

# A23. Draft legal instruments

Publication Date: 2 November 2018 [Updated on 19 December 2018]

## Notification under section 48A and 80A of the Communications Act 2003 of proposals for identifying markets, making market power determinations and setting SMP conditions in relation to BT and KCOM

### Background

1. On 28 April 2016, Ofcom published a statement entitled “*Business Connectivity Market Review, Review of competition in the provision of leased lines*” (“**2016 BCMR Statement**”).<sup>1</sup> That document set out Ofcom’s conclusions on its review of the relevant markets relating to leased lines and backhaul circuits used by businesses and communication providers, by identifying markets, making certain market determinations and setting SMP conditions (including charge control conditions). At Annex 35 of that document, Ofcom published a notification under section 45 of the Act containing its market identifications, market power determinations and the setting of SMP conditions and directions to be applied to BT and KCOM respectively (“**April 2016 Notification**”).
2. On 28 June 2016, BT brought an appeal against the 2016 BCMR Statement in the Competition Appeal Tribunal (“**Tribunal**”) under section 192 of the Act. On 26 July 2017, the Tribunal ruled that Ofcom had erred in certain aspects of its market definition analysis in relation to product market definition, geographic market definition and the delineation of the competitive core and remitted these matters to Ofcom. On 10 November 2017 the Tribunal published its reasons for this ruling.
3. Accordingly, on 23 November 2017 Ofcom:
  - a. issued a notification under section 195(6) of the Act revoking certain market identifications and market power determinations made in the April 2016 Notification. As a result of this revocation, certain SMP services conditions and directions set out in the April 2016 Notification ceased to apply to BT<sup>2</sup>;

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<sup>1</sup> Ofcom, Business Connectivity Market Review, Review of competition in the provision of leased lines, 28 April 2016. [https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2016#accordion\\_target-89118](https://www.ofcom.org.uk/consultations-and-statements/category-1/business-connectivity-market-review-2016#accordion_target-89118)

<sup>2</sup> Ofcom, Business Connectivity Market Review 2016, Revocation of certain measures imposed in the business connectivity markets, 23 November 2017. [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0018/108018/BCMR-Revocation-Notification.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0018/108018/BCMR-Revocation-Notification.pdf)

- b. issued a notification (“**Temporary Conditions Notification**”) identifying markets, making market power determinations, setting of temporary SMP services conditions and the giving of temporary directions in relation to BT under sections 48A(2), 49A(2), 80(1A) and 80A(2) of the Act<sup>3</sup>; and
  - c. published a statement entitled “*Business Connectivity Markets – Temporary SMP conditions in relation to business connectivity services*”<sup>4</sup> which set out Ofcom’s reasons for imposing the temporary conditions contained in the Temporary Conditions Notification.
4. Ofcom is today publishing a consultation document entitled “*Business connectivity market review consultation*” (the “**Consultation**”). In this document, Ofcom is consulting on new proposals to identify markets, make market power determinations and set SMP conditions with respect to BT and KCOM.

## Proposed determinations

### Market identifications and market power

5. Ofcom is proposing to identify the following markets listed in Column 1 of **Table A** below for the purposes of making a proposed determination that the person specified in the corresponding row in Column 2 of that Table has significant market power in that identified services market.

**Table A: Proposed market identifications and market power determinations**

Column 1: Market Identification	Column 2: Market power determination
<b>United Kingdom (excluding the Hull Area)</b>	
(a) Wholesale market for <b>CI Access services</b> in the <b>Central London Area</b>	None
(b) Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Birmingham</b>	BT
(c) Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Bristol</b>	BT
(d) Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Edinburgh</b>	BT
(e) Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Glasgow</b>	BT

<sup>3</sup> Ofcom, Business Connectivity Markets - Temporary SMP conditions in relation to business connectivity services, Annex 1, 23 November 2017. [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0020/108137/Annex-1-Legal-instruments.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0020/108137/Annex-1-Legal-instruments.pdf)

<sup>4</sup> Ofcom, Business Connectivity Markets – Temporary SMP conditions in relation to business connectivity services, 23 November 2017. [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0018/108018/BCMR-Revocation-Notification.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0018/108018/BCMR-Revocation-Notification.pdf)

(f) Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Leeds</b>	BT
(g) Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Manchester</b>	BT
(h) Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas in the Rest of UK</b>	BT
(i) Wholesale market for <b>CI Access services</b> in <b>BT+1 Areas</b>	BT
(j) Wholesale market for <b>CI Access services</b> in <b>BT Only Areas</b>	BT
(k) Wholesale market for <b>CI Inter-exchange Connectivity services</b> along <b>Competitive IEC Routes</b>	None
(l) Wholesale market for <b>CI Inter-exchange Connectivity services</b> along <b>Non-competitive IEC Routes</b>	BT
<b>Hull Area</b>	
(m) Wholesale market for <b>CI Access services</b> in the <b>Hull Area</b>	KCOM

6. For the avoidance of doubt, Ofcom proposes to determine that the markets listed at **(a)** and **(k)** in **Table A** above are effectively competitive and, therefore, that no person has significant market power in that market.
7. The effect of, and Ofcom's reasons for, proposing to identify the markets and make the market power determinations referred to in **paragraph 5** above are set out in the Consultation accompanying this notification.

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

8. Ofcom is proposing to set, in relation to each of the services markets in which Ofcom is proposing to make the market power determinations as listed at **(b)-(j)**, **(l)** and **(m)** in **Table A** above, the SMP conditions set out in:
  - a. **Schedule 1** to this notification to be applied to BT;
  - b. **Schedule 2** to this notification to be applied to KCOM;

to the extent specified in those Schedules, which SMP conditions shall, unless otherwise is stated in those Schedules, take effect from the date specified in any notification under sections 48(1) and 79(4) of the Act adopting the proposals set out in this notification.
9. Ofcom is (to the extent still extant) proposing to revoke the SMP conditions applied to BT and KCOM as set out in the April 2016 Notification.

10. The SMP conditions set in the Temporary Conditions Notification expire after 31 March 2019.
11. The effect of, and Ofcom's reasons for, the proposals in relation to the SMP conditions referred to in **paragraph 8** above are set out in the Consultation document accompanying this notification.

### **BT's regulatory financial reporting**

12. Ofcom's proposals in relation to BT's regulatory financial reporting will be contained in a further consultation document and proposed directions will be contained in a separate notification under section 49A of the Act.

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

13. In identifying and analysing the markets referred to in **paragraph 5** above, and in considering whether to make the corresponding determinations 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 an EU instrument and which relate to market identification and analysis or the determination of what constitutes significant market power. In so doing, pursuant to Article 3(3) of Regulation (EC) No 1211/2009, Ofcom has also taken the utmost account of any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by BEREC.
14. Ofcom considers that the proposed SMP conditions above comply with the requirements of sections 45 to 47, 87, 88 and 91 of the Act, as appropriate and relevant to each such SMP condition, and further that the proposed modifications and revocations of the SMP conditions referred to above comply with the requirements of sections 45 to 47, 87, 88 and 91 of the Act as appropriate and relevant to them.
15. 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.

### **Making representations**

16. Representations may be made to Ofcom about any of the proposals set out in this notification and the accompanying consultation document by no later than 18 January 2019.
17. Copies of this notification and the accompanying Consultation have been sent to the Secretary of State in accordance with sections 48C(1) and 81(1) of the Act.

## Interpretation

18. For the purpose of interpreting this notification —

- a. except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in **paragraph 19** below, and otherwise any word or expression shall have 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.

19. In this notification—

<b>“Act”</b>	means the Communications Act 2003 (c. 21);
<b>“April 2016 Notification”</b>	means the notification referred to in <b>paragraph 1</b> above;
<b>“BT”</b>	means British Telecommunications plc, whose registered company number is 1800000 and any British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined in section 1159 of the Companies Act 2006;
<b>“BT+1 Areas”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “UK BT plus 1” in <b>Schedule 5</b> of this notification;
<b>“BT Only Areas”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “UK BT only” in <b>Schedule 5</b> of this notification;
<b>“Central London Area”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “CLA” in <b>Schedule 5</b> of this notification;
<b>“CI”</b>	means contemporary interface;
<b>“Competitive IEC Routes”</b>	means connectivity between two BT exchanges identified as “BT plus two or more” in <b>Schedule 6</b> of this notification;
<b>“High Network Reach Areas of Birmingham”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “Birmingham” in <b>Schedule 5</b> of this notification;

<b>“High Network Reach Areas of Bristol”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “Bristol” in <b>Schedule 5</b> of this notification;
<b>“High Network Reach Areas of Edinburgh”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “Edinburgh” in <b>Schedule 5</b> of this notification;
<b>“High Network Reach Areas of Glasgow”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “Glasgow” in <b>Schedule 5</b> of this notification;
<b>“High Network Reach Areas of Leeds”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “Leeds” in <b>Schedule 5</b> of this notification;
<b>“High Network Reach Areas of Manchester”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “Manchester” in <b>Schedule 5</b> of this notification;
<b>“High Network Reach Areas in the Rest of UK”</b>	means, subject to <b>Schedule 4</b> of this notification, the areas consisting of the postcode sectors identified as “UK BT plus 2 or more” in <b>Schedule 5</b> of this notification;
<b>“Hull Area”</b>	means, subject to <b>Schedule 4</b> of this notification, 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 KCOM Group plc and shown in <b>Schedule 3</b> of this notification;
<b>“KCOM”</b>	means KCOM Group plc, whose registered company number is 2150618, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;
<b>“Non-Competitive IEC Routes”</b>	means all connectivity between the BT exchanges set out in <b>Schedule 6</b> of this notification, excluding Competitive IEC Routes;
<b>“Ofcom”</b>	means the Office of Communications;
<b>“United Kingdom”</b>	has the meaning given to it in the Interpretation Act 1978 (1978 c30).



**Ali-Abbas Ali**

**Competition Policy Director, Ofcom**

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

2 November 2018

## Schedule 1: SMP conditions (BT)

### 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**.
2. Nothing in these Conditions shall require the Dominant Provider to provide the following:
  - a. Ethernet First Mile copper services (EFMcU) (as defined in IEEE standard 802.3.1-2013);
  - b. Symmetric Digital Subscriber Line services.

**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>
Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Birmingham</b>	Conditions 1-9 Condition 11
Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Bristol</b>	Conditions 1-9 Condition 11
Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Edinburgh</b>	Conditions 1-9 Condition 11
Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Glasgow</b>	Conditions 1-9 Condition 11
Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Leeds</b>	Conditions 1-9 Condition 11
Wholesale market for <b>CI Access services</b> in the <b>High Network Reach Areas of Manchester</b>	Conditions 1-9 Condition 11
Wholesale market for <b>CI Access services</b> in the <b>High Network Reach</b>	Conditions 1-9



<b>Areas in the Rest of UK</b>	Condition 11
Wholesale market for <b>CI Access services</b> in <b>BT+1 Areas</b>	Conditions 1-11
Wholesale market for <b>CI Access services</b> in <b>BT Only Areas</b>	Conditions 1-11
Wholesale market for <b>CI Inter-exchange Connectivity services</b> along <b>Non-competitive IEC Routes</b>	Conditions 1-11

The Conditions referred to in Column 2 of **Table 1** are entitled as follows—

Condition 1	Network access on reasonable request
Condition 2	Specific forms of network access
Condition 3	No undue discrimination
Condition 4	Equivalence of Inputs basis
Condition 5	Publication of a Reference Offer
Condition 6	Notification of charges and terms and conditions
Condition 7	Quality of service
Condition 8	Notification of technical information
Condition 9	Requests for new forms of network access
Condition 10	Charge Controls
Condition 11	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**—

**“Accepted Order”** means an Order that has been validated and accepted by the Dominant Provider;

**“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**;

**“Access Charge Change Notice”** means a notice given by the Dominant Provider of an Access Charge Change;

**“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;

**“Access Segment”** means network access providing uncontended bandwidth connecting an end user premises to—

- (a) a Local Access Node; or
- (b) an operational building of the Dominant Provider; or
- (c) an operational building of a Third Party.

