4 For the purpose of this Condition 8, publication shall be effected by

- a. placing a copy of the relevant information on any relevant publicly accessible website, which for the avoidance of doubt shall not require password access, operated or controlled by the Dominant Provider; and
- b. sending a copy of the relevant information to any person at that person's written request.

### **Requirements relating to the preparation, audit, delivery and publication of the Regulatory Financial Statements**

A5 the Dominant Provider shall in respect of the Market, Technical Areas and the Disaggregated Activities (as applicable) for each Financial Year:

- a. prepare such Regulatory Financial Statements as directed by Ofcom from time to time in accordance with the Accounting Documents (the relevant Accounting Documents to be identified in the Regulatory Financial Statements by reference to their date);
- b. secure the expression of an audit opinion upon the Regulatory Financial Statements as directed by Ofcom from time to time;
- c. deliver to Ofcom the Regulatory Financial Statements and corresponding audit opinion identified as directed by Ofcom from time to time and in accordance with condition A6(a);
- d. publish the Regulatory Financial Statements and corresponding audit opinion as directed by Ofcom from time to time and in accordance with condition A6(b) and (c);

- e. ensure that any Regulatory Financial Statements and corresponding audit opinion that it delivers to Ofcom and/or publishes are fit for such purpose (or purposes), if any, as notified by Ofcom in writing; and
- f. in so far as it is reasonably practicable to monitor the effect of such changes, deliver to Ofcom a report detailing any changes in the Accounting Documents, any Process and any other methodology which caused any figure presented on any one of the Regulatory Financial Statements to change by more than 5% from the figure that would have been presented had such a change not been made. Any such report shall include details sufficient to render transparent such changes in accordance with any relevant direction Ofcom may make from time to time.

A6 the Dominant Provider shall:

- a. deliver to Ofcom copies of the Regulatory Financial Statements and any corresponding audit opinion, each and all of which shall be in the form in which they are ultimately to be published, at least two weeks before they are required to be published;
- b. publish the Regulatory Financial Statements and any corresponding audit opinions within 4 months after the end of the period to which they relate; and
- c. publish with the Regulatory Financial Statements any written statement made by Ofcom and provided to the Dominant Provider commenting on the data in, the notes to or the presentation of any or all of the Regulatory Financial Statements and/or the Accounting Documents.

A7 The Dominant Provider shall make such amendments to the form and content of the Regulatory Financial Statements as are necessary to give effect fully to the requirements of this Condition 8. The Dominant Provider shall provide to Ofcom particulars of any such amendment, the reasons for it and its effect, when it delivers the Regulatory Financial Statements to Ofcom.

A8 The Dominant Provider shall prepare all Regulatory Financial Statements, explanations or other information required by virtue of this Condition 8 on a current cost basis and shall be capable of doing so in relation to any period. Such

Financial Statements, explanations or other information shall be, in the opinion of Ofcom, meaningfully reconcilable to the Statutory Financial Statements.

A9 the Dominant Provider shall ensure that Accounting Policies shall be applied consistently within the same Regulatory Financial Statements, between Regulatory Financial Statements for the same Financial Year and from one Financial Year to the next. Each Regulatory Financial Statement shall include Prior Year Comparatives which shall be prepared on a basis consistent with Current Year Figures. The Dominant Provider may depart from this requirement in preparing the Regulatory Financial Statements for a Financial Year if there are reasons for doing so provided that the particulars of the departure, the reasons for it and its effect are stated in a note in the Regulatory Financial Statements in accordance with Accounting Standards and GAAP.

A10 The Dominant Provider shall secure that sufficient checks, controls and meaningful reconciliations are performed between figures contained in the Regulatory Financial Statements and the accounting records (or between figures supplied by either the Cost Accounting System or the Accounting Separation System upon which the Regulatory Financial Statements rely and (i) other figures supplied by either the Cost Accounting System or the Accounting Separation System and/or (ii) the accounting records) to:

- a. enable the Regulatory Auditor to conclude that, in its opinion, both the Cost Accounting System and the Accounting Separation System complies with the Accounting Documents; and
- b. enable the Regulatory Financial Statements to be audited and an audit opinion expressed upon them in accordance with any relevant direction of Ofcom under this Condition 8.

A11 The Dominant Provider shall preserve records sufficient to provide an adequate explanation of each Regulatory Financial Statement for a period of six years from the date on which each Regulatory Financial Statement is delivered to Ofcom.

#### **Requirements relating to audit of the Regulatory Financial Statements**

A12 The Regulatory Auditor that the Dominant Provider from time to time appoints shall at all times be satisfactory to Ofcom having regard to such matters as Ofcom consider appropriate. The Dominant Provider shall notify Ofcom in writing of the



Auditor appointed to secure compliance with this Condition 8 before the Auditor carries out any work for that purpose. the Dominant Provider shall notify Ofcom of any proposed change of Regulatory Auditor 28 days before effect is given to that change.

A13 In the event that the Regulatory Auditor is in the opinion of Ofcom unsatisfactory, the Dominant Provider shall appoint and instruct an Alternative Regulatory Auditor that is at all times satisfactory to Ofcom having regard to such matters as Ofcom consider appropriate. The Dominant Provider shall ensure that the Alternative Regulatory Auditor:

- a. carries out such on-going duties as are required to secure compliance with this Condition 8;
- b. carries out work or further work, in addition to that performed by the Statutory Auditor and/or by the former Regulatory Auditor, in relation to such matters connected to compliance with this Condition 8 as are of concern to Ofcom and notified to the Dominant Provider in writing; and/or
- c. re-performs work previously performed by the Statutory Auditor and/or by the former Regulatory Auditor in relation to such matters connected to compliance with this Condition as are of concern to Ofcom and notified to the Dominant Provider in writing.

A14 the Dominant Provider shall extend to the Alternative Regulatory Auditor such assistance and cooperation as would be extended to the Statutory Auditor and/or to the Regulatory Auditor and, to the extent similar assistance and co-operation may be required from the Statutory Auditor and/or from the former Regulatory Auditor, the Dominant Provider shall use its best endeavours to secure such assistance and co-operation.

A15 the Dominant Provider's letter of engagement appointing the Regulatory Auditor shall include such provisions acknowledging the acceptance by the Regulatory Auditor of duties and responsibilities to Ofcom in respect of its audit work, audit report and audit opinion as are consistent with the ICAEW Guidance.

A16 the Dominant Provider shall use its best endeavours to obtain from the Regulatory Auditor any further explanation and clarification of any audit opinion required under this Condition 8 and any other information in respect of the matters which are the subject of that audit opinion as Ofcom shall require.

## **Requirements relating to the Primary and Secondary Accounting Documents**

A17 the Dominant Provider shall review the Primary Accounting Documents as they exist before the coming into force of this Condition 8, and to the extent these documents do not comply with this Condition 8, the Dominant Provider shall by four months after the date on which this Condition 8 comes into force make changes to the Primary Accounting Documents to render them compliant. Such changes shall be delivered to Ofcom on or before four months after the date on which this Condition 8 comes into force together with a copy of the Primary Accounting Documents marked up to show the effect of such changes. All such changes shall take effect on the date on which they are delivered to Ofcom.

A18 Following the review of the Primary Accounting Documents in accordance with condition A17, the Dominant Provider shall prepare the Secondary Accounting Documents in accordance with the Primary Accounting Documents and the requirements of this Condition 8. The Secondary Accounting Documents shall be delivered to Ofcom eight months after the date on which this Condition 8 comes into force.

A19 the Dominant Provider shall,

- a. publish the Primary Accounting Documents on or by four months after the date on which this Condition 8 comes into force following their first review in accordance with condition A17;
- b. publish the Secondary Accounting Documents following their first review in accordance with condition A18 on or prior to the date of publication of the Regulatory Financial Statements in accordance with conditions A5 and A6; and
- c. thereafter publish, and deliver to Ofcom, details of any amendment to the Accounting Documents as soon as practicable, and in any event within 28 days of the incorporation of such an amendment into the Accounting Documents. Such amendments shall take effect when delivered to Ofcom.

A20 Insofar as there is any inconsistency between any or all of the Primary Accounting Documents, the Primary Accounting Documents shall have the following order of priority:

- a. the Regulatory Accounting Principles;

- b. the Attribution Methods;
- c. the Transfer Charge System Methodology;
- d. the Accounting Policies.

**Requirements relating to the up-dating of systems, Accounting Documents and form and content**

A21 the Dominant Provider shall make such amendments as are from time to time required to:

- a. the Cost Accounting System and the Accounting Separation System;
- b. the Accounting Documents; and
- c. the form and content of the Financial Statements, in order to ensure that they are consistent with, and give effect fully to:
  - i. any modifications of any SMP conditions;
  - ii. any formal undertakings given by the Dominant Provider to Ofcom following investigations by them into possible contraventions by the Dominant Provider of any SMP conditions or any provisions of the Act and following any dispute considered by Ofcom under the Act; and
  - iii. (any enforcement notifications, directions, consents and determinations given or made by Ofcom from time to time under any SMP condition or under the Act or in relation to any dispute considered by Ofcom under the Act, and the Dominant Provider shall make such amendments, and notify Ofcom in writing of such amendments, within three months of the modifications, formal undertakings, enforcement notifications, directions, consents and determinations having been made, provided that the requirements of this paragraph shall be suspended pending the final disposal of any proceedings seeking to have any such modifications, enforcement notifications, directions, consents, or determinations, quashed, set aside, modified or varied.