**“Accommodation Services”** means the provision of space permitting a Third Party to occupy part of an MDF/ODF Site reasonably sufficient to permit the use of network access provided by the Dominant Provider in accordance with **Condition 1** and **Condition 2** (as applicable), and in particular to permit the connection of the Dominant Provider’s electronic communications network with that of a Third Party at that location and having the following characteristics —

(a) the Third Party’s electronic communications network is situated in an area of the MDF/ODF Site which—

- (i) is a single undivided space;
- (ii) after proper performance by the Dominant Provider of its obligation to provide network access pursuant to **Condition 1** and **Condition 2** (as applicable), would permit the normal operation of the Third Party’s electronic communications network (or would permit if the Dominant Provider removed any object or substance whether toxic or not, which might reasonably prevent or hinder the occupation of the MDF/ODF Site for such use); and
- (iii) if so requested by the Third Party, is not unreasonably distant from the Dominant Provider’s electronic communications network within the MDF/ODF Site;

(b) no permanent physical partition is erected in the space between the Third Party’s electronic communications network and the Dominant Provider’s electronic communications network; and

(c) the Third Party’s electronic communications network is neither owned nor run by the Dominant Provider or by any person acting on the Dominant Provider’s behalf;

**“Backhaul Segment”** means network access providing uncontended bandwidth connecting either—

(a) an operational building of the Dominant Provider to—

- (i) another operational building of the Dominant Provider; or
- (ii) an operational building of a Third Party;

or

(a) an operational building of a Third Party to—

- (i) another operational building of a Third Party; or
- (ii) an operational building of the Dominant Provider

**“Commercial Information”** means information of a commercially confidential nature relating to products and services to which **Condition 4** applies, and which relates to any or all of the following in relation thereto—

- (a) product development;
- (b) pricing;
- (c) marketing strategy and intelligence;
- (d) product launch dates;
- (e) cost;
- (f) projected sales volumes; or
- (g) network coverage and capabilities,

save for any such information in relation to which Ofcom consents in writing that it shall be treated as falling outside this definition;

**“Completed Order”** means an Accepted Order that has been provisioned and for which all related work has been carried out;

**“Customer-Sited Handover”** means interconnection between the electronic communications network of the Dominant Provider and the electronic communications network of a Third Party at an operational building of the Third Party;

**“Dark Fibre Access”** means a service providing network access to one or more optical fibres suitable for the transmission of electromagnetic energy to convey signals;

**“Dominant Provider”** means British Telecommunications plc, whose registered company number is 1800000 and any British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, all as defined in section 1159 of the Companies Act 2006;

**“Equivalence of Inputs”** means that the Dominant Provider provides, in respect of a particular product or service, the same product or service to all Third Parties (including itself) 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 Third Parties (including itself) of the same Commercial Information about such products, services, systems and processes as the Dominant Provider provides to its own divisions, subsidiaries or partners. In particular, it includes the use by the Dominant Provider of such systems and processes in the same way as other Third Parties and with the same degree of reliability and performance as experienced by other Third Parties.

In this definition “the same” means exactly the same subject only to:

(a) trivial differences; and

(b) differences relating to:

(i) credit vetting procedures,

(ii) payment procedures,

(iii) matters of national and crime-related security (which for the avoidance of doubt includes for purposes related to the Regulation of Investigatory Powers Act 2000), physical security, security required to protect the operational integrity of the network,

(iv) provisions relating to the termination of a contract,

(v) contractual provisions relating to requirements for a safe working environment;

(c) differences relating to the provision of Commercial Information by the Dominant Provider to its own divisions, subsidiaries or partners where this is necessary for purposes other than those relating to the provision of network access to those own divisions, subsidiaries or partners; and

(d) such other differences as OFCOM may from time to time consent to in writing.

For the avoidance of any doubt, unless seeking Ofcom’s consent, the Dominant Provider may not rely on any other reasons in seeking to objectively justify the provision in a different manner;

**“Ethernet Services”** means services presented with the standard networking protocol defined under that name in IEEE 802.3 and published by the Institute of Electrical and Electronics Engineers;

**“In-Building Handover”** means interconnection between the electronic communications network of the Dominant Provider and the electronic communications network of a Third Party within an operational building of the Dominant Provider;

**“Initial Contractual Delivery Date”** means the first date provided by the Dominant Provider to a Third Party Customer on which an Order is planned to become a Completed Order;

**“Interconnection Services”** means each of the following, individually and collectively—

(a) Customer-Sited Handover; and

(b) In-Building Handover;

**“Local Access Node”** means an operational building of the Dominant Provider which supports the provision of services to end users and to which the end user is directly connected. For the avoidance of doubt, such nodes include sites housing a main distribution frame or an optical distribution frame;

**“MDF/ODF Site”** means the site of an operational building of the Dominant Provider that houses a main distribution frame or an optical distribution frame;

**“Order”** means a request for the Relevant Ethernet Service, the Relevant WDM Service or the Dark Fibre Access (as applicable), including a request for an upgrade on bandwidth of an existing Relevant Ethernet Service or an existing Relevant WDM Service or a request for a change to the product variant of an existing Relevant Ethernet Service or an existing Relevant WDM Service, submitted to the Dominant Provider by a Third Party;

**“Reference Offer”** means the terms and conditions on which the Dominant Provider is willing to enter into an Access Agreement;

**“Relevant Ethernet Services”** means those Ethernet Services offered by the Dominant Provider to a Third Party under the product or service names of (i) Ethernet Access Direct, (ii) Ethernet Backhaul Direct or (iii) Cablelink including, in relation to each:

- (a) all product variants except where Ofcom agrees otherwise, and
- (b) the introduction by the Dominant Provider of a new product and/or service wholly or substantially in substitution for that existing product and/or service;

**“Relevant WDM Service”** means those WDM Services offered by the Dominant Provider to a Third Party under the product or service names of (i) Optical Spectrum Access; (ii) Optical Spectrum Extended Access; or (iii) Optical Filter Connect including, in relation to each:

- (a) all product or service variants except where Ofcom agrees otherwise; and
- (b) the introduction by the Dominant Provider of a new product and/or service wholly or substantially in substitution for that existing product and/or service;

**“Service Level Commitment”** means the quality standards that the Dominant Provider must meet when performing its obligations;

**“Service Level Guarantee”** means a commitment specifying the amount payable

- proactively; and
- without prejudice to the right of either party to claim for additional loss;

by the Dominant Provider to a Third Party for a failure to adhere to a Service Level Commitment;

**“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;

**“Third Party Customer”** means a Third Party purchasing a Relevant Ethernet Service or a Dark Fibre Access (as applicable) from the Dominant Provider;

**“Third Party”** means a person providing a public electronic communications service or a person providing a public electronic communications network;

**“WDM Services”** means services provided using wavelength division multiplexing equipment located at the customer’s premises and which is capable of supporting multiple leased line services over a single fibre or pair of fibres;

**“Wholesale End-to-End Segments”** means network access connecting an end user premises and another end user premises.

## Part 3: SMP conditions

### Condition 1 – Network access on reasonable request

- 1.1 Except insofar as Ofcom may from time to time otherwise consent in writing, the Dominant Provider must provide network access to a Third Party where that Third Party, in writing, reasonably requests it.
- 1.2 Except where **Condition 1.3** applies, 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 a Third Party (and, in any event, in accordance with **Condition 7**);
  - (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 Where **Condition 10** applies to the provision of network access by the Dominant Provider, the provision of that network access in accordance with this Condition must:
  - (a) take place as soon as reasonably practicable after receiving the request from a Third Party (and, in any event, in accordance with **Condition 7**);
  - (b) be on:
    - (i) fair and reasonable terms and conditions (excluding charges); and
    - (ii) such terms, conditions and charges as Ofcom may from time to time direct.
- 1.4 The provision of network access by the Dominant Provider in accordance with this Condition shall 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 and, for the avoidance of doubt, associated facilities include Accommodation Services and Interconnection Services.
- 1.5 The Dominant Provider must comply with any direction Ofcom may make from time to time under this Condition.



## Condition 2 – Specific forms of network access

2.1 Without prejudice to the generality of **Condition 1**, the provision of network access under **Condition 1** shall include the following specific forms of network access—

(a) Ethernet Services including the provision of the following services:

- (i) Access Segments;
- (ii) Backhaul Segments;
- (iii) Wholesale End-to-End Segments, up to a maximum straight-line distance of 25km;

(b) WDM Services at bandwidths above 1 Gbit/s including the provision of the following services:

- (i) Access Segments;
- (ii) Backhaul Segments;
- (iii) Wholesale End-to-End Segments;

(c) Dark Fibre Access in Backhaul Segments, where one or more circuit end(s) terminate(s) at a BT exchange which is identified as a “BT Only” exchange in **Schedule 6** of this notification.

2.2 In providing Dark Fibre Access the Dominant Provider shall ensure that, where a service is provided which corresponds to the optical fibre elements of a service made available pursuant to **Conditions 2.1(a)** or **2.1(b)** above, save in respect of objectively justifiable differences, it shall be provided:

- (a) in accordance with the same systems and processes;
- (b) in the same manner; and
- (c) within the same or shorter period of time.

2.3 Nothing in this **Condition 2** shall require the Dominant Provider:

- (a) to provide network access to itself under **Condition 2.1(c)**;
- (b) where the Dominant Provider provides network access to itself under **Condition 2.1(c)**, to provide to Third Parties services that use that network access as an input.

2.4 The Dominant Provider shall comply with **Condition 2.1(c)** no later than [*one month after the date on which this Condition enters into force*].

- 2.5 The provision of network access by the Dominant Provider in accordance with this Condition shall also include such other entitlements as Ofcom may from time to time direct.
- 2.6 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 **Conditions 1 and 2** (as applicable).
- 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 – Equivalence of Inputs basis

- 4.1 Subject to **Condition 4.2**, the Dominant Provider must provide network access in accordance with **Conditions 1 and 2** (as applicable) on an Equivalence of Inputs basis.
- 4.2 The obligation in **Condition 4.1** to provide network access on an Equivalence of Inputs basis shall not apply to:
- (a) Accommodation Services other than in relation to the allocation of space (to be allocated on a first-come-first-served basis) and power in operational buildings belonging to the Dominant Provider;
  - (b) WDM Services with a straight line distance of more than 70km;
  - (c) network access which the Dominant Provider was providing but was not required to provide on an Equivalence of Inputs basis as at [*the day immediately prior to the date on which this Condition enters into force*]; or
  - (d) such provision of network access as Ofcom may from time to time otherwise consent in writing.
- 4.3 Where WDM Services provided by the Dominant Provider to a Third Party differ from WDM Services provided by the Dominant Provider to itself only in respect of the interface used:
- (a) subject to **Condition 4.3(b)**, the obligation in **Condition 4.1** shall apply;
  - (b) the obligation in **Condition 4.1** shall not apply to the price for the provision of such WDM Services, but the Dominant Provider must ensure that such a price is not unduly discriminatory within the meaning of **Condition 3**.
- 4.4 Without prejudice to the generality of **Condition 4.1**, the Dominant Provider must not provide (or seek to provide) network access for its own services (including for those of its retail divisions, subsidiaries or partners), unless at the same time the Dominant Provider provides and/or offers to provide such network access to Third Parties on an Equivalence of Inputs basis.
- 4.5 For the avoidance of doubt, the obligations set out in this **Condition 4** shall apply in addition to the obligations set out in **Condition 3**.

## Condition 5 – Publication of a Reference Offer

- 5.1 Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider shall publish a Reference Offer in relation to the provision of network access pursuant to **Conditions 1 and 2** (as applicable) and comply with the requirements set out below.
- 5.2 Subject to **Condition 5.9**, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of network access pursuant to **Conditions 1 and 2** (as applicable) 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, including the provision of Initial Contractual Delivery Dates;
  - (f) relevant charges, terms of payment and billing procedures;
  - (g) details of interoperability tests;
  - (h) 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, provision of support services (such as fault handling and repair);
    - (ii) a definition and limitation of liability and indemnity;
    - (iii) 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;
    - (iv) and (v) apply in respect of network access provided pursuant to Condition 2.1(a) (Ethernet Services) and Condition 2.1(c) (Dark Fibre Access):**
      - (iv) Service Level Commitments in respect of at least the following aspects of that service:
        - (a) completion of the provision of the service;

(b) fault repair times;

(v) Service Level Guarantees in respect of the Service Level Commitments specified in **Condition 5.2(h)(iv)** above;

**(vi) and (vii) apply in respect of all other network access:**

(vi) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;

(vii) the amount of compensation payable by one party to another for failure to perform contractual commitments;

(i) details of any relevant intellectual property rights;

(j) a dispute resolution procedure to be used between the parties;

(k) details of duration and renegotiation of agreements;

(l) provisions regarding confidentiality of the agreements;

(m) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts); and

(n) the standard terms and conditions for the provision of network access.

5.3 The Dominant Provider shall ensure that a Reference Offer in relation to the provision of Dark Fibre Access pursuant to **Condition 2.1(c)** separately sets out, in addition to the matters set out in **Condition 5.2**, an explanation of differences (if any) between:

(a) the matters set out in **Condition 5.2** which apply to the provision of the Dark Fibre Access; and

(b) the matters set out in **Condition 5.2** which apply to the provision of the services corresponding to the optical fibre elements of each of the services made available pursuant to **Conditions 2.1(a)** and **2.1(b)** above.

5.4 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 the network access provided to any 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 shall 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 **Condition 5.2**.

- 5.5 Except where **Condition 5.6** applies, the Dominant Provider shall:
- (a) on the date that this Condition enters into force, publish a Reference Offer in relation to any network access that it is providing as at the date that this Condition enters into force; and
  - (b) as soon as reasonably practicable, 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.
- 5.6 In relation to specific forms of Dark Fibre Access to be provided under **Condition 2.1(c)**:
- a) the Dominant Provider shall publish a Reference Offer in relation to Dark Fibre Access by no later than *[one month after the date on which this Condition enters into force]*;
  - b) the Service Level Commitments and Service Level Guarantees included in the Reference Offer referred to in (a) shall come into effect no later than *[four months after the date on which this Condition enters into force]*.
- 5.7 The publications referred to above shall be effected by the Dominant Provider placing a copy of the Reference Offer on any relevant publicly available website operated or controlled by the Dominant Provider.
- 5.8 The Dominant Provider shall 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).
- 5.9 The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.
- 5.10 The Dominant Provider shall provide network access on the terms and conditions (including charges) in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.
- 5.11 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

## Condition 6 – Notification of charges and terms and conditions

- 6.1 Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider shall publish charges, terms and conditions and comply with the requirements set out in this Condition.
- 6.2 Where it proposes an Access Charge Change, the Dominant Provider shall send to every person with which it has entered into an Access Agreement pursuant to **Conditions 1 and 2** (as applicable), an Access Charge Change Notice.
- 6.3 The obligation in **Condition 6.2** shall not apply where the Access Charge Change is directed or calculated by Ofcom or is a consequence of such direction or determination (including pursuant to the setting of an SMP services condition under section 45 of the Act) or required by a notification or enforcement notification issued by Ofcom under sections 96A or 96C of the Act.
- 6.4 An Access Charge Change Notice must:
- (a) in the case of an Access Charge 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 Charge 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 Charge Change relating to the end of a temporary price reduction, or an increase to a price offered as a temporary price reduction (where the increased price is still a temporary price reduction), in accordance with the terms of a Special Offer, be sent not less than 28 days before any such amendment comes into effect;
  - (d) in the case of an Access Charge Change relating to an amendment to the terms and conditions of a Special Offer (other than relating to price or an extension of the duration of the Special Offer), be sent not less than 28 days before any such amendment comes into effect;
  - (e) in the case of an Access Charge Change relating solely to an extension of the duration of a Special Offer at the same price or a lower price with no other amendments to the terms and conditions of the Special Offer, be sent at least one Working Day before such amendment comes into effect;
  - (f) in the case of any other Access Charge Change involving existing network access, be sent not less than 90 days before any such amendment comes into effect.

For the avoidance of doubt, where the Dominant Provider provides network access under a Special Offer, the Dominant Provider is not required to give an Access Charge Change Notice when the price is increased in accordance with the stated terms of the Special Offer.



- 6.5 The Dominant Provider shall 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; and
  - (c) the date on which, and the period for which, the Access Charge Change will take effect (the "effective date").
- 6.6 The Dominant Provider shall not apply any Access Charge Change identified in an Access Charge Change Notice before the effective date.
- 6.7 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 other person; or
  - (b) may be used for a purpose that is the same, similar or equivalent to the network access provided to any other person, in a manner that differs from that detailed in an Access Charge Change Notice in relation to network access provided to any other person,
- the Dominant Provider shall 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 **Condition 6.5** and, where the Dominant Provider amends the charges, terms and conditions on which it provides itself with network access, it shall ensure it sends to Ofcom a notice equivalent to an Access Charge Change Notice.

## Condition 7 – Quality of service

- 7.1 The Dominant Provider must comply with all such quality of service requirements as Ofcom may from time to time direct in relation to network access provided by the Dominant Provider pursuant to **Conditions 1 and 2** (as applicable).
- 7.2 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 **Conditions 1 and 2** (as applicable), in such manner and form, and including such content, as Ofcom may from time to time direct.

## Condition 8 – Notification of technical information

8.1 Except in so far as Ofcom may from time to time otherwise consent in writing, in relation to network access pursuant to **Conditions 1 and 2**, where the Dominant Provider 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. Other than where the new or amended terms and conditions are a consequence of new or amended technical specifications determined by NICC Standards Limited (whose registered company number is 6613589), that reasonable notice must be 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 an existing Access Agreement come into effect.

8.2 The obligation in **Condition 8.1** shall not apply where the new or amended terms and conditions are 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 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.

8.3 The Dominant Provider shall 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 current Reference Offer of the terms and conditions associated with the provision of that network access; and

(c) the date on which, and the period for which, an Access Agreement to provide the new network access will be available or the amended terms and conditions will take effect (the “effective date”).

8.4 The Dominant Provider shall 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.

8.5 The publication referred to in **Condition 8.1** shall be effected by the Dominant Provider:

- (a) placing a copy of the Notice on any relevant publicly available website operated or controlled by the Dominant Provider;
- (b) where the Notice identifies an amendment 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 **Conditions 1** and **2** (as applicable); and
- (c) 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 9 – Requests for new forms of network access

- 9.1 The Dominant Provider must, for the purposes of transparency, publish guidelines, in relation to requests for new forms of network access made to it. Such guidelines must set out:
- a. the form in which such a request should be made;
  - b. the information that the Dominant Provider requires in order to consider a request for a new form of network access;
  - c. the timescales in which such requests will be handled by the Dominant Provider; and
  - d. any provisions directed by Ofcom.
- 9.2 The guidelines must meet the following principles:
- a. the process for consideration of requests shall be documented end-to-end;
  - b. the timescales for each stage of the process shall be reasonable;
  - c. the criteria by which requests will be assessed shall be clearly identified;
  - d. the reasons for rejecting any request shall be clear and transparent; and
  - e. any changes to the guidelines shall be agreed between the Dominant Provider and other communications providers in an appropriate manner.
- 9.3 The Dominant Provider must, upon reasonable request from a Third Party considering making a request for a new form of network access, provide that Third Party with such information as may be reasonably required to enable that Third Party to make a request for a new form of network access. Such information must be provided within a reasonable period.
- 9.4 On receipt of a written request for a new form of network access, the Dominant Provider must deal with the request in accordance with the guidelines described in **Condition 9.1** above. A modification of a request for a new form of network access which has previously been submitted to the Dominant Provider, and rejected by the Dominant Provider, must be considered as a new request.
- 9.5 The Dominant Provider must comply with any direction Ofcom may make from time to time under this Condition requiring amendments to the guidelines.

## Condition 10 – Charge Controls

This **Condition 10** comprises **Conditions 10A** to **10E**, the contents of which are set out below.

<b>Condition 10A</b>	<b>Controls on the Ethernet (1 Gbit/s and below) Services Basket, Ethernet and WDM (over 1 Gbit/s) Services Basket and Cablelink Sub-basket</b>  Ethernet (1 Gbit/s and below) Services Basket, Ethernet and WDM (over 1 Gbit/s) Basket and Cablelink Sub-basket Controls  Sub-caps Control  General provisions and interpretation  Annex to <b>Condition 10A</b>  Section 1 - Meaning of "Ethernet (1 Gbit/s and below) Services Basket"  Section 2 - Meaning of "Cablelink Sub-basket"  Section 3 – Meaning of "Ethernet and WDM (over 1 Gbit/s) Services Basket"  Interpretation
<b>Condition 10B</b>	<b>Controls on Dark Fibre</b>  Interpretation
<b>Condition 10C</b>	<b>Controls on Accommodation Services and Overlapping Accommodation Services</b>  Control on Accommodation Services  Control on Overlapping Accommodation Services  General provisions and interpretation  Annex to <b>Condition 10C</b>  Section 1 - Meaning of "Accommodation Services"  Section 2 - Meaning of "Overlapping Accommodation Services"  Interpretation
<b>Condition 10D</b>	<b>Controls on the Direct ECC Services Basket and Contractor ECC Services</b>  Direct ECC Services Basket Control  Sub-caps control  Control on Contractor ECC Services  General provisions and interpretation  Annex to <b>Condition 10D</b>  Section 1 - Meaning of "Direct ECC Services Basket"

Section 2 - Meaning of “Contractor ECC Services”

Section 3 - Meaning of “EAD” and “EAD LA” for the purposes  
of **Condition 10D.13**

Interpretation

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**Condition 10E**

**Controls on Time Related Charges**

General provisions and interpretation

Annex to **Condition 10E**

Section 1 - Meaning of “Ethernet TRC Services”

Interpretation

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**Condition 10A - Controls on the Ethernet (1 Gbit/s and below) Services Basket, Ethernet and WDM (over 1 Gbit/s) Services Basket and Cablelink Sub-basket**

**10A.1** In this **Condition 10A** a reference to a “**Basket**” means any of the following:

- (i) the Ethernet (1 Gbit/s and below) Services Basket;
- (ii) the Ethernet and WDM (over 1 Gbit/s) Basket; and
- (iii) the Cablelink Sub-basket.

Ethernet (1 Gbit/s and below) Services Basket, Ethernet and WDM (over 1 Gbit/s) Basket and Cablelink Sub-basket Controls

**10A.2** In respect of each Basket and subject to the provisions of **Condition 10A.10**, the Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Period, the Percentage Change (calculated in accordance with **Condition 10A.3**) in the total charges for all of the services falling within that Basket is not greater than the Controlling Percentage (calculated in accordance with **Condition 10A.4**).

**10A.3** The Percentage Change in respect of a Basket shall be calculated by employing the following formula:

(a)

$$C_t = \frac{\sum_{i=1}^n \left[ R_i \frac{(\bar{p}_{i,t} - \bar{p}_{i,t-1})}{\bar{p}_{i,t-1}} \right]}{\sum_{i=1}^n R_i}$$

Where:

$C_t$  is the Percentage Change in the total charges for all of the services falling within the Basket for the Relevant Period,  $t$ ;

$n$  is the number of individual services in the Basket;

$i$  is a number from 1 to  $n$  for each of the  $n$  individual services in the Basket;

$R_i$  is the Total Revenue accrued during the Prior Financial Year in respect of the individual service  $i$  falling within the Basket;

$t$  refers to the Relevant Period;

$t-1$  refers to the Prior Period;

(b)  $\bar{p}_{i,t}$  is the Relevant Period Weighted Average Charge set by the Dominant Provider for the individual service  $i$  falling within the Basket during the Relevant Period, subject to the provisions set out in **Condition 10A.10**, which shall be calculated by employing the following formula:

$$\bar{p}_{i,t} = \sum_{j=1}^m (w_{i,j,t} p_{i,j,t})$$

Where:



$m$  is the number of time periods for which there are distinct charges during the Relevant Period;

$j$  is a number from 1 to  $m$  for each of the  $m$  time periods during which a distinct charge is in effect;

$w_{i,j,t}$  is the proportion of the Relevant Period in which a distinct charge is in effect and is calculated by dividing the total number of days during which the charge is in effect:

- (i) for the First Relevant Period, by the total number of days in the First Relevant Period; and
- (ii) for the Second Relevant Period, by the total number of days in the Second Relevant Period.