**Requirements relating to deficiencies in the Regulatory Financial Statements and the Accounting Documents**

A22 Where Ofcom have reasonable grounds to believe that any or all of the Regulatory Financial Statements and/or Accounting Documents are deficient, the Dominant Provider shall, where directed by Ofcom,

- a. amend the Accounting Documents in order to remedy the deficiencies identified by Ofcom;
- b. restate the Regulatory Financial Statements identified by Ofcom as requiring restatement in accordance with the Accounting Documents which have, where necessary, been amended pursuant to subparagraph (a);
- c. secure in accordance with any relevant direction of Ofcom under this Condition the expression of an audit opinion on the restated Regulatory Financial Statements;
- d. deliver to Ofcom the restated Regulatory Financial Statements and corresponding audit opinion; and
- e. publish the restated Regulatory Financial Statements and corresponding audit opinion.

**Requirements relating to the maintenance of sufficient accounting records**

A23 the Dominant Provider shall maintain accounting records in a form which, on a historical cost basis and on a current cost basis:

- a. enables the Accounting Separation Market Activities and, insofar as these comprise or use Accounting Separation Activities, each of the Accounting Separation Activities, to be separately identified; and the revenues, costs, assets and liabilities of the Accounting Separation Market Activities and, insofar as these comprise or use Accounting Separation Activities, the revenues, costs, assets and liabilities of each of those Accounting Separation Activities, to be separately attributable; and
- b. shows and explains the transactions of the Accounting Separation Market Activities and, insofar as these comprise or use Accounting Separation Activities, the transactions of each of the Accounting Separation Activities.

A24 The accounting records referred to in condition A23 and all associated documentation shall be, as appropriate:

- a. maintained in accordance with the Accounting Documents;

- b. maintained in order to ensure compliance with this Condition 8;
- c. sufficient to enable the Regulatory Financial Statements to have expressed upon them any relevant audit opinion required under this Condition 8;
- d. sufficient to ensure that charges for Network Access can be shown to be fair and reasonable and not to be unduly discriminatory; and
- e. sufficient to provide a complete justification of the Dominant Provider's charges for Network Access; and
- f. sufficient, to provide a complete justification of the Dominant Provider's charges for the provision of services to End Users.

**Requirements relating to the preparation and maintenance of a Wholesale Catalogue**

A25 the Dominant Provider shall ensure that by three months after the date on which this Condition 8 comes into force,

- a. all of its Wholesale Services as at the date on which this Condition 8 comes into force are identified as either External Wholesale Services and placed on the External Wholesale Services List or Internal Wholesale Services and placed on the Internal Wholesale Services List or, where appropriate, are identified as being both External Wholesale Services and Internal Wholesale Services and place on both the External Wholesale Services List and the Internal Wholesale Services List;
- b. an accurate description is prepared of all the Dominant Provider's Internal Wholesale Services, External Wholesale Services and Wholesale Activities as at the date this Condition 8 comes into force sufficient in the opinion of Ofcom to enable them to determine whether these activities have been appropriately identified and sufficiently described; and
- c. an accurate description is prepared of all of the Dominant Provider's Network Services and the extent to which these activities are used in the course of supplying Wholesale Services as at the date this Condition 8 comes into force sufficient in the opinion of Ofcom to enable them to determine whether these activities and their use have been appropriately identified and adequately described.

A26 The Wholesale Catalogue shall be delivered to Ofcom as soon as practicable after the date on which this Condition 8 comes into force and in any event by four months after that date.

A27 the Dominant Provider shall ensure that when from time to time Wholesale Activities and Network Activities used in the course of supplying Wholesale Services vary from those as at the date on which this Condition 8 comes into force (including, amongst other changes, new activities and the cessation of former activities) it shall within 28 days of such variation:

- a. amend the Wholesale Catalogue to reflect such variation; and
- b. deliver to Ofcom the amended version of the Wholesale Catalogue marked up to show those amendments.

The revised version of the Wholesale Catalogue shall be sufficient to enable Ofcom to determine whether such activities have been identified appropriately and their use categorised correctly.

#### **Further accounting separation requirements**

A28 the Dominant Provider shall maintain a separation for accounting purposes of the Accounting Separation Market Activities from other activities and of Accounting Separation Activities from other activities, so as to:

- a. identify all elements of revenue, cost, assets and liabilities, with the basis of their calculation and the detailed attribution methods used, related to the Accounting Separation Market Activities and Accounting Separation Activities including an itemised breakdown of fixed assets; and
- b. ensure that Accounting Separation Market Activities and Accounting Separation Activities are identified and are recorded at an appropriate amount in accordance with the Accounting Documents.

#### **Requirements relating to the demonstration of non-discrimination**

A29 the Dominant Provider shall ensure it is able to demonstrate that at any point in time:

- a. where a Network Service or combination of Network Services is used by the Dominant Provider in providing Internal Wholesale Services, the amount applied and incorporated in the Transfer Charge for the Internal

Wholesale Service in respect of the use of the Network Services is equivalent to the amount applied and incorporated for the use of the Network Services or combination of Network Services in the charge payable for an equivalent External Wholesale Service;

b. the same amount as applied and incorporated in the Transfer Charge for the Internal Wholesale Service in subparagraph (a) in respect of the use of the Network Services is applied to the Network Service or combination of Network Services whenever it is used by the Dominant Provider in providing an Internal Wholesale Service; and

c. the same amount as applied and incorporated in the Transfer Charge for the equivalent External Wholesale Service in subparagraph (a) in respect of the use of the Network Services is applied to the Network Service or combination of Network Services whenever it is used by the Dominant Provider in providing an External Wholesale Service;

d. the amount applied and incorporated in the Transfer Charge for the Internal Wholesale Service in subparagraph (a) in respect of the use of the Network Services shall be the cost of those Network Services unless the Network Service concerned is one of the Accounting Separation Activities.

### **Definitions**

For the purpose of interpreting this Condition 8 the following definitions shall apply:

**'Accounting Documents'** means together the Primary Accounting Documents, the Secondary Accounting Documents, and either the Wholesale Catalogue or the Retail Catalogue as appropriate, all as amended from time to time in accordance with this Condition 8;

**'Accounting Policies'** means the manner in which the requirements of the Companies Act 1985 as amended by the Companies Act 1989, the Accounting Standards and the accounting policies whenever not superseded by the Regulatory Accounting Principles, are applied by the Dominant Provider in each of the Regulatory Financial Statements;

**‘Accounting Separation Activities’** means Wholesale Services and those Wholesale Activities, Network Services and Network Activities used directly or indirectly in the course of supplying Wholesale Services;

**‘Accounting Separation Attribution’** means the totality of all apparatus, data, procedures and activities which the Dominant Provider uses or holds for use to determine the costs, revenues, assets and liabilities to be attributed to an activity, either based upon data recorded by an Accounting Separation Measuring System or otherwise;

**‘Accounting Separation Market Activities’** means all of the Wholesale Services supplied in the Market or Technical Area (as applicable) and all of the Wholesale Activities, Network Services and Network Activities used directly or indirectly in the course of supplying those Wholesale Services;

**‘Accounting Separation Measuring System’** means the totality of all apparatus, systems, data, procedures and activities which the Dominant Provider uses or holds for use to determine the extent to which costs, revenues, assets and liabilities are to be attributed to activities related to Network Access;

**‘Accounting Separation System’** means the Accounting Separation Attribution and Accounting Separation Measuring System taken together;

**‘Accounting Standards’** means the accounting standards by reference to which the Dominant Provider are required to prepare the Statutory Financial Statements;

**‘Alternative Regulatory Auditor’** means any Auditor not for the time being appointed as the Dominant Provider’s Regulatory Auditor;

**‘Attribution Methods’** means the practices used by the Dominant Provider to attribute revenue (including appropriate Transfer Charges), costs (including appropriate Transfer Charges), assets and liabilities to activities or, insofar as those activities have been aggregated into Wholesale Segments or Retail Segments in a given Market or Technical Area (as applicable), to each Wholesale Segment or Retail Segment;

**‘Auditing Standards’** means the standards required to be applied by the Statutory Auditor for the purpose of auditing the Statutory Financial Statements;



**'Auditor'** means any auditor which could be appointed as the Dominant Provider's auditor in accordance with the requirements of the Companies Act 1985 as amended by the Companies Act 1989;

**'Cost Accounting Attribution'** means the totality of all apparatus, data, procedures and activities which the Dominant Provider uses or holds for use to determine the costs, revenues, assets and liabilities to be attributed to an activity, either based upon data recorded by a Cost Accounting Measuring System or otherwise;

**'Cost Accounting Measuring System'** means the totality of all apparatus, systems, data, procedures and activities which the Dominant Provider uses or holds for use to determine the extent to which costs, revenues, assets and liabilities are to be attributed to an activity related to Network Access or the provision of services to End-Users (as appropriate);

**'Cost Accounting System'** means Cost Accounting Attribution and Cost Accounting Measuring System taken together;

**'Current Year Figures'** means, in relation to any set of Financial Statements, the amounts relating to the Financial Year to which the accounts relate;

**'Disaggregated Activities'** means, in respect of a Market or Technical Area, the Wholesale Segments, Wholesale Services, Wholesale Activities, Network Services, Network Activities, Retail Segments, Retail Products, Retail Activities and/or Retail Support Activities used or carried out in the Market or Technical Area, as appropriate;

**'External Wholesale Services'** means services supplied or offered to any Communications Provider other than the Dominant Provider;

**'External Wholesale Services List'** means the list of External Wholesale Services prepared under condition A25 as amended from time to time under condition A27;

**'Financial Year'** means a financial year of the Dominant Provider in respect of which annual statutory accounts are required to be (or to have been) prepared and audited in accordance with the requirements of the Companies Act 1985 as amended by the Companies Act 1989;