$p_{i,j,t}$  is the charge for the specified period,  $j$ , during the Relevant Period,  $t$ , for the individual service,  $i$ ;

(c)  $\bar{p}_{i,t-1}$  is for the purposes of calculating the Percentage Change:

- (i) for the Ethernet and WDM (over 1Gbit/s) Basket:
  - a. for the First Relevant Period, the price on [1 October 2018], as per the Dominant Provider's Price List, for the individual service  $i$  falling within the Ethernet and WDM (over 1Gbit/s) Basket, subject to the provisions set out in **Condition 10A.10**;
  - b. for the Second Relevant Period the Prior Period Weighted Average Charge made by the Dominant Provider for the individual service  $i$  falling within the Ethernet and WDM (over 1Gbit/s) Basket during the Prior Period, subject to the provisions set out in Condition 10A.10;
- (ii) for the Ethernet (1 Gbit/s and below) Services Basket and Cablelink Sub-Basket for each Relevant Period, the Prior Period Weighted Average Charge made by the Dominant Provider for the individual service  $i$  falling within the Ethernet (1 Gbit/s and below) Services Basket and Cablelink Sub-Basket, subject to the provisions set out in **Condition 10A.10**;

Where the Prior Period Weighted Average Charge shall be calculated by employing the following formula:

$$\bar{p}_{i,t-1} = \sum_{j=1}^m (w_{i,j,t-1} p_{i,j,t-1})$$

Where:

$m$  is the number of time periods for which there are distinct charges during the Prior Period;

$j$  is a number from 1 to  $m$  for each of the  $m$  time periods during which a

distinct charge is in effect;

$w_{i,j,t-1}$  is the proportion of the Prior Period in which a distinct charge is in effect and is calculated by dividing the total number of days during which the charge is in effect:

- (i) for the First Relevant Period, by the total number of days in the First Relevant Period; and
- (ii) for the Second Relevant Period, by the total number of days in the Second Relevant Period.

$p_{i,j,t-1}$  is the charge for the individual period,  $j$ , during the Prior Period,  $t-1$ , for the individual service,  $i$ .

**10A.4** In respect of each Basket and subject to the provisions set out in **Conditions 10A.5** to **10A.7**, the Controlling Percentage in relation to any Relevant Period shall be calculated by employing the following formula:

$$CP_t = CPI_t - CPI_t$$

Where:

$CP_t$  is the Controlling Percentage for the Relevant Period,  $t$ ;

$CPI_t$  is CPI for the Relevant Period,  $t$ .

**10A.5** Where the Percentage Change for a Basket at the end of the Relevant Period is:

- i. less than the Controlling Percentage for that Basket ("**Deficiency**"); or
- ii. greater than the Controlling Percentage for that Basket ("**Excess**");

the Controlling Percentage for that Basket for the following Relevant Period shall be calculated in accordance with **Condition 10A.6**.

**10A.6** Where **Condition 10A.5** applies, the Controlling Percentage for the relevant Basket shall be calculated by employing the following formula:

$$CP_t = [(100\%)(100\% + CP_{t-1}) / (100\% + C_{t-1})] - 100\%$$

Where:

$CP_t$  is the Controlling Percentage in the Second Relevant Period (in the case of Deficiency or Excess in the First Relevant Period);

$C_{t-1}$  is the Percentage Change for the Basket for the First Relevant Period (in the case of Deficiency or Excess in the First Relevant Period), calculated in accordance with the formula for  $C_t$  as set out in **Condition 10A.3**, as applicable.

**10A.7** In the case of Excess, the Dominant Provider shall, to the extent reasonably possible, and as soon as reasonably practicable, repay the Relevant Excess Revenue to the relevant Affected

Communications Provider.

Sub-caps Control

**10A.8** In respect of:

- (i) each and every individual service falling within the Ethernet (1 Gbit/s and below) Services Basket;
- (ii) each and every individual service falling within the Ethernet and WDM (over 1 Gbit/s) Services Basket; and
- (iii) any Generic Resilience Facilities Fee<sup>5</sup> charged in connection with any of the services falling under the Baskets mentioned under (i) and (ii) above;

and subject to **Condition 10A.10**, the Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Period, the Percentage Change, calculated in accordance with **Condition 10A.9**, in the charge for that service is no greater than the Controlling Percentage calculated in accordance with the following formula:

$$CP_t = CPI_t + X$$

Where:

$CP_t$  is the Controlling Percentage for Relevant Period  $t$ ;

$CPI_t$  is CPI for the Relevant Period,  $t$ ;

$X$  is equal to 5 percentage points.

**10A.9** For the purposes of **Condition 10A.8**, the Percentage Change shall be calculated by employing the formula set out below. References in the formula below to “*an individual service falling within the Basket*” shall be treated as references to each of the services listed in **Condition 10A.8** (i) to (iii), as applicable.

$$C_t = \frac{(\bar{p}_t - \bar{p}_{t-1})}{\bar{p}_{t-1}}$$

Where:

$C_t$  is the Percentage Change in the charge for an individual service falling within the Basket, as applicable, for the Relevant Period,  $t$ ;

$t$  refers to the Relevant Period;

$t-1$  refers to the Prior Period;

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<sup>5</sup> Openreach Price List (Ethernet Services):

<https://www.openreach.co.uk/org/home/products/pricing/loadProductPriceDetails.do?data=GySUDXIH5MW8yvxEfOgrzKx2jat%2B4Zqlm0ZuL5IG8lMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D>

$\bar{p}_t$  is the Relevant Period Weighted Average Charge set by the Dominant Provider for the individual service falling within the Basket, subject to the provisions set out **Condition10A.10**:

Where such Relevant Period Weighted Average Charge shall be calculated by employing the following formula:

$$\bar{p}_t = \sum_{j=1}^m (w_{j,t} p_{j,t})$$

Where:

$m$  is the number of time periods for which there are distinct charges during the Relevant Period;

$j$  is a number from 1 to  $m$  for each of the  $m$  time periods during which a distinct charge is in effect;

$w_{j,t}$  is the proportion of the Relevant Period in which a distinct charge is in effect and is calculated by dividing the total number of days during which the charge is in effect:

- (i) for the First Relevant Period, by the total number of days in the First Relevant Period; and
- (ii) for the Second Relevant Period, by the total number of days in the Second Relevant Period;

$p_{j,t}$  is the charge for the specified period,  $j$ , during the Relevant Period,  $t$  for the individual service falling within the Baskets;

$\bar{p}_{t-1}$  is for the purposes of calculating the Percentage Change: for each Relevant Period, the Prior Period Weighted Average Charge set by the Dominant Provider for the individual service falling within the Baskets, subject to the provisions set out in **Condition 10A.10**;

Where such Prior Period Weighted Average Charge shall be calculated by employing the following formula:

$$\bar{p}_{t-1} = \sum_{j=1}^m (w_{j,t-1} p_{j,t-1})$$

Where:

$m$  is the number of time periods for which there are distinct charges during the Prior Period;

$j$  is a number from 1 to  $m$  for each of the  $m$  time periods during which a distinct charge is in effect;

$w_{j,t-1}$  is the proportion of the Prior Period in which a distinct charge is in effect and is calculated by dividing the total number of days during which the charge is in effect:

- (i) for the First Relevant Period, by the total number of days in the Prior Period; and
- (ii) for the Second Relevant Period, by the total number of days in the First Relevant Period.

$p_{j,t-1}$  is the charge for the individual period,  $j$ , during the Prior Period,  $t-1$ , for the individual service  $i$  falling within the Basket.

#### General provisions and interpretation

**10A.10** For the purposes of determining compliance with this **Condition 10A**, the relevant charges shall be calculated as follows:

- (i) including Three Year Term Products;
- (ii) including Five Year Term Products; and
- (iii) excluding Time Limited Discounts and all other forms of discounts;

and shall be subject to the provisions set out in **Condition 10D.10**.

**10A.11** Except where **Condition 10A.12** applies, where the Annex to this **Condition 10A** lists a service as being available with more than one minimum contract period, the charge for the purposes of determining compliance with this **Condition 10A** shall be deemed to be the charge for the service with the shortest minimum contract period.

**10A.12** Where the Dominant Provider offers a service listed in the Annex to this **Condition 10A** with a minimum contract period of three years or five years, such service shall be deemed, for the purposes of determining compliance with this **Condition 10A**, to be a separate service falling within the Ethernet (1 Gbit/s and below) Services Basket or the Ethernet and WDM (over 1 Gbit/s) Services Basket (as applicable), provided such service complies with the requirements set out in the definitions of the Three Year Term Product or the Five Year Term Product (as applicable), each set out in **Condition 10A.18**.

**10A.13** Except where **Condition 10A.14** applies, where:

- (i) the Dominant Provider makes a material change (other than to a charge) to any service which is subject to this **Condition 10A**; or
- (ii) the Dominant Provider makes a change to the date on which its Financial Year ends; or
- (iii) there is a material change in the basis of the Consumer Prices Index;

**Condition 10A** shall have effect subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances.

For the purposes of this **Condition 10A.13**, a material change to any service which is subject to this **Condition 10A** includes (but is not limited to) a change to the billing practice for any service which is subject to this **Condition 10A**.

**10A.14** Where the Dominant Provider introduces, at any time during each Relevant Period, Substituted Services wholly or substantially in substitution for a Replaced Service which is subject to this **Condition 10A**, the following shall apply to the Substituted Services:

- (i) the Substituted Services shall fall within the same Basket set out in **Condition 10A.1** as the Replaced Service;
- (ii) the Substituted Services shall be subject to the entirety of this **Condition 10A** subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances; and
- (iii) in the Relevant Period that the Substituted Services are introduced, any reference in this **Condition 10A** to charges and/or volumes in the Prior Period (including any reference to the Prior Period Weighted Average Charge) shall be treated as a reference to charges and/or volumes in the Prior Period as agreed by Ofcom.

**10A.15** The Dominant Provider must record, maintain and supply to Ofcom in an electronic format, no later than three months after the end of each Relevant Period, the data necessary for Ofcom to monitor compliance of the Dominant Provider with this **Condition 10A**. The data must include:

- (i) pursuant to **Condition 10A.3**, the calculated Percentage Change relating to each Basket specified in **Condition 10A.1**;
- (ii) all relevant data the Dominant Provider used in the calculation of the Percentage Change as set out in **Conditions 10A.3** and **10A.9**, including for each sub basket and/or individual service in the Basket;
- (iii) all relevant Total Revenues during the relevant Financial Year and during the Relevant Period (where these differ) in respect of the individual service (as applicable) in the Basket;
- (iv) charges published by the Dominant Provider at time,  $t$ , during the Relevant Period and the Prior Period, including published charges for the Three Year Term Products and the Five Year Term Products but excluding any Time Limited Discounts and any other forms of discounts;
- (v) the relevant published charges at the start of each Relevant Period;
- (vi) the Relevant Period Weighted Average Charges and the Prior Period Weighted Average Charges for all of the services to which **Condition 10A.3** applies and calculations thereof;
- (vii) other data necessary for monitoring compliance with the charge control; and
- (viii) such data as Ofcom may from time to time direct.

**10A.16** Ofcom may direct that **Conditions 10A.1 to 10A.15** shall not apply to the extent specified in any such direction.