**'GAAP'** (Generally Accepted Accounting Practice(s)) means United Kingdom or international (as appropriate) conventions, rules and procedures that define currently accepted accounting practice (including, for the avoidance of doubt, not only broad guidelines of general application but also any detailed practices and procedures);

**'ICAEW Guidance'** means the technical release titled "Reporting to Regulators of Regulated Entities: Audit 05/03" issued by the Audit and Assurance Faculty of the Institute of Chartered Accountants in England & Wales in October 2003;

**'Interconnection Services'** means In-Span Handover ("ISH"), Customer-Sited Handover ("CSH"), ISH extension circuits, Synchronous Transfer Mode-1/ISH handover, and Synchronous Transfer Mode-1/CSH handover;

**'Internal Wholesale Services'** means services equivalent to the External Wholesale Services which, in the absence of horizontal or vertical integration, could be supplied within the Dominant Provider;

**'Internal Wholesale Services List'** means the list of Internal Wholesale Services prepared under condition A25 as amended from time to time under condition A27;

**'Market'** means the market to which this Condition 8 applies in accordance with paragraph 4 of this notification;

**'Network Activities'** means any activities related to Network Access used directly or indirectly (or which in the absence of horizontal or vertical integration would be used directly or indirectly) in the course of supplying Wholesale Services and any activities used in the course of such activities, excluding those activities which are Wholesale Activities;

**'Network Component'** means, to the extent they are used in the Market or Technical Area (as applicable), the network components specified in any direction given by Ofcom from time to time for the purposes of these conditions;

**'Network Services'** means those groups of Network Activities used directly (or which in the absence of horizontal or vertical integration would be used directly) in the course of supplying Wholesale Services;

**'Primary Accounting Documents'** means documentation setting out the Accounting Policies, the Attribution Methods, the Regulatory Accounting Principles, and the Transfer Charge System Methodology;

**'Prior Year Comparatives'** means, in relation to any set of Financial Statements, the amounts relating to the Financial Year immediately preceding the Financial Year to which the accounts relate, re-evaluated if necessary to ensure that such figures are comparable to the Current Year Figures;

**'Process'** means the series of inter-related activities or actions to obtain, record or hold data or information or to carry out any operation or set of operations on the data or information, including:

- i. organisation, storage, adaptation, or alteration of the data or information;
- ii. retrieval, consultation, computation or use of the data or information;
- iii. disclosure of the data or information by transmission, dissemination, or otherwise making available; or
- iv. alignment, combination, blocking, erasing or destruction of the data or information;

**'Regulatory Accounting Principles'** means the principles applied or used by the Dominant Provider in the preparation of the Regulatory Financial Statements;

**'Regulatory Auditor'** means the Auditor for the time being appointed by the Dominant Provider in accordance with these conditions;

**'Regulatory Financial Statement'** means any financial statement in respect of a Financial Year prepared, or required to be prepared by the Dominant Provider in accordance with this Condition 8;

**'Relevant Financial Year'** means the Financial Year in relation to which any given set of Regulatory Financial Statements are required;

**'Retail Activities'** means any activities wholly and exclusively carried out (or which in the absence of horizontal or vertical integration would wholly and exclusively be carried out) in the course of supplying Retail Products and any activities wholly and

exclusively carried out in the course of such activities, excluding those activities which are Wholesale Services;

**'Retail Products'** means services used by or offered to any End Users (including The Dominant Provider);

**'Retail Segments'** means groups of Retail Products;

**'Retail Support Activities'** means any activities carried out directly or indirectly (or which in the absence of horizontal or vertical integration would be carried out directly or indirectly) in the course of supplying Retail Products and any activities directly or indirectly carried out in the course of such activities, excluding those activities which are Retail Activities or Wholesale Services;

**'Secondary Accounting Documents'** means documentation setting out details of the policies, methodologies, systems, processes and procedures for deriving or calculating the costs, revenues, assets and liabilities (including detailed attribution methods and detailed valuation methodology) used by the Dominant Provider in addition to the Primary Accounting Documents, the Wholesale Catalogue and the Retail Catalogue to prepare the Regulatory Financial Statements;

**'Statutory Auditor'** means the Auditor for the time being appointed by the Dominant Provider in accordance with the requirements of the Companies Act 1985 as amended by the Companies Act 1989;

**'Statutory Financial Statements'** means any annual report required to be prepared by the Dominant Provider in accordance with the requirements of the Companies Act 1985 as amended by the Companies Act 1989;

**'Technical Areas'** means either in-span Interconnection links or Interconnection Services which are subject to SMP Conditions by virtue of a market power determination in an identified services market;

**'Transfer Charge'** means the charge or price that is applied, or deemed to be applied, by the Dominant Provider to itself for the use or provision of an activity or group of activities. For the avoidance of doubt, such activities or group of activities include, amongst other things, products and services provided from, to or within the Market or Technical Area (as applicable) and the use of Network Components in the Market or Technical Area (as applicable);

**'Transfer Charge System Methodology'** means the methodology of the system employed by the Dominant Provider which enables an activity to use a service or good from another activity and to account for it as though it had purchased that service or good from an unrelated party (including accounting for it an at appropriate amount);

**'Usage Factor'** means the average usage by any Communications Provider (including the Dominant Provider itself) of each Network Component in using or providing a particular product or service or carrying out a particular activity;

**'Wholesale Activities'** means any activities wholly and exclusively carried out (or which in the absence of horizontal or vertical integration would wholly and exclusively be carried out) in the course of supplying Wholesale Services and any activities wholly and exclusively carried out in the course of such activities;

**'Wholesale Catalogue'** means the documentation required to be produced by The Dominant Provider under condition A25 as amended from time to time in accordance with condition A27;

**'Wholesale Segments'** means groups of Wholesale Services;

**'Wholesale Services'** means services related to Network Access used by or offered to any Communications Provider (including the Dominant Provider).

## Annex 5

# Regulatory Framework

## Introduction

- A5.1 This annex provides an overview of the market review process to give some additional context and understanding of the matters discussed in this statement, including the legal instruments (statutory notification) published at Annex 4.
- A5.2 This overview identifies some of the key aspects of materials relevant to this market review, but does not purport to give a full and exhaustive account of all materials that we have considered in developing our proposals for this market.

## Market reviews

- A5.3 A market review is a process by which, at regular intervals, we identify relevant markets appropriate to national circumstances and carry out analyses of these markets to determine whether they are effectively competitive. Where an operator has significant market power (SMP) in a market, we impose appropriate remedies, known as SMP obligations or conditions, to address this. We explain the concept of SMP below.
- A5.4 In carrying out this work, we act in our capacity as the sector-specific regulator for the UK communications industries, particularly relating to our role as the regulator for telecommunications. Our functions in this regard are to be found in Part 2 of the Communications Act 2003 (the “**2003 Act**”).<sup>92</sup> We exercise those functions within the framework harmonised across the European Union for the regulation of electronic communications by the Member States (known as the Common Regulatory Framework or the ‘CRF’), as transposed by the 2003 Act. The applicable rules<sup>93</sup> are contained in a package of five EC Directives, of which two Directives are particularly relevant for present purposes, namely:
- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the ‘Framework Directive’); and
  - Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the ‘Access Directive’).
- A5.5 The Directives require that NRAs (such as Ofcom) carry out reviews of competition in communications markets to ensure that SMP regulation remains appropriate and proportionate in the light of changing market conditions.
- A5.6 Each market review normally involves three analytical stages, namely:
- the procedure for the identification and definition of the relevant markets (the market definition procedure);

<sup>92</sup> <http://www.legislation.gov.uk/ukpga/2003/21/contents>

<sup>93</sup> The Directives were subsequently amended on 19 December 2009. The amendments have been transposed into the national legislation and applied with effect from 26 May 2011 and any references in this statement to the 2003 Act should be read accordingly.

- the procedure for the assessment of competition in each market, in particular whether the relevant market is effectively competitive (the market analysis procedure); and
- the procedure for the assessment of appropriate regulatory obligations (the remedies procedure).

A5.7 These stages are normally carried out together.

## Market definition procedure

A5.8 The 2003 Act provides that, before making a market power determination,<sup>94</sup> we must identify “the markets which in [our] opinion, are the ones which in the circumstances of the United Kingdom are the markets in relation to which it is appropriate to consider whether to make such a determination” and analyse those markets.<sup>95</sup>

A5.9 The Framework Directive requires that NRAs shall, taking the utmost account of the 2014 EC Recommendation<sup>96</sup> and SMP Guidelines<sup>97</sup> published by the European Commission, define the relevant markets appropriate to national circumstances, in particular relevant geographic markets within their territory, in accordance with the principles of competition law.<sup>98</sup>

A5.10 The 2014 EC Recommendation identifies a set of product and service markets within the electronic communications sector in which *ex ante* regulation may be warranted. Its purpose is twofold. First, seeking to achieve harmonisation across the single market by ensuring that the same markets will be subject to a market analysis in all Member States. Second, the 2014 EC Recommendation seeks to provide legal certainty by making market players aware in advance of the markets to be analysed.

A5.11 However, NRAs are able to regulate markets that differ from those identified in the 2014 EC Recommendation where this is justified by national circumstances by demonstrating that three cumulative criteria referred to in the 2014 EC Recommendation (the three-criteria test) are satisfied and where the EC does not raise any objections.

A5.12 The three criteria, which are cumulative, are:

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<sup>94</sup> The market power determination concept is used in the 2003 Act to refer to a determination that a person has SMP in an identified services market.