**10A.17** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this **Condition 10A**.

**10A.18** In this **Condition 10A**:

**“Affected Communications Provider”** means each communications provider to whom the Dominant Provider has provided any of the services specified in the Annex to this **Condition 10A** during the Relevant Period;

**“Basket”** has the meaning given in **10A.1**;

**“Cablelink Sub-basket”** means the sub-basket of services set out in Section 2 of the Annex to this **Condition 10A**;

**“Controlling Percentage”** means a percentage to be calculated in accordance with **Conditions 10A.4** and **10A.8**, as applicable;

**“Consumer Prices Index”** means the index of prices compiled by an agency or a public body on behalf of Her Majesty’s Government or a governmental department (which is the Office for National Statistics at the time of publication of this notification) from time to time in respect of all items;

**“CPI”** means:

- (i) for the First Relevant Period, the amount of the change in Consumer Prices Index in the period of twelve months ending on 30 November 2018, expressed as a percentage (rounded to one decimal place), and
- (ii) for the Second Relevant Period, the amount of the change in the Consumer Prices Index in the period of twelve month ending on 30 November 2019, expressed as a percentage (rounded to one decimal place);

**“Dominant Provider’s Price List”** means a document containing the charges for the Dominant Provider’s products and services;

**“Ethernet and WDM (over 1Gbit/s) Services Basket”** means the basket of services set out in Section 3 of the Annex to this **Condition 10A**;

**“Ethernet (1Gbit/s and below) Services Basket”** means the basket of services set out in Section 1 of the Annex to this **Condition 10A**;

**“Excess Revenue”** means the difference between (i) the revenue which the Dominant Provider earned in the Relevant Period from providing the services specified in the Annex to this **Condition 10A**, and (ii) the revenue the Dominant Provider would have earned in the Relevant Period from providing the services specified in the Annex to this **Condition 10A** if it had complied with the requirements set out in **Condition 10A.2**;

**“Financial Year”** has the same meaning as in **Condition 11**;

**“First Relevant Period”** means a period beginning on [*one day after the date on which this Condition enters into force*] and ending on 31 March 2020 (inclusive);

**“Five Year Term Product”** means any service offered by the Dominant Provider during each of the Relevant Periods which:

- (i) has a minimum contract period of five years;

- (ii) does not include any connection charge; and
- (iii) includes a rental charge which complies with the following formula:

$$R5_t = \frac{1}{5} C1_t + R1_t$$

Where:

$R5_t$  is the rental charge of the Five Year Term Product in period t (paid by both new and existing Third Parties);

$C1_t$  is the connection charge of the equivalent product with a 1 year term in period t;

$R1_t$  is the rental charge of the equivalent product with a 1 year term in period t;

**“Percentage Change”** has the meaning given to it in **Conditions 10A.3** and **10A.9**, as applicable;

**“Prior Financial Year”** means a) for the First Relevant Period, the period of twelve months ending on 31 March immediately before the commencement of the First Relevant Period; and (b) for the Second Relevant Period, the First Relevant Period;

**“Prior Period”** means, in relation to:

- (i) the First Relevant Period, the period of twelve months from 1 April 2018 to 31 March 2019 (inclusive); and
- (ii) the Second Relevant Period, the First Relevant Period.

**“Prior Period Weighted Average Charge”** means a charge to be calculated in accordance with the relevant formula in **Condition 10A.3**;

**“Relevant Excess Revenue”** means the Excess Revenue earned from charging the Affected Communications Provider;

**“Relevant Period”** means each of the following two periods:

- (i) the First Relevant Period; and
- (ii) the Second Relevant Period;

**“Relevant Period Weighted Average Charge”** means a charge to be calculated in accordance with the relevant formula in **Condition 10A.3**;

**“Replaced Service”** means any service subject to **Condition 10A.14** that is withdrawn and wholly or substantially replaced by Substituted Services;

**“Second Relevant Period”** means a period beginning on 1 April 2020 and ending on 31 March 2021 (inclusive);

**“Substituted Services”** means two or more services subject to **Condition 10A.14** that are introduced and wholly or substantially replace a Replaced Service;



**“Three Year Term Product”** means any service offered by the Dominant Provider during each of the Relevant Periods which:

- (i) has a minimum contract period of three years;
- (ii) does not include any connection charge; and
- (iii) includes a rental charge which complies with the following formula:

$$R3_t = \frac{1}{3}C1_t + R1_t$$

Where

$R3_t$  is the rental charge of the Three Year Term Product in period t (paid by both new and existing Third Parties);

$C1_t$  is the connection charge of the equivalent product with a 1 year term in period t;

$R1_t$  is the rental charge of the equivalent product with a 1 year term in period t; and

**“Time Limited Discount”** means any temporary reduction in the charge for a service (“Initial Charge”) where such reduction is reversed after a pre-determined period of time, at which point the revised charge is increased to no more than the same level as the Initial Charge was immediately before the reduction was implemented; and

**“Total Revenue”** means the total revenue from communications providers (including, for the avoidance of doubt, the Dominant Provider itself) in relation to the services and/or products subject to this **Condition 10A**.

## **Annex to Condition 10A**

### **Services subject to charge control pursuant to Condition 10A**

#### **Section 1**

##### **Meaning of “Ethernet (1 Gbit/s and below) Services Basket”**

For the purposes of **Condition 10A**, the expression “**Ethernet (1 Gbit/s and below) Services Basket**” shall be construed as including:

- (i) the services listed in this section, where such services have bandwidths of 1 Gbit/s and below; and
- (ii) all services specified in section 2 of this Annex,

subject to such changes as Ofcom may agree to from time to time, such agreement to be given in writing or by way of direction, as Ofcom considers appropriate, following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

##### **Bulk Transport Link for 1Gbps<sup>6</sup>**

Connection, rental and migration charges for:

- Openreach Handover Point (OHP) Hub
- Main Link
- Point of Presence (PoP)

Additional charges

Cancellation charges

##### **Ethernet Access Direct (EAD)<sup>7</sup>**

Connection and rental charges for:

- EAD circuits
- EAD Modify – upgrade charges
- EAD SyncE Modify – upgrade charges
- EAD RO2 Resilience Main Link Charge
- EAD RO1 Resilience Main Link Charge

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<sup>6</sup> Openreach, *Price List, Bulk Transport Link*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=F6GFzqfhDSmh7Oyv8Xw%2BtziW%2FvYZGtoQraq%2BNu4alFhZ6rNZujnCs99NblKJZPD9hXYmiiixH6wrCQm97GZMyQ%3D%3D> [accessed 28 September 2018].

<sup>7</sup> Openreach, *Price List, Ethernet Access Direct (EAD) including EAD Enable*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=5uW5cDedIGJkun%2FLo2I67PEgpNm%2BtShF6YESRcCqrDFZ6rNZujnCs99NblKJZPD9hXYmiiixH6wrCQm97GZMyQ%3D%3D> [accessed 25 September 2018].

- WES/WEES/BES to EAD Transfer migration charges
- EAD Local Access 10 Mbit/s circuits and above
- EAD Resilience Option 1 (Hot Standby)
- EAD SyncE
- EAD Enable
- EAD Enable RO2 Resilience Main Link Charge
- EAD Enable RO1 Resilience Main Link Charge

Migration charges<sup>8</sup>

Ancillary services:

- Managed migration options
- Cancellation charges
- Termination charges
- EAD Modify Shift Circuit Charges

### **Ethernet Access Direct (EAD) Main Link<sup>9</sup>**

EAD Main Link charges

RO2 Resilience Main Link charges

RO1 Resilience Main Link charges

EAD Enable Main Link charges

EAD Enable RO2 Resilience Main Link charges

EAD Enable RO1 Resilience Main Link charges

### **Ethernet Backhaul Direct (EBD)<sup>10</sup>**

Connection and rental charges

Migration charges<sup>11</sup>

Ancillary services:

- Upgrade charges

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<sup>8</sup> Only applies to rentals without an associated migration charge.

<sup>9</sup> Openreach, *Price List, Ethernet Access Direct (EAD) including EAD Enable*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=5uW5cDedIGJkun%2FLo2I67PEgpNm%2BtShF6YESRcCqrDFZ6rNZujnCs99NbIKJZPD9hXYmiiH6wrCQm97GZMyQ%3D%3D> [accessed 25 September 2018].

<sup>10</sup> Openreach, *Price List, Ethernet Backhaul Direct*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=F6GFzqfhDSmh7Oyv8Xw%2Bt6ZkEknUEHFW9O1w%2FCiItaVZ6rNZujnCs99NbIKJZPD9hXYmiiH6wrCQm97GZMyQ%3D%3D> [accessed 25 September 2018].

<sup>11</sup> Only applies to rentals without an associated migration charge.

- Cancellation Charges
- Shift charges
- Service Features charges

## **Wholesale Extension Service (WES) & Wholesale End-to-End Extension Service (WEES)<sup>12</sup>**

Connection and Rental Charges

Migration charges

Ancillary services:

- Upgrade charges
- Re-grade charges
- Additional charges
- Cancellation Charges
- Circuit Shift Charges

WES/WEES Main Link charges

WES Resilient Option 1 Main link up to 1Gbit/s

WES Resilient Option 2 Main link up to 1Gbit/s

WEES Resilient Option 2 Main link up to 1Gbit/s

## **Backhaul Network Services (BNS)<sup>13</sup>**

Connection and rental charges

Ancillary services:

- Upgrade charges
- Additional charges
- Cancellation Charges

## **Openreach Network Backhaul Services (ONBS)<sup>14</sup>**

Connection and rental charges

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<sup>12</sup> Openreach, *Price List, Wholesale Extension Service & Wholesale End to end Extension Service*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=TG6A8jbarofqqfNi%2BYxJT%2BWx9RC8ygO7YK%2FGFXHQ0KYIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D> [accessed 25 September 2018].

<sup>13</sup> Openreach, *Price List, Backhaul Network Services (BNS)*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=to6u3F12FmH4GL92i3NosYRiske12ZrKBXGHf8sPBYwIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D> [accessed 25 September 2018].

<sup>14</sup> Openreach, *Price List, Openreach Network Backhaul Services*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Rdc2f4wj9k%2Fplcog3gDRrhrrw6STLWGzW%2FOBqqNvIIIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtIFAKw%3D%3D> [accessed 25 September 2018].

Cancellation charges

Resilient Options 1, 2 and 3 - resilience link per metre charges up to 1Gbit/s

### **Backhaul Extension Service (BES)<sup>15</sup>**

Connection and rental charges

Migration charges

Ancillary services:

- Additional charges
- Upgrade Charges
- Circuit Shift charges
- Cancellation charges

Resilient Option 2 – resilience link per metre up to 1Gbit/s

## **Section 2**

### **Meaning of “Cablelink Sub-basket”**

For the purposes of **Condition 10A**, the expression “**Cablelink Sub-basket**” shall be construed as including the following services, subject to such changes as Ofcom may agree to from time to time, such agreement to be given in writing or by way of direction, as Ofcom considers appropriate, following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

### **Cablelink<sup>16</sup>**

Connection and rental charges

Cancellation charges

Additional charges

## **Section 3**

### **Meaning of “Ethernet and WDM (over 1 Gbit/s) Services Basket”**

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<sup>15</sup> Openreach, *Price List, Backhaul Extension Service (BES)*,  
<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Gb5DIOWDeWrdvLSdpeomsa0DzFBxAUIONmfpe3%2FG3G4IMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtlFAKw%3D%3D> [accessed 12 February 2016].

<sup>16</sup> Openreach, *Price List, Cablelink*,  
<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=kgnGm8XSPQZEY5UMJxGwO9yDfzzeTWgW5o%2FPQLWLvfwIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2F%0AIIISgtlFAKw%3D%3D> [accessed 28 September 2018].

For the purposes of **Condition 10A**, the expression “**Ethernet and WDM (over 1 Gbit/s) Services Basket**” shall be construed as including

- (i) the services listed in Section 1 of this Annex, where such services have bandwidths above 1 Gbit/s; and
- (ii) all services listed in this section;

subject to such changes as Ofcom may direct from time to time following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

### **Optical Spectrum Access (OSA)<sup>17</sup>**

Connection and rental charges

Main Link charges

Upgrade charges

Cancellation charges

Shift charges

Service reconfiguration charges

Abortive Visit charges

Amend Order Request charges

Optical Assist charges

OSA Filter Connect

### **Optical Spectrum Extended Access (OSEA)<sup>18</sup>**

Connection and rental charges

Main Link charges

Cancellation charges

Shift charges

Service reconfiguration charges

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<sup>17</sup> Openreach, *Price List, Optical Spectrum Access*,

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Wk%2B2hSVL2knF5F0Ve%2F1N8yiI4DelvXU8bqZRwL0sgJZ6rNZujnCs99NbIKJZPD9hXYmiiH6wrCQm97GZMyQ%3D%3D> [accessed 28 September 2018].

<sup>18</sup> Openreach, *Price List, Optical Spectrum Extended Access*,

<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=Wk%2B2hSVL2knF5F0Ve%2F1N8%2BzJs9AuBR97In%2B8uxoSog9Z6rNZujnCs99NbIKJZPD9hXYmiiH6wrCQm97GZMyQ%3D%3D> [accessed 28 September 2018].

### Interpretation of Annex to Condition 10A

Except insofar as the context otherwise requires, the terms or descriptions of services used in this Annex shall be construed as having the same meaning as those provided by the Dominant Provider on its website for definitions and explanations of its services. These are currently found as follows:

- Services within the “**Ethernet Services Basket**” please refer to <http://www.openreach.co.uk/orpg/home/home.do>
- Specifically:
  - For EAD, please refer to <http://www.openreach.co.uk/orpg/home/products/ethernetservices/ethernetaccessdirect/ead.do>
  - For EBD, please refer to <http://www.openreach.co.uk/orpg/home/products/ethernetservices/ethernetbackhauldirect/ebd.do>
  - For BTL, please refer to <https://www.openreach.co.uk/orpg/home/products/ethernetservices/products-with-drawn-from-news-supply/bulk-transport-link/btl.do>
  - For WES/WEES, please refer to <http://www.openreach.co.uk/orpg/home/products/ethernetservices/wholesale-extension-services/wes.do>
  - For BES, please refer to <https://www.openreach.co.uk/orpg/home/products/ethernetservices/products-with-drawn-from-news-supply/backhaul-extension-services/bes.do>
  - For ONBS, please refer to <http://www.openreach.co.uk/orpg/home/products/ethernetservices/openreach-network-backhaul-services/onbs.do>
  - For BNS, please refer to <https://www.openreach.co.uk/orpg/home/products/ethernetservices/products-with-drawn-from-news-supply/backhaul-network-services/bns.do>
  - For Cablelink, please refer to <https://www.openreach.co.uk/orpg/home/products/ethernetservices/cablelink/cablelink.do>
  - For OSA, please refer to <https://www.openreach.co.uk/orpg/home/products/opticalservices/optical-spectrum-access/optical-spectrum-access.do>
  - For OSEA, please refer to <https://www.openreach.co.uk/orpg/home/products/opticalservices/optical-spectrum-extended-access/optical-spectrum-extended-access.do>

## **Condition 10B - Controls on Dark Fibre Access**

**10B.1** The Dominant Provider shall take all reasonable steps to secure that it does not charge more than the following during each Relevant Period, for the provision of the following Dark Fibre Access services:

- (i) £733, for each Dark One Fibre Access Connection;
- (ii) £1,334, for each Dark Two Fibre Access Connection;
- (iii) £51, for each Dark Fibre Access Annual Rental;
- (iv) £0.15, for each Dark Fibre Access Main Link Annual Rental;
- (v) £192, for each Dark Fibre Access Cessation; and
- (vi) £350, for each Dark Fibre “Right When Tested (RWT)” Charge.

**10B.2** Where:

- (i) the Dominant Provider makes a material change (other than to a charge) to any service which is subject to this **Condition 10B**; or
- (ii) the Dominant Provider makes a change to the date on which its Financial Year ends; or
- (iii) there is a material change in the basis of the Consumer Prices Index;

**Condition 10B** shall have effect subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances.

For the purposes of this **Condition 10B.2**, a material change to any service which is subject to this **Condition 10B** includes (but is not limited to) the introduction of a new service wholly or substantially in substitution for that existing service which is subject to this **Condition 10B** or a change to the billing practice for any service which is subject to this **Condition 10B**.

**10B.3** The Dominant Provider must record, maintain and supply to Ofcom in an electronic format, no later than three months after the end of each Relevant Period, the data necessary for Ofcom to monitor compliance of the Dominant Provider with this **Condition 10B**. The data must include:

- (i) all charges published by the Dominant Provider from time to time during the Relevant Period, including the dates and time periods during which such charges were in force;
- (ii) other data necessary for monitoring compliance with the charge control; and
- (iii) such data as Ofcom may from time to time direct.

**10B.4** Ofcom may direct that **Conditions 10B.1** to **10B.3** shall not apply to the extent specified in any such direction.

**10B.5** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this **Condition 10B**.



**10B.6 In this Condition 10B:**

**“Dark One Fibre Access Connection”** means the one-off charge offered or charged by the Dominant Provider for the provision of a new Dark Fibre Access circuit consisting of one fibre, including any Excess Construction Charges for Fibre Access;

**“Dark Two Fibre Access Connection”** means the one-off charge offered or charged by the Dominant Provider for the provision of a new Dark Fibre Access circuit consisting of two fibres, including any Excess Construction Charges for Fibre Access;

**“Dark Fibre Access Annual Rental”** means the annual rental charge per fibre offered or charged by the Dominant Provider once a Dark Fibre Access circuit has been provided;

**“Dark Fibre Access Main Link Annual Rental”** means the annual rental charge per fibre per metre, or any other part thereof, offered or charged by the Dominant Provider once a Dark Fibre Access circuit has been provided;

**“Dark Fibre Access Cessation”** means the one-off charge offered or charged by the Dominant Provider when one or more fibres in a Dark Fibre Access circuit is ceased;

**“Dark Fibre Access Right When Tested Charge”** means the charge offered or charged by the Dominant Provider for a Third-Party Customer’s RWTs relating to the provision of Dark Fibre Access, where such RWTs are in excess of the 6% threshold of all of this customer’s faults;

**“Dominant Provider’s Price List”** means a document containing the charges for the Dominant Provider’s products and services;

**“Excess Construction Charges for Fibre Access”** means any charge offered or charged by the Dominant Provider where the cost of a new Dark Fibre Access circuit exceeds a specified amount, in accordance with the Dominant Provider’s Price List;

**“First Relevant Period”** means a period beginning on [*one day after the date on which this Condition enters into force*] and ending on 31 March 2020 (inclusive);

**“Relevant Period”** means each of the following two periods:

- (i) the First Relevant Period; and
- (ii) the Second Relevant Period;

**“RWT”** means **“Right When Tested Fault”**, i.e. a fault which has been closed as not requiring any repair activity by the Dominant Provider in accordance with the Dominant Provider’s relevant product handbook, as published from time to time; and

**“Second Relevant Period”** means a period beginning on 1 April 2020 and ending on 31 March 2021 (inclusive).

## **Condition 10C – Controls on Accommodation Services and Overlapping Accommodation Services**

### Accommodation Services Control

- 10C.1** Subject to **Conditions 10C.4** and **10C.5**, the Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Period, the Percentage Change (calculated in accordance with **Condition 10C.2**) in each of the charges for each and every Accommodation Service is not greater than the Controlling Percentage (calculated in accordance with the formula in **Condition 10C.3**).
- 10C.2** For the purposes of **Condition 10C.1**, the Percentage Change shall be calculated by employing the formula in **Condition 10A.9**, except that references to an “individual service falling within the Baskets” shall be treated as references to each individual Accommodation Service subject to **Condition 10C**.
- 10C.3** For the purposes of complying with **Condition 10C.1**, and subject to the provisions set out in **Conditions 10C.4** and **10C.5**, the Controlling Percentage in relation to any Relevant Period shall be calculated, for the purposes of complying with **Condition 10C.1**, by employing the formula in **Condition 10A.4**.
- 10C.4** Where the Percentage Change for the Accommodation Services Basket at the end of the Relevant Period is:
- i. less than the Controlling Percentage (“**Deficiency**”); or
  - ii. greater than the Controlling Percentage (“**Excess**”);

the Controlling Percentage for the subsequent Relevant Period shall be calculated employing the formula set out in **Condition 10A.6** with the exception that the references to “the Basket” in **Condition 10A.6** shall be treated as references to the Accommodation Services subject to this **Condition 10C**.

- 10C.5** In the case of Excess, the Dominant Provider shall, to the extent reasonably possible, and as soon as reasonably practicable, repay the Relevant Excess Revenue to the relevant Affected Communications Provider.

### Controls on Overlapping Accommodation Services

- 10C.6** The Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Period, each of the charges for each and every Overlapping Accommodation Service is not greater than the amount that the Dominant Provider charges for the Overlapping Accommodation Service in question at the relevant time for the purpose of providing Co-Mingling New Provide and Rental Services for wholesale local access at a fixed location.

### General provisions and interpretation

- 10C.7** Where:
- (i) the Dominant Provider makes a material change (other than to a charge) to any service which is subject to this **Condition 10C**; or

- (ii) the Dominant Provider makes a change to the date on which its Financial Year ends;  
or
- (iii) there is a material change in the basis of the Consumer Prices Index;

**Condition 10C** shall have effect subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances.

For the purposes of this **Condition 10C.7**, a material change to any service which is subject to this **Condition 10C** includes (but is not limited to a change to the billing practice for any service which is subject to this **Condition 10C**).

**10C.8** Where the Dominant Provider introduces, at any time during each Relevant Period, Substituted Services wholly or substantially in substitution for a Replaced Service which is subject to **Condition 10C.1**, the following shall apply to the Substituted Services:

- (i) the Substituted Services shall be subject to the entirety of this **Condition 10C**, subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances; and
- (ii) in the Relevant Period that the Substituted Services are introduced, any reference in **Condition 10A**, where such **Condition 10A** is referred to in this **Condition 10C**, to charges and/or volumes in the Prior Period (including any reference to the Prior Period Weighted Average Charge) shall be treated as a reference to charges and/or volumes in the Prior Period as agreed by Ofcom.

**10C.9** Ofcom may direct that **Conditions 10C.1** to **10C.8** shall not apply to the extent specified in any such direction.

**10C.10** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this **Condition 10C**.

**10C.11** In this **Condition 10C**:

“**Accommodation Services**” means the services defined and listed in Section 1 of the Annex to this **Condition 10C**;

“**Affected Communications Provider**” means each communications provider to whom the Dominant Provider has provided any of the services specified in the Annex to this **Condition 10C** during the Relevant Period;

“**Consumer Prices Index**” means the index of prices compiled by an agency or a public body on behalf of Her Majesty’s Government or a governmental department (which is the Office for National Statistics at the time of publication of this notification) from time to time in respect of all items;

“**Controlling Percentage**” has the meaning given to it in **Condition 10C.3**;

“**CPI**” means:

- (i) for the First Relevant Period, the amount of the change in Consumer Prices Index in the period of twelve months ending on 30 November 2018, expressed as a percentage (rounded to one decimal place); and

- (ii) for the Second Relevant Period, the amount of the change in the Consumer Prices Index in the period of twelve month ending on 30 November 2019, expressed as a percentage (rounded to one decimal place);

**“Excess Revenue”** means the difference between (a) the revenue which the Dominant Provider earned in the Relevant Period from providing the services specified in the Annex to this **Condition 10C**, and (b) the revenue the Dominant Provider would have earned in the Relevant Period from providing the services specified in the Annex to this **Condition 10C** if it had complied with **Conditions 10C.1**;

**“First Relevant Period”** means a period beginning on [*one day after the date on which this Condition enters into force*] and ending on 31 March 2020 (inclusive);

**“Overlapping Accommodation Services”** means the services defined and listed in Section 2 of the Annex to this **Condition 10C**;

**“Percentage Change”** has the meaning given to it in **Condition 10C.2**;

**“Prior Financial Year”** means (a) for the First Relevant Period, the period of twelve months ending on 31 March immediately before the commencement of the First Relevant Period; and (b) for the Second Relevant Period, the First Relevant Period;

**“Prior Period”** means, in relation to:

- (i) for the First Relevant Period, the twelve months from 1 April 2018 to 31 March 2019 (inclusive); and
- (ii) for the Second Relevant Period, the First Relevant Period;

**“Relevant Period”** means each of the following two periods:

- (i) the First Relevant Period; and
- (ii) the Second Relevant Period;

**“Relevant Excess Revenue”** means the Excess Revenue earned from charging the Affected Communications Provider; and

**“Second Relevant Period”** means a period of twelve months beginning on 1 April 2020 and ending on 31 March 2021 (inclusive).