<sup>95</sup> Section 79 of the 2003 Act

<sup>96</sup> *Commission Recommendation of 9 October 2014 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 communications networks and services*, (2014/710/EU), available at [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2014.295.01.0079.01.ENG](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2014.295.01.0079.01.ENG). Together with this Recommendation, the Commission has adopted an Explanatory Note, available at: [http://ec.europa.eu/information\\_society/newsroom/cf/dae/document.cfm?action=display&doc\\_id=7056](http://ec.europa.eu/information_society/newsroom/cf/dae/document.cfm?action=display&doc_id=7056)

<sup>97</sup> *Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services* (2002/C 165/03), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:165:0006:0031:EN:PDF>.

<sup>98</sup> Article 15(3) Framework Directive

- the presence of high and non-transitory structural, legal or regulatory barriers to entry;
  - a market structure which does not tend towards effective competition within the relevant time horizon, having regard to the state of infrastructure-based and other competition behind the barriers to entry; and
  - competition law alone is insufficient to adequately address the identified market failure(s).
- A5.13 The 2014 EC Recommendation identifies wholesale central access provided at a fixed location for mass-market products (which we refer to as wholesale broadband access for the purposes of this consultation – in order to be consistent with the nomenclature of previous reviews) as one of the markets to be reviewed (Market 3b).
- A5.14 The fact that an NRA identifies the product and service markets listed in the 2014 EC Recommendation or identifies other product and service markets that meet the three-criteria test does not automatically mean that regulation is warranted. Market definition is not an end in itself but rather a means of assessing effective competition.
- A5.15 The relationship between the market definitions we propose to identify in this review and those listed in the 2014 EC Recommendation is discussed in relevant parts of this Consultation.
- A5.16 The SMP Guidelines make clear that market definition is not a mechanical or abstract process. It requires an analysis of any available evidence of past market behaviour and an overall understanding of the mechanics of a given market sector. As market analysis has to be forward-looking, the SMP Guidelines state that NRAs should determine whether the market is prospectively competitive, and thus whether any lack of effective competition is durable, by taking into account expected or foreseeable market developments over the course of a reasonable period.<sup>99</sup> The SMP Guidelines clarify that NRAs enjoy discretionary powers which reflect the complexity of all the relevant factors that must be assessed (economic, factual and legal) when identifying the relevant market, and assessing whether an undertaking has SMP.
- A5.17 The SMP Guidelines also describe how competition law methodologies may be used by NRAs in their analysis. In particular, there are two dimensions to the definition of a relevant market: the relevant products to be included in the same market and the geographic extent of the market. Ofcom's approach to market definition follows that used by the UK competition authorities, which is in line with the approach adopted by the EC.
- A5.18 While competition law methodologies are used in identifying the relevant markets *ex ante*, the markets identified will not necessarily be identical to markets defined in *ex post* competition law cases. This may be the case, especially as the former is based on an overall forward-looking assessment of the structure and the functioning of the market under examination. Accordingly, the economic analysis carried out for the purpose of this review, including the markets we propose to identify, is without

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<sup>99</sup> The SMP Guidelines provide that the actual period used should reflect the specific characteristics of the market and the expected timing for the next review of the relevant market by the NRA.



prejudice to any analysis that may be carried out in relation to any investigation pursuant to the Competition Act 1998<sup>100</sup> (relating to the application of the Chapter I or II prohibitions or Article 101 or 102 of the Treaty on the Functioning of the European Union<sup>101</sup>) or the Enterprise Act 2002.<sup>102</sup>

## Market analysis procedure

### Effective competition

A5.19 The 2003 Act requires that we carry out market analyses of identified markets for the purpose of making or reviewing market power determinations. Such analyses are normally to be carried out within two years from the adoption of a revised recommendation on markets, where that recommendation identifies a market not previously notified to the EC, or within three years from the publication of a previous market power determination relating to that market.<sup>103</sup> Exceptionally, the three-year period may be extended for up to three additional years where the NRA notifies the EC, and it does not object.

A5.20 In carrying out a market analysis, the key issue for an NRA is to determine whether the market in question is effectively competitive. The 27<sup>th</sup> recital to the Framework Directive clarifies the meaning of that concept:

*“[it] is essential that ex ante regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem”.*

A5.21 The definition of SMP is equivalent to the concept of dominance as defined in competition law.<sup>104</sup> In essence, it means that an undertaking in the relevant market is in a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers. The Framework Directive requires that NRAs must carry out the market analysis taking the utmost account of the SMP Guidelines, which emphasise that NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of SMP.

### Sufficiency of competition law

A5.22 As part of our overall forward-looking analysis, we also assess whether competition law by itself (without *ex ante* regulation) is sufficient, within the relevant markets we have defined, to address the competition problems we have identified. We consider this matter in our assessment of the appropriate remedies which, as explained below, are based on the nature of the specific competition problems we identify within the relevant markets as defined. We also note that the SMP Guidelines clarify

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<sup>100</sup> <http://www.legislation.gov.uk/ukpga/1998/41/contents>

<sup>101</sup> Previously Article 81 and Article 82 of the EC Treaty, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:FULL:EN:PDF>

<sup>102</sup> <http://www.legislation.gov.uk/ukpga/2002/40/contents>

<sup>103</sup> Section 84A 2003 Act

<sup>104</sup> Article 14 Framework Directive, implemented by section 78 of the 2003 Act.

that, if NRAs designate undertakings as having SMP, they must impose on them one or more regulatory obligations.

- A5.23 In considering this matter, we bear in mind the specific characteristics of the relevant markets we have defined. Generally, the case for *ex ante* regulation is based on the existence of market failures, which, by themselves or in combination, mean that the establishment of competition might not be possible if the regulator relied solely on *ex post* competition law powers which are not specifically tailored to the sector. Therefore, it may be appropriate for *ex ante* regulation to be used to address these market failures along with any entry barriers that might otherwise prevent effective competition from becoming established within the relevant markets we have defined. By imposing *ex ante* regulation that promotes competition, it may be possible to reduce such regulation over time, as markets become more competitive, allowing greater reliance on *ex post* competition law.
- A5.24 *Ex post* competition law is also unlikely in itself to bring about (or promote) effective competition, as it prohibits the abuse of dominance rather than the holding of a dominant position itself. In contrast, *ex ante* regulation is normally aimed at actively promoting the development of competition through attempting to reduce the level of market power (or dominance) in the identified relevant markets, thereby encouraging the establishment of effective competition.
- A5.25 We generally take the view that *ex ante* regulation provides additional legal certainty for the market under review and may also better enable us to intervene in a timely manner. We may also consider that certain obligations are needed as competition law would not remedy the particular market failure(s), or that the specific clarity and detail of the obligation is required to achieve a particular result.

## Remedies procedure

### Powers and legal tests

- A5.26 The Framework Directive prescribes what regulatory action NRAs must take depending upon whether or not an identified relevant market has been found effectively competitive. Where a market has been found effectively competitive, NRAs are not allowed to impose SMP obligations and must withdraw such obligations where they already exist. On the other hand, where the market is found not effectively competitive, the NRAs must identify the undertakings with SMP in that market and then impose appropriate obligations.<sup>105</sup>
- A5.27 NRAs have a suite of regulatory tools at their disposal, as reflected in sections 87 to 91 of the 2003 Act. Specifically, the Access Directive specifies a number of SMP obligations, including transparency, non-discrimination, accounting separation, access to and use of specific network elements and facilities, price control and cost accounting. When imposing a specific obligation, the NRA will need to demonstrate that the obligation in question is based on the nature of the problem identified, proportionate and justified in the light of the policy objectives as set out in Article 8 of the Framework Directive.<sup>106</sup>
- A5.28 Specifically, for each and every proposed SMP obligation, we explain why it satisfies the requirement in section 47(2) of the 2003 Act that the obligation is:

<sup>105</sup> See Article 16(3) and (4) of the Framework Directive; sections 84 and 87(1) of the Act.

<sup>106</sup> See Article 8(4) of the Access Directive.

- objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- not such as to discriminate unduly against particular persons or against a particular description of persons;
- proportionate to what the condition or modification is intended to achieve; and
- transparent in relation to what is intended to be achieved.<sup>107</sup>

A5.29 Additional legal requirements may also need to be satisfied depending on the SMP obligation in question.<sup>108</sup> For example, in the case of price controls, the NRA's market analysis must indicate that the lack of effective competition means that the telecoms provider concerned may sustain prices at an excessively high level, or may apply a price squeeze, to the detriment of end-users and that the setting of the obligation is appropriate for the purposes of promoting efficiency, promoting sustainable competition and conferring the greatest possible benefits on the end-users of public electronic communications services. In that instance, NRAs must take into account the investment made by the telecoms provider and allow it a reasonable rate of return on adequate capital employed, taking into account any risks specific to a particular new investment, as well as ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits.<sup>109</sup>

A5.30 Where an obligation to provide third parties with network access is considered appropriate, NRAs must take into account factors including the feasibility of the proposed network access, the technical and economic viability of creating networks (including the viability of other network access products, whether provided by the dominant provider or another person) that would make the network access unnecessary, the investment of the network operator who is required to provide access (taking account of any public investment made), and the need to secure effective competition (including, where it appears to us to be appropriate, economically efficient infrastructure-based competition) in the long term.<sup>110</sup>

A5.31 To the extent relevant to this review, we demonstrate the application of these legal tests to the particular SMP obligations we have decided to impose in the parts of this document which set out our decisions on remedies. In doing so, we also assess how the performance of our general duties under section 3 of the 2003 Act is secured or furthered by our regulatory intervention, and that it is in accordance with the six Community requirements in section 4 of the 2003 Act. This is also relevant to our assessment of the likely impact of implementing our conclusions.