## Annex to Condition 10C

### Services subject to charge control pursuant to Condition 10C

#### Section 1

##### Meaning of “Accommodation Services”

For the purposes of **Condition 10C**, the expressions “**Accommodation Services**” shall be construed as including the following services reasonably necessary for the use of the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket (as these are defined in **Condition 10A**), or Dark Fibre Access, subject to such changes as Ofcom may direct from time to time following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly):

##### Access locate<sup>19</sup>

All charges excluding Access Locate Plus bespoke charges

#### Section 2

##### Meaning of “Overlapping Accommodation Services”

For the purposes of **Condition 10C**, the expressions “**Overlapping Accommodation Services**” shall be construed as having the same meaning as “**Co-Mingling New Provide and Rental Services**” in **Part 4** of the Annex to **Condition 7A** set out at **Annex 33** to a statement entitled “Wholesale Local Access Market Review: Statement” published on 28 March 2018, such services being reasonably necessary for the use of the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket (as these are defined in **Condition 10A**), or Dark Fibre Access, subject to such changes as Ofcom may direct from time to time following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

#### Interpretation of Annex to Condition 10C

Except insofar as the context otherwise requires, the terms or descriptions of services used in this Annex shall be construed as having the same meaning as those provided by the Dominant Provider on its website for definitions and explanations of its services. These are currently found as follows:

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<sup>19</sup> Openreach, *Price List, Access Locate and Access Locate Plus*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=q%2B2vpfgQQ99SiimXeC7QjskLe4HVN3IVHU%2BmY7RLKoBZ6rNZujnCs99NbIKJZPD9hXYmijxH6wrCQm97GZMyQ%3D%3D> [accessed 15 November 2017].

- Services within the meaning of “**Accommodation Services**” and “**Overlapping Accommodation Services**”, please refer to <http://www.openreach.co.uk/orpg/home/products/llu/llu.do>
- Specifically:
  - For Access Locate, please refer to <http://www.openreach.co.uk/orpg/home/products/llu/accesslocate/accesslocate.do>
  - For Accommodation, please refer to <http://www.openreach.co.uk/orpg/home/products/llu/comingling/comingling.do>

## **Condition 10D - Controls on the Direct ECC Services Basket and Contractor ECC Services**

### Direct ECC Services Basket Control

- 10D.1** The Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Period, the Percentage Change (calculated in accordance with **Condition 10D.2**) in the total charges for all of the services falling within the Direct ECC Services Basket is not greater than the Controlling Percentage (calculated in accordance with **Condition 10D.3**).
- 10D.2** For the purposes of **Condition 10D.1**, the Percentage Change shall be calculated by employing the formula in **Condition 10A.3** above, except that references to “the Basket” should be treated as references to the Direct ECC Services Basket.
- 10D.3** For the purposes of complying with **Condition 10D.1**, and subject to the provisions set out in **Conditions 10D.4** and **10D.5**, the Controlling Percentage in relation to any Relevant Period shall be calculated, for the purposes of complying with **Condition 10D.1**, by employing the formula in **Condition 10A.4**.
- 10D.4** Where the Percentage Change for the Direct ECC Services Basket at the end of the Relevant Period is:
- i. less than the Controlling Percentage (“**Deficiency**”); or
  - ii. greater than the Controlling Percentage (“**Excess**”);

the Controlling Percentage for the subsequent Relevant Period shall be calculated employing the formula set out in **Condition 10A.6** with the exception that the references to “the Basket” in **Condition 10A.6** shall be treated as references to the Direct ECC Services Basket.

- 10D.5** In the case of Excess, the Dominant Provider shall, to the extent reasonably possible, and as soon as reasonably practicable, repay the Relevant Excess Revenue to the relevant Affected Communications Provider.

### Sub-caps Control

- 10D.6** In respect of each individual service falling within the Direct ECC Services Basket, the Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Period, the Percentage Change in the charge for that service (calculated in accordance with **Condition 10D.7**) is no greater than the Controlling Percentage (calculated in accordance with **Condition 10D.8**).
- 10D.7** For the purposes of complying with **Condition 10D.6**, the Percentage Change shall be calculated by employing the formula in **Condition 10A.9**, except that references to “an individual service falling within the Basket” shall be treated as references to each individual service falling within the Direct ECC Services Basket.
- 10D.8** For the purposes of complying with **Condition 10D.6**, the Controlling Percentage shall be calculated by employing the formula in **Condition 10A.8**.

### Control of Contractor ECC Services

- 10D.9** The Dominant Provider must secure, and must be able to demonstrate to the satisfaction of

Ofcom, that in each Relevant Period, each and every charge offered or payable for each Contractor ECC Service is reasonably derived from the costs of provision based on the charge paid by the Dominant Provider, plus the Dominant Provider's forward looking long run incremental costs related to the provision of that Contractor ECC Service allowing an appropriate mark-up for recovery of common costs.

**10D.10** Where the Dominant Provider charges the ECC Balancing Charge, the ECC Balancing Charge (calculated in accordance with **Condition 10D.12**) in respect of each published charge for each of the ECC Services shall be excluded, subject to the requirement set out in **Condition 10D.11** being satisfied, from the calculation of the Percentage Change calculated in accordance with:

- (i) **Condition 10A.3** for the purpose of complying with **Condition 10A.2**; and
- (ii) **Condition 10A.9** for the purpose of complying with **Conditions 10A.8**.

**10D.11** The requirement referred to in **Condition 10D.10** is that, where the Dominant Provider provides one or more of the ECC Services to a Third Party in connection with the provision of a service ("Connected Service") reasonably necessary for the use of the services falling within the Ethernet 1Gbit/s Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket, the Dominant Provider must not charge the Third Party for such ECC Services, unless the total amount of charges for all of the ECC Services for that Connected Service exceeds £2,800, in which case the Dominant Provider may only charge the Third Party, as a maximum, the amount in excess of £2,800 for providing such ECC Services.

**10D.12** For the purposes of complying with **Condition 10D.10**, the ECC Balancing Charge for new connections for the ECC Services for each Relevant Period shall be calculated by employing the following formula (which applies to the Prior Financial Year):

$$B = \frac{\sum_{k=1}^C \sum_{i=1}^n p_{i,k} q_{i,k} - TR}{C}$$

Where

B is the ECC Balancing Charge;

C is the number of new EAD and EAD LA connections in the Prior Financial Year;

k is a number from 1 to C for each new EAD or EAD LA connection;

n is the number of the ECC Services provided by the Dominant Provider,

i is a number from 1 to n for each of the n individual ECC Service;

$p_{i,k}$  is the charge of the ECC Service i that was in effect at the time of new EAD or EAD LA connection k;

$q_{i,k}$  is the volume of the individual ECC Service i that was sold as part of new EAD or EAD LA connection k;



TR is the revenue generated from new connections for the ECC Services above the exemption threshold of £2,800 in the Prior Financial Year;

$$TR = \sum_{k=1}^C \delta_k \left[ \sum_{i=1}^n p_{i,k} q_{i,k} - 2,800 \right]$$

Where  $\delta_k$  is a binary variable for each new EAD or EAD LA connection k, given by the following formula:

$$\delta_k = \begin{cases} 1 & \text{if } \sum_{i=1}^n p_{i,k} q_{i,k} > 2,800 \\ 0 & \text{if } \sum_{i=1}^n p_{i,k} q_{i,k} \leq 2,800 \end{cases}$$

#### General provisions and interpretation

**10D.13** Where:

- (i) the Dominant Provider makes a material change (other than to a charge) to any service which is subject to this **Condition 10D**; or
- (ii) the Dominant Provider makes a change to the date on which its Financial Year ends; or
- (iii) there is a material change in the basis of the Consumer Prices Index;

**Condition 10D** shall have effect subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances.

For the purposes of this **Condition 10D.14**, a material change to any service which is subject to this **Condition 10D** includes (but is not limited to) a change to the billing practice for any service which is subject to this **Condition 10D**.

**10D.14** Where the Dominant Provider introduces, at any time during each Relevant Period, Substituted Services wholly or substantially in substitution for a Replaced Service which is subject to **Condition 10D.1**, the following shall apply to the Substituted Services:

- (i) the Substituted Services shall fall within the Direct ECC Services Basket;
- (ii) the Substituted Services shall be subject to the entirety of this **Condition 10D**, subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances; and

- (iii) in the Relevant Period that the Substituted Services are introduced, any reference in **Condition 10A**, where such **Condition 10A** is referred to in this **Condition 10D**, to charges and/or volumes in the Prior Period (including any reference to the Prior Period Weighted Average Charge) shall be treated as a reference to charges and/or volumes in the Prior Period as agreed by Ofcom.

**10D.15** The Dominant Provider must record, maintain and supply to Ofcom in an electronic format, no later than three months after the end of each Relevant Period, the data necessary for Ofcom to monitor compliance of the Dominant Provider with this **Condition 10D**. The data must include:

- (i) pursuant to **Conditions 10D.2** and **10D.7**, the calculated Percentage Change relating to the Direct ECC Services Basket and individual services, as relevant;
- (ii) all relevant data the Dominant Provider used in the calculation of the Percentage Change as set out in **Conditions 10D.2** and **10D.8**;
- (iii) all charges, excluding discounts, published by the Dominant Provider at time, *t*, during the Relevant Period and the Prior Period;
- (iv) the relevant published charges at the start of each Relevant Period;
- (v) the Relevant Period Weighted Average Charges and the Prior Period Weighted Average Charges for all of the Direct ECC Services to which **Condition 10D** applies and calculations thereof;
- (vi) other data necessary for monitoring compliance with the charge control; and
- (vii) such data as Ofcom may from time to time direct.

**10D.16** Ofcom may direct that **Conditions 10D.1** to **10D.15** shall not apply to the extent specified in any such direction.