### **Ofcom's general duties – section 3 of the 2003 Act**

A5.32 Under the 2003 Act, our principal duty in carrying out our functions is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition (section 3(1)).

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<sup>107</sup> Section 47 of the 2003 Act; Article 8(5) of the Framework Directive and Article 5(2) of the Access Directive.

<sup>108</sup> As set out in sections 87 et seq of the 2003 Act

<sup>109</sup> Section 88 of the 2003 Act, which implements Article 13 of the Access Directive.

<sup>110</sup> Section 87 of the 2003 Act.

- A5.33 In so doing, we are required to secure a number of specific objectives and to have regard to a number of matters set out in section 3 of the Act.
- A5.34 In performing our duties, we are also required to have regard to a range of other considerations, as appear to us to be relevant in the circumstances. In this context, we consider that a number of such considerations are relevant, namely:
- the desirability of promoting competition in relevant markets (section 3(4)(b));
  - the desirability of encouraging investment and innovation in relevant markets (section 3(4)(d)); and
  - the desirability of encouraging the availability and use of high speed data transfer services throughout the UK (section 3(4)(e)).
- A5.35 We must also have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed (section 3(3)), as well as the interest of consumers in respect of choice, price, quality of service and value for money (section 3(5)).
- A5.36 Ofcom has, however, a wide measure of discretion in balancing its statutory duties and objectives. In so doing, we take account of all relevant considerations, including responses received during our consultation process, in reaching our conclusions.

### **European Community requirements for regulation – sections 4 and 4A of the 2003 Act and Article 3 of the BEREC Regulation**

- A5.37 As noted above, our functions exercised in this review fall under the CRF. As such, section 4 of the 2003 Act requires us to act in accordance with the six European Community requirements for regulation. Where it appears to Ofcom that any of their general duties conflict with one or more of their duties under section 4, priority must be given to those latter duties (section 3(6)).
- A5.38 In summary, these six requirements are:
- to promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;
  - to contribute to the development of the European internal market;
  - to promote the interests of all persons who are citizens of the EU;
  - to take account of the desirability of Ofcom's carrying out of its functions in a manner which, so far as practicable, does not favour one form of or means of providing electronic communications networks, services or associated facilities over another (i.e. to be technologically neutral);
  - to encourage, to such extent as Ofcom considers appropriate for certain prescribed purposes, the provision of network access and service interoperability, namely securing efficient and sustainable competition, efficient investment and innovation, and the maximum benefit for customers of telecoms providers; and
  - to encourage compliance with certain standards in order to facilitate service interoperability and secure freedom of choice for the customers of telecoms providers.

- A5.39 We considered that the first, third, fourth and fifth of those requirements are of particular relevance to the matters under review and that no conflict arises in this regard with those specific objectives in section 3 of the 2003 Act that we consider are particularly relevant in this context.
- A5.40 Section 4A of the 2003 Act requires Ofcom, in carrying out certain of its functions (including, among others, Ofcom's functions in relation to market reviews under the CRF) to take due account of applicable recommendations issued by the EC under Article 19(1) of the Framework Directive. Where we decide not to follow such a recommendation, we must notify the EC of that decision and the reasons for it.
- A5.41 Further, Article 3(3) of the Regulation establishing BEREC<sup>111</sup> requires NRAs to take utmost account of any opinion, recommendation, guidelines, advice or regulatory best practice adopted by BEREC.
- A5.42 Accordingly, we have taken due account of the applicable EC recommendations, (including, in the context of this review, the NGA Recommendation<sup>112</sup> and the Costing and Non-Discrimination Recommendation<sup>113</sup>) and utmost account of the applicable opinions, recommendations, guidelines, advice and regulatory best practices adopted by BEREC relevant to the matters under consideration in this review (in particular, in the context of this review, the BEREC Common Position on geographical aspects of market analysis<sup>114</sup>, the BEREC Common Position on best practice in remedies in the WBA market<sup>115</sup> and the BEREC Common Position on best practice in remedies in the WLA market<sup>116</sup>).

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<sup>111</sup> Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators of Electronic Communications (BEREC) and the Office (the BEREC Regulation), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0001:0010:EN:PDF>.

<sup>112</sup> Commission Recommendation of 20 September 2010 on regulated access to Next Generation Access Networks (NGA) (2010/572/EU), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:251:0035:0048:EN:PDF>

<sup>113</sup> Commission Recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0466&from=EN>.

<sup>114</sup> BEREC Common Position on geographical aspects of market analysis (definition and remedies) [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/4439-berec-common-position-on-geographic-aspe\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/4439-berec-common-position-on-geographic-aspe_0.pdf)

<sup>115</sup> BEREC Common Position on best practice in remedies on the market for wholesale broadband access (including bitstream access) imposed as a consequence of a position of significant market power in the relevant market [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/download/0/1126-revised-berec-common-position-on-best-pr\\_0.pdf](http://berec.europa.eu/eng/document_register/subject_matter/berec/download/0/1126-revised-berec-common-position-on-best-pr_0.pdf)

<sup>116</sup> BEREC Common Position on best practice in remedies on the market for wholesale (physical) network infrastructure access (including shared or fully unbundled access) at a fixed location imposed as a consequence of a position of significant market power in the relevant market [http://berec.europa.eu/eng/document\\_register/subject\\_matter/berec/regulatory\\_best\\_practices/comm\\_on\\_approaches\\_positions/1127-revised-berec-common-position-on-best-practice-in-remedies-on-the-market-for-wholesale-physical-network-infrastructure-access-including-shared-or-fully-unbundled-access-at-a-fixed-location-imposed-as-a-consequence-of-a-position-of-significant-market-power-in-the-relevant-market](http://berec.europa.eu/eng/document_register/subject_matter/berec/regulatory_best_practices/comm_on_approaches_positions/1127-revised-berec-common-position-on-best-practice-in-remedies-on-the-market-for-wholesale-physical-network-infrastructure-access-including-shared-or-fully-unbundled-access-at-a-fixed-location-imposed-as-a-consequence-of-a-position-of-significant-market-power-in-the-relevant-market)

## Regulated entity

- A5.43 The power in the 2003 Act to impose an SMP obligation by means of an SMP services condition provides that it is to be applied only to a ‘person’ whom we have determined to be a ‘person’ having SMP in a specific market for electronic communications networks, electronic communications services or associated facilities (i.e. the ‘services market’).
- A5.44 The Framework Directive requires that, where an NRA determines that a relevant market is not effectively competitive, it shall identify ‘undertakings’ with SMP on that market and impose appropriate specific regulatory obligations. For the purposes of EU competition law, ‘undertaking’ includes companies within the same corporate group (for example, where a company within that group is not independent in its decision making).<sup>117</sup>
- A5.45 We consider it appropriate to prevent a dominant provider to whom an SMP service condition is applied, which is part of a group of companies, exploiting the principle of corporate separation. The dominant provider should not use another member of its group to carry out activities or to fail to comply with a condition, which would otherwise render the dominant provider in breach of its obligations.
- A5.46 To secure that aim, we apply the SMP conditions to the person in relation to which we have made the market power determination in question by reference to the so-called ‘Dominant Provider’, which we define as “[X plc], whose registered company number is [000] and any [X plc] subsidiary or holding company, or any subsidiary of that holding company, all as defined in section 1159 of the Companies Act 2006”.

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<sup>117</sup> *Viho v Commission*, Case C-73/95 P [1996] ECR I-5447. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61995CJ0073:EN:PDF>.

## Annex 6

# Approach to market definition and SMP assessment

## Introduction

A6.1 This annex sets out in general terms the processes that we have followed in defining the markets within this review, how and on what basis we assess and whether any operator has SMP in a given market. Section 3 sets out in more detail how we have applied our analytical approach in the WLA and WBA markets in the Hull Area.

## Overview of approach

A6.2 The market review procedure requires us to analyse markets in order to determine whether they are effectively competitive, and then to decide on appropriate remedies if necessary. Before an assessment of competitive conditions is possible it is necessary to define the relevant market.

A6.3 The definition of the relevant market does not simply entail identifying services that resemble each other in some way, but the set of services (and geographical areas) that exercise some competitive constraint on each other. It therefore has two dimensions:

- the relevant products or services to be included within the market; and
- the geographic extent of the market.

A6.4 It is often practical to define the relevant product market before exploring the geographic dimension of the market.

A6.5 The market definition exercise is not an end in itself, but a means to assessing whether there is effective competition and thus whether there is a need for *ex ante* regulation. It is in this light that we have conducted our market definitions in this review.

## 2014 EC Recommendation and the three-criteria test

A6.6 As explained in Annex 5, in defining the market for market review purposes, we are required to define relevant markets appropriate to national circumstances in accordance with the principles of competition law. In doing so we have taken due account of the 2014 EC Recommendation, the accompanying Explanatory Note and the EC SMP Guidelines.

A6.7 As explained in Annex 5, the 2014 EC Recommendation identifies a set of product and service markets within the electronic communications sector in which *ex ante* regulation may be warranted. NRAs may also identify markets that differ from those in the 2014 EC Recommendation which may be susceptible to *ex ante* regulation having regard to the three-criteria test.



A6.8 The three-criteria test is related to the assessment of SMP and involves the assessment of similar evidence, but is analytically distinct. The three-criteria test focuses on overall market characteristics and structure, for the sole purpose of identifying those markets that are susceptible to *ex ante* regulation. In contrast, assessment of SMP involves determining whether an operator active in a market that has been identified as being susceptible to *ex ante* regulation should be made subject to *ex ante* regulation.<sup>118</sup>

**The time period under review**

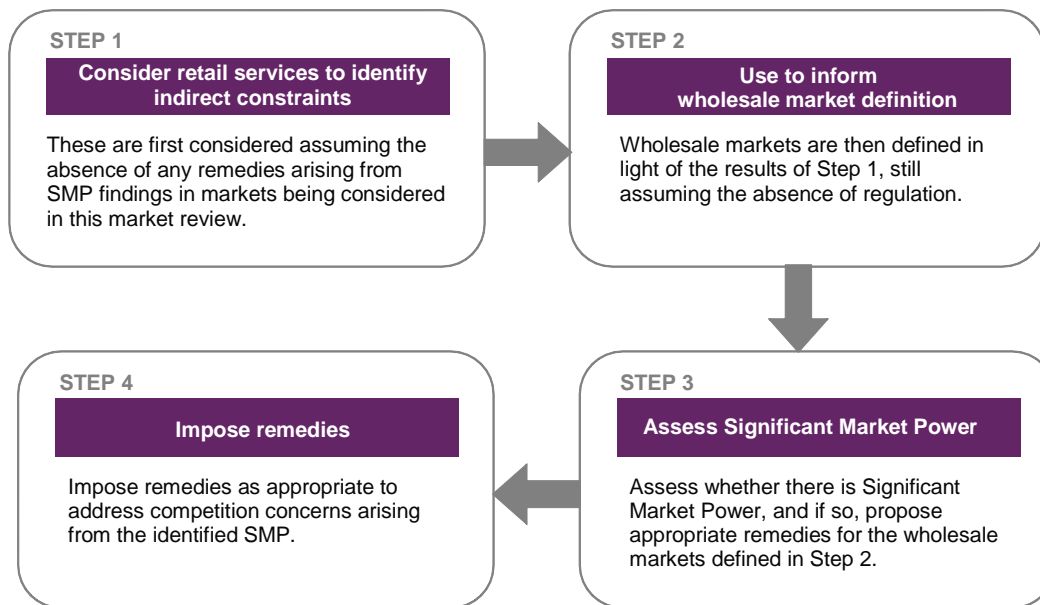
A6.9 Rather than just looking at the current position, market reviews look ahead to how competitive conditions may change in future. Our evaluation of the current market takes into account past developments and evidence, before then considering the foreseeable market changes that we expect to affect its development over the period to March 2021. This forward looking period reflects the period covered by this market review.

A6.10 The forward look period that we have used does not preclude us reviewing the market before that point should the market develop in a way we have not foreseen, to the extent that it is likely to affect the competitive conditions that are operating.

**Market review process**

A6.11 The market review process can be characterised as having four stages, which are shown in Figure A6.1 below.

**Figure A6.1 Sequencing of market definition, SMP and remedies analysis**



Source: Ofcom

A6.12 These steps are explained further in the following sub-sections.

<sup>118</sup> See the Commission Explanatory Note accompanying the 2014 EC Recommendation.



## Market definition

- A6.13 The starting point for identifying markets which may be susceptible to *ex ante* regulation is the consideration of retail services from a forward-looking perspective. The wholesale market is defined subsequent to this exercise being carried out. In relevant cases we then consider whether the wholesale market is one in which *ex ante* regulation may be appropriate (if so, we have then formally identified a relevant market).<sup>119</sup>
- A6.14 Consideration of retail services is logically prior to wholesale market definition because the demand for the upstream wholesale service is a derived demand, meaning that the level of the demand for the upstream input depends on the demand for the retail service.
- A6.15 This link between the retail and wholesale level means that the range of available substitutes at the downstream (e.g. retail) level will inform the likely range of competitive constraints acting at the upstream (e.g. wholesale) level. This is because a rise in the price of a wholesale service which is passed through to the price retail services may cause retail customers to switch to substitute retail services, reducing demand for the wholesale input. We refer to this as an indirect constraint.
- A6.16 Consequently, the analysis of the retail and wholesale levels of the supply-chain should be regarded as one exercise, the ultimate purpose of which is to define those wholesale markets in the UK where there may be a requirement for the imposition of *ex ante* regulation.<sup>120</sup>

## Demand-side and supply-side substitution

- A6.17 The boundaries between markets are determined by identifying competitive constraints on the price setting behaviour of firms. There are two main constraints to consider:<sup>121</sup>
- to what extent it is possible for a customer to substitute other services for those in question in response to a relative price increase (demand-side substitution); and
  - to what extent suppliers can switch, or increase, production to supply the relevant products or services in response to a relative price increase (supply-side substitution).
- A6.18 The hypothetical monopolist test (HMT) is a tool which can be used to identify close demand-side and supply-side substitutes.<sup>122</sup> In this test, a product is considered to constitute a separate market if the hypothetical monopolist supplier could impose a small but significant non-transitory increase in price (SSNIP) above the competitive

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<sup>119</sup> See recital 5 and point 2 of the 20014 EC Recommendation.

<sup>120</sup> See, in this respect, recital 7 of the 2014 EC Recommendation which states that “*the starting point for the identification of wholesale markets susceptible to ex ante regulation is the analysis of corresponding retail markets*”. See also section 2.1 of the Explanatory Note to the 2014 EC Recommendation and paragraph 44 of the SMP Guidelines.

<sup>121</sup> See paragraph 38 of the SMP Guidelines, which also notes that potential competition also acts as a third source of competitive constraint on an operator’s behaviour, but is taken into account in the SMP assessment.

<sup>122</sup> See paragraph 40 of the SMP Guidelines.

level without losing sales to such a degree as to make this price rise unprofitable. If such a price rise would be unprofitable, because consumers would switch to other products or because suppliers of other products would begin to compete with the hypothetical monopolist, then the market definition should be expanded to include the substitute products.

- A6.19 We must first therefore address the issue of which product(s) should form the starting point for the application of the HMT. This starting point can be referred to as the ‘focal product’<sup>123</sup>, and typically starts from the narrowest potential market definition.<sup>124</sup>
- A6.20 Having considered demand-side substitution we then, where relevant, assess supply-side substitution possibilities to consider whether they provide any additional constraints on the pricing behaviour of the hypothetical monopolist which have not been captured by the demand-side analysis. In this assessment, supply-side substitution is considered to be a low-cost form of entry which can take place within a reasonable timeframe (e.g. up to 12 months).
- A6.21 For supply-side substitution to be relevant not only must suppliers be able, in theory, to enter the market quickly and at low cost by virtue of their existing position in the supply of other products or geographic areas, but there must also be an additional competitive constraint arising from such entry into the supply of the service in question.
- A6.22 Therefore, in identifying potential supply-side substitutes, it is important that providers of these services have not already been taken into consideration. There might be suppliers who provide other services but who might also be materially present in the provision of demand-side substitutes to the service for which the hypothetical monopolist has raised its price. Such suppliers are not relevant to supply-side substitution since they supply services already identified as demand-side substitutes. However, the impact of expansion by such suppliers can be taken into account in the assessment of market power.

### Relevance of existing regulation – the modified Greenfield approach

- A6.23 When we conduct our analysis we use the modified Greenfield approach.<sup>125</sup> This requires us to assess whether markets are effectively competitive from a forward-looking perspective in the absence of any regulation that would result from a finding of SMP. To do otherwise would be circular.
- A6.24 However, it remains appropriate to take into account *ex ante* regulation arising from SMP findings in markets either upstream from, or horizontally related to, the services of interest.

<sup>123</sup> This reflects the terminology used by the OFT (OFT, *Market definition*, December 2004, OFT403, [www.of.gov.uk/shared\\_of/business\\_leaflets/ca98\\_guidelines/of403.pdf](http://www.of.gov.uk/shared_of/business_leaflets/ca98_guidelines/of403.pdf)).

<sup>124</sup> Paragraph 3.2 of the OFT Market Definition Guidelines explains that ‘previous experience and common sense will normally indicate the narrowest potential market definition, which will be taken as the starting point for the analysis’.

<sup>125</sup> See also Section 2.5 of the Explanatory Note to the 2014 EC Recommendation.

## Bundling

- A6.25 A common feature of the retail telecoms sector is the supply of bundles of different services. However, the Explanatory Note explains that the fact that bundling is a trend observed at the retail level does not require the definition of retail market(s) for bundles. This is because evidence to date has not indicated that there is a need for *ex ante* regulation of bundles, which may contain a previously regulated input.<sup>126</sup>
- A6.26 The Explanatory Note goes on to explain that what matters in this regard is that:

“NRAs are able to ensure that the vertically integrated SMP operator’s regulated elements of the bundle can be effectively replicated (in terms of both technical and economic replicability) at the retail level, without an implicit extension of regulation to other components which are available under competitive conditions”.

## Aggregating markets

- A6.27 In certain circumstances, it may also be appropriate to define a product or geographic market by grouping together services despite the absence of demand- and supply-side substitutability.

### Homogeneity of competitive conditions

- A6.28 Aggregating markets on the basis of the homogeneity of competitive conditions can help streamline the subsequent market power analysis by reducing the need to review multiple markets for products, the provision of which is subject to homogeneous competitive conditions.
- A6.29 However, combining products and services based on homogenous competitive conditions, is – by definition – only appropriate where this would not substantively alter any subsequent findings of SMP (relative to defining those markets separately).
- A6.30 Our approach also takes into account the SMP Guidelines. In particular, in the context of geographic market analysis, the SMP Guidelines state that:

“According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are similar or sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different. [...]”<sup>127</sup>

- A6.31 Hence, subject to the relevant caveats above, where there are products (or geographic areas) where competitive conditions are sufficiently homogeneous, the definition of the relevant market will include all of those products (or geographic areas) within one market.

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<sup>126</sup> See Section 3.2 of the Explanatory Note to the 2014 EC Recommendation.

<sup>127</sup> See paragraph 56 of the SMP Guidelines.

## Common pricing constraints

- A6.32 Another factor that is sometimes considered in setting market boundaries is whether there exist common pricing constraints across customers, services or geographic areas (for example, areas in which a firm voluntarily offers its services at a uniform price). Where common pricing constraints exist, the products or geographic areas in which they apply could be included within the same relevant market even if demand-side and supply-side substitution is limited (or absent). Failure to consider the existence of a common pricing constraint could lead to unduly narrow markets being defined.

## **Geographic market**

- A6.33 In addition to the product(s) to be included within a market, market definition requires us to specify the geographic extent of the market in which conditions of competition are sufficiently similar.
- A6.34 One approach would be to begin with a narrowly defined geographic area and then consider whether a price increase by a hypothetical monopolist in that area would encourage customers to switch to suppliers located outside the area (demand-side substitution) or telecoms providers outside the area to begin to offer services in the area (supply-side substitution). If demand- and/or supply-side substitution is sufficient to constrain prices, then it is appropriate to expand the geographic market boundary.
- A6.35 We recognise that in certain communications (product) markets, there may be different competitive conditions in different geographic areas. In this case, we therefore have to consider whether it is appropriate to identify separate geographic markets for some services. Defining separate markets by geographic area may be problematic because, due to the dynamic nature of communications markets, the boundary between areas where there are different competitive pressures may be unstable and change over time.
- A6.36 An alternative approach is to define geographic markets in a broader sense. This involves defining a single geographic market but recognising that this single market has local geographic characteristics. That is to say, recognising that within the single market there are geographic areas where competition is more developed than in other geographic areas. This avoids the difficulties of defining and remedying large numbers of markets and instability in the definition over time. Such an approach may also include the aggregation of markets as discussed above.

## **Market power assessment**

- A6.37 Having identified the relevant product and geographic market(s) and, where relevant having identified the market as susceptible to *ex ante* regulation, we go on to analyse each market in order to assess whether any person or persons have SMP as defined in section 78 of the Act (construed in accordance with Article 14 of the Framework Directive). Section 78 of the Act provides that SMP is defined as being equivalent to the competition law concept of dominance in accordance with Article 14(2) of the Framework Directive which provides:

“An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording

it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."

A6.38 Further, Article 14(3) of the Framework Directive states that:

"Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking."

A6.39 Therefore, in the relevant market, one or more undertakings may be designated as having SMP where that undertaking or undertakings enjoy a position of dominance. Also, an undertaking may be designated as having SMP where it could lever its market power from a closely related market into the relevant market, thereby strengthening its market power.

A6.40 In assessing whether an undertaking has SMP, we take due account of the SMP Guidelines as we are required to do under section 79 of the Act.

### **The criteria for assessing SMP**

A6.41 The SMP Guidelines require NRAs to assess whether competition in a market is effective. This assessment is undertaken through a forward-looking evaluation of the market (i.e. determining whether the market is prospectively competitive), taking into account foreseeable developments and a number of relevant criteria.<sup>128</sup>

A6.42 Our assessments of SMP are concerned with the prospects for competition over the review period of three years. Ultimately, we want to understand how the markets are likely to develop, and whether competition is likely to be, or become, effective during this review period. Below we set out certain key factors that we are likely to consider when assessing SMP.<sup>129</sup>

A6.43 Where a market is found to be competitive then no SMP conditions can be imposed. Section 84(4) of the Act requires that any SMP condition in that market, applying to a person by reference to a market power determination made on the basis of an earlier analysis, must be revoked.

### **Market shares**

A6.44 In the SMP Guidelines, the EC discusses market shares as being an indicator of (although not sufficient to establish) market power:

"...Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market would be in a dominant position. Thus, undertakings with market shares of no more than 25% are not likely to enjoy a (single) dominant position on

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<sup>128</sup> See, for example, paragraphs 19 and 20, and the opening words of paragraph 75, of the SMP Guidelines.

<sup>129</sup> The factors listed in this annex are not intended to be exhaustive and other evidence may be relevant.

the market concerned. In the Commission's decision making practice, single dominance concerns normally arise in the case of undertakings with market shares of over 40%, although the Commission may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share. According to established case-law, very large market shares — in excess of 50% — are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position...<sup>130</sup>

A6.45 Market shares and market share trends provide an indication of how competitive a market has been in the past. If a firm has a persistently high market share, then that in itself gives rise to a presumption of SMP. However, changes in market share are also relevant to our assessment of prospects for competition. For example, a market share trend which shows a decline may suggest that competition will provide an effective constraint within the time period over which the SMP assessment is being conducted, although it does not preclude the finding of SMP.<sup>131</sup>

### Other factors affecting competitive constraints

A6.46 In addition to market shares, the SMP Guidelines set out a number of criteria that can be used by NRAs to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers, including:<sup>132</sup>

- the overall size of the undertaking;
- control of infrastructure not easily duplicated;
- technological advantages or superiority;
- easy or privileged access to capital markets/financial resources;
- product/services diversification (e.g. bundled products or services);
- economies of scale;
- economies of scope;
- vertical integration;
- highly developed distribution and sales network;
- absence of potential competition; and
- barriers to expansion.

A6.47 A dominant position can derive from a combination of these criteria, which when taken separately may not necessarily be determinative.

<sup>130</sup> Paragraph 75 of the SMP Guidelines.

<sup>131</sup> Paragraph 75 of the SMP Guidelines.

<sup>132</sup> SMP Guidelines, paragraph 78.

- A6.48 An SMP analysis may also take into account the extent to which products or services within the market are differentiated. The constraint from products or services outside the relevant market may also be a relevant factor.

### **Excessive pricing and profitability**

- A6.49 In a competitive market, individual firms should not be able to persistently raise prices above costs and sustain excess profits.
- A6.50 The ability, therefore, to price at a level that keeps profits persistently and significantly above the competitive level is an important indicator of market power. The SMP Guidelines refer to the importance, when assessing market power on an *ex ante* basis, of considering the power of undertakings to raise prices without incurring a significant loss of sales or revenue.<sup>133</sup> Factors that may explain excess profits in the short term, such as greater innovation and efficiency, or unexpected changes in demand, should however be considered in interpreting high profit figures.
- A6.51 However, consistently low profits, i.e. profits at or below the cost of capital, cannot be taken as evidence of an absence of market power. It may simply be evidence of inefficiency or other factors such as predatory pricing. For example, if a firm with SMP were to have inefficiently high costs, it may charge a price above the level we would expect to see in a competitive market but this would not result in high profits. In addition, price regulation exists in many of the wholesale markets considered, and therefore low profits may simply be the result of existing regulation rather than a reflection of the underlying competitive conditions.

### **Barriers to entry and expansion**

- A6.52 Entry barriers are important in the assessment of potential competition.<sup>134</sup> The lower entry barriers are, the more likely it is that potential competition will prevent undertakings already within a market from profitably sustaining prices above competitive levels. Moreover, the competitive constraint imposed by potential entrants is not simply about introducing a new product to the market. To be an effective competitive constraint, a new entrant must be able to attain a large enough scale to have a competitive impact on undertakings already in the market. This may entail entry on a small scale, followed by growth. Accordingly, whether there are barriers to expansion is also relevant to an SMP assessment. Many of the factors that may make entry harder might also make it harder for undertakings that have recently entered the market to expand their market shares and hence their competitive impact.
- A6.53 A related factor is the growth in demand in the market. In general, telecoms providers are more willing to invest in a growing market (and less willing in a declining market). As a result, barriers to entry and expansion tend to be less of an impediment to competition in rapidly growing markets.

### **Countervailing buyer power**

- A6.54 A concentrated market need not lead to harmful outcomes if buyers have sufficient countervailing buyer power to curtail the exercise of market power. In general, purchasers may have a degree of buyer power where they purchase large volumes

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<sup>133</sup> Paragraph 73 of the SMP Guidelines.

<sup>134</sup> Paragraph 80 of the SMP Guidelines.

and can make a credible threat to switch supplier or to meet their requirements through self-supply to a significant degree. It is important to note, however, that the volumes involved must be large enough to make a material difference to the profitability of the current supplier. That is, an individual wholesale customer must represent a significant proportion of the total volume supplied by the relevant telecoms provider.



# Equality Impact Assessment

## Introduction

- A7.1 Ofcom<sup>135</sup> is required by statute to assess the potential impact of all its functions, policies, projects and practices on equality.<sup>136</sup> An equality impact assessment (EIA) also assists us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.
- A7.2 Unless we state otherwise in this document, it is not apparent to us that our proposed remedies will have a differential impact on any equality group.
- A7.3 Further, we have not considered it necessary to carry out separate EIAs in relation to race or sex equality or equality schemes under the Northern Ireland and Disability Equality Schemes. This is because we anticipate that our regulatory intervention will not have a differential impact on people of different sexes or ethnicities, consumers with protected characteristics in Northern Ireland<sup>137</sup> or disabled consumers compared to consumers in general.
- A7.4 The analysis presented in this document represents an impact assessment, as defined in section 7 of the Communications Act 2003 (the Act).
- A7.5 You should send any comments on this impact assessment to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.

## Equality impact assessment

- A7.6 We have considered whether the proposed remedies would have an adverse impact on promoting equality. In particular, we have considered whether the remedies would have a different or adverse effect on consumers and citizens with respect to the following equality groups: age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation in the Hull Area.
- A7.7 The intention behind our approach to regulating the WLA and WBA markets in the Hull Area is to promote competition to the ultimate benefit of end consumers by, for example, requiring any telecoms provider with Significant Market Power (SMP) to provide access to its networks on regulated terms.
- A7.8 To understand how our proposals may affect equality groups, we have considered how different groups in society engage with communications services. While our research identifies differences in take-up and use of fixed line services by different groups within society our proposed regulation is aimed at promoting competition

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<sup>135</sup> We explain why we undertake an Equality Impact Assessment (EIA) and how we have done it in Section 2 of this consultation.

<sup>136</sup> Ofcom has a general duty under the 2010 Equality Act to advance equality of opportunity in relation to age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation.

<sup>137</sup> In addition to the characteristics outlined in the 2010 Equality Act, in Northern Ireland consumers who have dependents or hold a particular political opinion are also protected.

across the range of services that rely on WLA and WBA services within the Hull Area.

A7.9 We consider that our proposals will not have a detrimental impact on any defined equality group.

A7.10 Rather, we consider that our proposals will further the aim of advancing equality of opportunity between different groups in society by furthering the interests of all consumers that use retail services reliant on WLA and WBA services in the Hull Area.

## Annex 7

# Glossary

**Access Network:** The part of the network that connects directly to customers from the local exchange.

**Asymmetric Digital Subscriber Line (ADSL):** A type of digital subscriber line technology, a data communications technology that enables faster data transmission over copper telephone lines rather than a conventional voiceband modem can provide.

**Bandwidth:** The rate at which data can be transmitted. Usually expressed in bits per second (bit/s). Sometimes also known as throughput.

**BDUK:** Broadband Delivery UK.

**BEREC:** Body of European Regulators for Electronic Communications.

**BT:** British Telecommunications plc.

**BT Consumer:** A division of BT concerned with the consumer retail market.

**BT Wholesale & Ventures:** The division of BT which provides wholesale services to communications providers.

**Charge Control:** A control which sets the maximum price that a telecoms provider can charge for a particular product or service (or basket of products or services). Most charge controls are imposed for a defined period.

**CMR:** Ofcom's Communications Market Reports.

**Connected Nations Report:** An annual report published by Ofcom the availability and quality of broadband across the UK.

**Consumer Price Index (CPI):** The official measure of inflation of consumer prices in the United Kingdom.

**D-side:** Distribution side. The segment of BT's access network between the Primary Cross Connection Points (street cabinets) and Distribution Points.

**Digital Subscriber Line (DSL):** A family of technologies generically referred to as DSL, or xDSL used to add a broadband service to an existing phone line provided using a pair of copper wires (known as a twisted copper pair).

**Digital Subscriber Line Access Multiplexer (DSLAM):** A network device, located in a telephone exchange or street cabinet that provides broadband services to multiple premises over the copper access network using DSL technologies.

**Distribution Point (DP):** A flexibility point in BT's access network where final connections to customer premises are connected to D-side cables. Usually either an underground joint or a connection point on a telegraph pole where dropwires are terminated.

**Downstream BT:** BT's downstream operations, by which we mean BT Wholesale & Ventures, BT Consumer or any other downstream operation owned or operated by BT.

**E-side:** Exchange side. The segment of BT's access network between telephone exchanges and Primary Cross Connection Points (street cabinets).

**EC:** European Commission.

**Equivalence of Input (EOI):** A remedy designed to prevent BT from discriminating between its competitors and its own business in providing upstream inputs. This requires BT to provide the same wholesale products to all telecoms providers including BT's own downstream division on the same timescales, terms and conditions (including price and service levels) by means of the same systems and processes, and includes the provision to all telecoms providers (including BT) of the same commercial information about such products, services, systems and processes.

**Ethernet:** A packet-based technology originally developed for use in Local Area Networks (LANs) but now also widely used in telecoms providers' network for the transmission of data services.

**FAMR:** Fixed Access Market Review.

**Fibre to the Cabinet (FTTC):** An access network structure in which the optical fibre extends from the exchange to a street cabinet. The street cabinet is usually located only a few hundred metres from the subscriber's premises. The remaining part of the access network from the cabinet to the customer is usually copper wire but could use another technology, such as wireless.

**Fibre to the Premises (FTTP):** An access network structure in which the optical fibre network runs from the local exchange to the customer's house or business premises. The optical fibre may be point-to-point – there is one dedicated fibre connection for each home – or may use a shared infrastructure such as a GPON. Sometimes also referred to as Fibre to the home (FTTH), or full-fibre.

**Fixed wireless:** An access service where the connection between the network and the equipment located at the customer premises is provided over the radio access medium.

**Fully allocated cost (FAC):** An accounting approach under which all the costs of the company are distributed between its various products and services. The fully allocated cost of a product or service may therefore include some common costs that are not directly attributable to the service.

**G.fast:** A DSL standard that supports higher bandwidth transmissions than ADSL and VDSL technologies over short copper lines.

**Generic Ethernet Access (GEA):** BT's wholesale service providing telecoms providers with access to BT's FTTC and FTTP networks in order to supply higher speed broadband services. BT currently meets its obligation to provide VULA using the GEA service.

**Hull Area:** 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 (KCOM).

**Local Loop:** The access network connection between the customer's premises and the local serving exchange, usually comprised of two copper wires twisted together.

**Local Loop Unbundling (LLU):** A process by which a dominant provider's local loops are physically disconnected from its network and connected to a competing provider's networks. This enables operators other than the incumbent to use the local loop to provide services directly to customers.

**Long Reach VDSL (LR-VDSL):** LR-VDSL uses VDSL technology but makes use of the frequency ranges assigned to both ADSL and VDSL, and utilises higher signal power. LR-VDSL also uses vectoring to minimise the impact of cross-talk and interference, which would otherwise reduce the speed available to customers.

**Metallic Path Facility (MPF):** The provision of access to the copper wires from the customer premises to a BT MDF that covers the full available frequency range, including both narrowband and broadband channels, allowing a competing provider to provide the customer with both voice and/or data services over such copper wires.

**Modified Greenfield Approach:** An approach to analysing markets, where we consider a hypothetical scenario in which there are no ex ante SMP remedies in the market being considered or in any markets downstream of it.

**Next Generation Access (NGA) Networks:** Wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over copper access networks. In most cases, NGAs are the result of an upgrade of an already existing copper or co-axial access network.

**NMR:** Narrowband Market Review.

**NRA:** National Regulatory Authority.

**Ofcom:** The Office of Communications.

**Openreach:** The access division of BT established by Undertakings in 2005.

**Primary Cross Connection Point (PCP):** A street cabinet (or equivalent facility) located between the customer's premises and BT's local serving exchanges, which serves as an intermediary point of aggregation for BT's copper network.

**Regulatory Financial Statements (RFS):** The financial statements that BT is required to prepare by Ofcom. They include the published RFS and Additional Financial Information provided to Ofcom in confidence.

**Shared Metallic Path Facility (SMPF)/Shared Access:** The provision of access to the copper wires from the customer's premises to a BT MDF that allows a competing provider to provide the customer with broadband services, while BT continues to provide the customer with conventional narrowband communications.

**Significant Market Power (SMP):** The significant market power test is set out in European Directives. It is used by National Regulatory Authorities (NRAs), such as Ofcom, to identify those telecoms providers which must meet additional obligations under the relevant Directives.

**Small and Medium Sized Enterprises (SME):** Businesses with 249 or fewer employees.

**Standard broadband (SBB):** A broadband connection that can support a maximum download speed of less than 30Mb/s.

**Statement of Requirements (SoR):** A mechanism by which telecoms providers can request KCOM to provide a service, which should meet guidelines published by KCOM on information required for it to consider the request.

**Strategic Review of Digital Communications:** Also referred to as the Digital Communications Review (DCR), is a document Ofcom published in February 2016 which set out a ten-year vision for communications services in the UK.

**Sub-Loop Unbundling (SLU):** Like local loop unbundling (LLU), except that telecoms providers interconnect at a point between the exchange and the customer, usually at the cabinet.

**Superfast Broadband (SFBB):** A broadband connection that can support a maximum download speed of between 30Mbit/s and 300Mbit/s.

**Telecoms provider:** A person who provides an electronic communications network or provides an electronic communications service.

**The Act:** The Communications Act 2003.

**Ultrafast Broadband (UFBB):** Broadband services which delivers headline download speeds greater than 300Mbit/s.

**USO:** Universal Service Obligation.

**Very-high-bit-rate digital subscriber line (VDSL):** DSL technologies offering superfast broadband speeds. On Openreach's FTTC network which uses VDSL technology, services of up to 80Mb/s downstream and 20Mb/s upstream are currently offered. VDSL, in this Consultation, refers to all generations of the technology.

**Virtual Local Area Network:** A subdivision of the capacity within the network allowing individual traffic streams to be managed. VLANs are used within Openreach's GEA service to separate each user's data traffic through the Openreach network.

**Virtual Unbundled Local Access (VULA):** A regulatory obligation requiring BT to provide access to its FTTC and FTTP network deployments which allows telecoms providers to connect at a 'local' aggregation point and are provided a virtual connection from this point to the customer premises.

**Wholesale Broadband Access (WBA):** The WBA market concerns the wholesale broadband products that CPs provide for themselves and sell to each other.

**Wholesale Line Rental (WLR):** The service offered by Openreach to other telecoms providers to enable them to offer retail line rental services in competition with BT's own retail services.

**Wholesale Local Access (WLA):** The market that covers fixed telecommunications infrastructure, specifically the physical connection between customers' premises and a local exchange.