**10D.17** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this **Condition 10D**.

**10D.18** In this **Condition 10D**:

“**Affected Communications Provider**” means each communications provider to whom the Dominant Provider has provided any of the services specified in the Annex to this **Condition 10D** during the Relevant Period;

“**Contractor ECC Services**” means the services defined and listed in Section 2 of the Annex to this **Condition 10D**;

“**Controlling Percentage**” has the meaning given to it in **Condition 10D.3** and **10D.8**, as applicable;

“**Consumer Prices Index**” means the index of prices compiled by an agency or a public body on behalf of Her Majesty’s Government or a governmental department (which is the Office for National Statistics at the time of publication of this notification) from time to time in respect of all items;

**“CPI”** means:

- (i) for the First Relevant Period, the amount of the change in Consumer Prices Index in the period of twelve months ending on 30 November 2018, expressed as a percentage (rounded to one decimal place), and
- (ii) for the Second Relevant Period, the amount of the change in the Consumer Prices Index in the period of twelve month ending on 30 November 2019, expressed as a percentage (rounded to one decimal place);

**“Direct ECC Services”** means the services listed in Section 1 of the Annex to this **Condition 10D**;

**“Direct ECC Services Basket”** means a basket of Direct ECC Services;

**“ECC Balancing Charge”** means the charge calculated in accordance with **Condition 10D.12**;

**“ECC Services”** means the Direct ECC Services and the Contractor ECC Services as defined in this **Condition 10D.18**;

**“Excess Revenue”** means the difference between (i) the revenue which the Dominant Provider earned in the Relevant Period from providing the services in the Direct ECC Services Basket specified in Section 1 of the Annex to this **Condition 10D**, and (ii) the revenue the Dominant Provider would have earned in the Relevant Period from providing the services in the Direct ECC Services Basket specified in Section 1 of the Annex to this **Condition 10D** if it had complied with **Conditions 10D.1**;

**“First Relevant Period”** means a period beginning on [*one day after the date on which this Condition enters into force*] and ending on 31 March 2020 (inclusive);

**“Percentage Change”** has the meaning given to it in **Condition 10D.2**;

**“Prior Financial Year”** means a) for the First Relevant Period, the period of twelve months ending on 31 March immediately before the commencement of the First Relevant Period; and (b) for the Second Relevant Period, the First Relevant Period;

**“Prior Period”** means, in relation to:

- (i) for the First Relevant Period, the period of twelve months from 1 April 2018 to 31 March 2019 (inclusive); and
- (ii) for the Second Relevant Period, the First Relevant Period;

**“Relevant Period”** means each of the following two periods:

- (i) the First Relevant Period; and
- (ii) the Second Relevant Period;

**“Relevant Excess Revenue”** means the Excess Revenue earned from charging the Affected Communications Provider; and

**“Second Relevant Period”** means a period beginning on 1 April 2020 and ending on 31 March 2021 (inclusive).

## Annex to Condition 10D

### Services subject to charge control pursuant to Condition 10D

## Section 1

### Meaning of “Direct ECC Services Basket”

For the purposes of **Condition 10D**, the expression “**Direct ECC Services**” shall be construed as including the following services reasonably necessary for the use of the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket, subject to such changes as Ofcom may agree to from time to time, such agreement to be given in writing or by way of direction, as Ofcom considers appropriate, following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

**Excess construction charges<sup>20</sup>**

Survey Fee/Planning charges

Per meter or part thereof charges for:

- Cable (fibre or copper) including any jointing required
- Blown Fibre
- Blown Fibre Tubing in Duct
- Internal cabling (including Internal Blown Fibre Tubing)
- Overblow services where this is provided using Openreach Direct Labour
- Fibre cable where this is provided using Openreach Direct Labour

## Section 2

### Meaning of “Contractor ECC Services”

For the purposes of **Condition 10D**, the expression “**Contractor ECC Services**” shall be construed as including the following services reasonably necessary for the use of the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1 Gbit/s) Services Basket, subject to such changes as Ofcom may agree to from time to time, such agreement to be given in writing or by way of direction, as Ofcom considers appropriate, following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed

<sup>20</sup> Openreach, *Price List, Excess Construction Charges*, <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=ZdqG%2Fzv%2FjSuBEEITnogh5uNOEWQ2%2FKws5WBAVclcholMnGHsqdC0vzO163bJmh34D910D7M0q8u%2F%0AIIsgtIFAKw%3D%3D> [accessed 15 November 2017].



- EAD Enable 10
- EAD Enable 100
- EAD Enable 1000
- EAD Enable 1000 Extended Reach
- EAD Enable 1000 (60 month term)
- EAD Enable 1000 Extended Reach (60 month term)
  
- EAD SyncE
  - EAD SyncE 100
  - EAD SyncE 1000
  - EAD SyncE 1000 (60 month minimum period)
  - EAD SyncE 10000 (84 month minimum period)
  - EAD SyncE 100 Extended Reach
  - EAD SyncE 1000 Extended Reach
  - EAD SyncE 1000 Extended Reach (60 month minimum period)
  - EAD SyncE 1000 Extended Reach (84 month minimum period)

For the purposes of **Condition 10C.10**, the expression **EAD LA** shall be construed as including the following services, subject to such changes as Ofcom may direct from time to time following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

#### **Ethernet Access Direct Local Access (EAD LA)<sup>23</sup>**

Connection charges for:

- EAD Local Access 10 Mbit/s circuits and above
  
- EAD Enable
  - EAD Enable 10 Local Access
  - EAD Enable 100 Local Access
  - EAD Enable 1000 Local Access
  - EAD Enable 1000 Local Access (60 month term)
  
- EAD SyncE
  - EAD SyncE 100 Local Access
  - EAD SyncE 1000 Local Access
  - EAD SyncE 1000 Local Access (60 month minimum period)
  - EAD SyncE 1000 Local Access (84 month minimum period)

#### **Interpretation of Annex to Condition 10D**

Except insofar as the context otherwise requires, the terms or descriptions of services used in this

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<sup>23</sup> Openreach, *Price List, Ethernet Access Direct (EAD) including EAD Enable*, <https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=5uW5cDedIGJkun%2FLo2I67PEgpNm%2BtShF6YESRcCqrDFZ6rNZujnCs99NbIKJZPD9hXYmiiixH6wrCQm97GZMyQ%3D%3D> [accessed 15 November 2017].

Annex shall be construed as having the same meaning as those provided by the Dominant Provider on its website for definitions and explanations of its services in addition to future updates. These are currently found as follows:

- Services within the meaning of “**Direct ECC Services and Contractor ECC Services**”, please refer to <http://www.openreach.co.uk/orpg/home/products/serviceproducts/excessconstructioncharges/excessconstructioncharges.do>

### **Condition 10E – Control on Time Related Charges**

**10E.1** The Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Period, the Percentage Change (calculated in accordance with **Condition 10E.2**) in each of the charges for each of:

- (i) Standard Chargeable Visit;
- (ii) Additional Hour;
- (iii) Supplementary Charges (Per Visit);
- (iv) Supplementary Charges (Per Hour);
- (v) Internal and External Shifts; and
- (vi) Additional Line Shifted;

(each of which is referred to in this Conditions as a “**Single Charge Category**” unless otherwise specified) is no greater than the Controlling Percentage (as calculated in accordance with **Condition 10E.3**).

**10E.2** For the purposes of **Condition 10E.1**, the Percentage Change shall be calculated by employing the formula in **Condition 10A.9**, except that references to “an individual service falling within the Basket” shall be treated as references to each individual Single Charge Category subject to **Condition 10E**. For the avoidance of doubt, the provisions in **Condition 10A.10** apply, as relevant.

**10E.3** For the purposes of **Condition 10E.1**, and subject to the provisions set out in **Conditions 10E.4** and **10E.5**, the Controlling Percentage in relation to any Relevant Period for each Single Charge Category shall be calculated by employing the formula in **Condition 10A.4**.

**10E.4** Where the Percentage Change at the end of the Relevant Period is:

- i. less than the Controlling Percentage for each Single Charge Category (“**Deficiency**”);  
or
- ii. greater than the Controlling Percentage for each Single Charge Category (“**Excess**”);

the Controlling Percentage for the following Relevant Period shall be calculated employing the formula set out in **Condition 10A.6** with the exception that the references to “the Basket” in **Condition 10A.6** shall be treated as references to each individual Single Charge Category subject to **Condition 10E**.

**10E.5** In the case of Excess, the Dominant Provider shall, to the extent reasonably possible, and as soon as reasonably practicable, repay the Relevant Excess Revenue to the relevant Affected Communications Provider.

#### General provisions and interpretation

**10E.6** Where:

- (i) the Dominant Provider makes a material change (other than to a charge) to any service which is subject to this **Condition 10E**; or
- (ii) the Dominant Provider makes a change to the date on which its Financial Year ends;



**Condition 10E** shall have effect subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances.

For the purposes of this **Condition 10E.6**, a material change to any service which is subject to this **Condition 10E** includes (but is not limited to) the introduction of a new service wholly or substantially in substitution for that existing service which is subject to this **Condition 10E** or a change to the billing practice for any service which is subject to this **Condition 10E**.

**10E.7** The Dominant Provider must record, maintain and supply to Ofcom in an electronic format, no later than three months after the end of each Relevant Period, the data necessary for Ofcom to monitor compliance of the Dominant Provider with this **Condition 10E**. The data must include:

- (i) pursuant to **Condition 10E.2**, the calculated Percentage Change relating to each Single Charge Category;
- (ii) all relevant data the Dominant Provider used in the calculation of the Percentage Change as set out in **Condition 10E.2**, including for each Single Charge Category;
- (iii) all charges, excluding discounts, published by the Dominant Provider at time, *t*, during the Relevant Period and the Prior Period;
- (iv) the relevant published charges at the start of each Relevant Period;
- (v) the Relevant Period Weighted Average Charges and the Prior Period Weighted Average Charges for each Single Charge category to which **Condition 10E.2** applies and calculations thereof;
- (vi) other data necessary for monitoring compliance with the charge control; and
- (vii) such data as Ofcom may from time to time direct.

**10E.8** Ofcom may direct that **Conditions 10E.1** to **10E.7** shall not apply to the extent specified in any such direction.

**10E.9** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this **Condition 10E**.

**10E.10** In this **Condition 10E**:

**“Additional Hour”** means the provision of the service ‘Additional Hours (or Part thereof)’ (which shall be construed as having the same meaning as provided by the Dominant Provider on its website for definitions and explanations of its services) where this is reasonably necessary for the use of the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket, or Dark Fibre Access;

**“Additional Line Shifted”** means the provision of the service ‘Additional Line shifted’ (which shall be construed as having the same meaning as provided by the Dominant Provider on its website for definitions and explanations of its services) where this is reasonably necessary

for the use of the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket, or Dark Fibre Access;

**“Affected Communications Provider”** means each communications provider to whom the Dominant Provider has provided any of the services specified in the Annex to this **Condition 10E** during the Relevant Period;

**“Ethernet (1 Gbit/s and below) Services Basket”** has the meaning given to it in **Condition 10A.18**;

**“Ethernet and WDM (over 1Gbit/s) Services Basket”** has the meaning given to it in **Condition 10A.18**;

**“Excess Revenue”** means the difference between (a) the revenue which the Dominant Provider earned in the Relevant Period from providing the services specified in the Annex to this **Condition 10E**, and (b) the revenue the Dominant Provider would have earned in the Relevant Period from providing the services specified in the Annex to this **Condition 10E** if it had complied with **Condition 10E.1**;

**“First Relevant Period”** means a period beginning on [*one day after the date on which this Condition enters into force*] and ending on 31 March 2020 (inclusive);

**“Internal and External Shifts”** means the provision of the service ‘Internal and External Shifts’ (which shall be construed as having the same meaning as provided by the Dominant Provider on its website for definitions and explanations of its services) where this is reasonably necessary for the services falling within the Ethernet Services Basket;

**“Percentage Change”** has the meaning given to it in **Condition 10D.2**;

**“Prior Period”** means, in relation to:

- (i) the First Relevant Period, the period of twelve months from 1 April 2018 to 31 March 2019 (inclusive); and
- (ii) for the Second Relevant Period, the First Relevant Period;

**“Relevant Period”** means each of the following two periods:

- (i) the First Relevant Period; and
- (ii) the Second Relevant Period;

**“Relevant Excess Revenue”** means the Excess Revenue earned from charging the Affected Communications Provider;

**“Second Relevant Period”** means a period beginning on 1 April 2020 and ending on 31 March 2021;

**“Standard Chargeable Visit”** means the provision of the service ‘Standard Chargeable Visit (Visit plus up to 1 hours work)’ (which shall be construed as having the same meaning as provided by the Dominant Provider on its website for definitions and explanations of its services) where this is reasonably necessary for the services falling within the Ethernet (1

Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket, or Dark Fibre Access ;

**“Supplementary Charges (Per Hour)”** means the provision of the service ‘Supplementary charges (Per Hour or Part thereof)’ (which shall be construed as having the same meaning as provided by the Dominant Provider on its website for definitions and explanations of its services) where this is reasonably necessary for the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket, or Dark Fibre Access; and

**“Supplementary Charges (Per Visit)”** means the provision of the service ‘Supplementary charges (Per Visit)’ (which shall be construed as having the same meaning as provided by the Dominant Provider on its website for definitions and explanations of its services) where this is reasonably necessary for the use of the services falling within the Ethernet (1 Gbit/s and below) Services Basket and the Ethernet and WDM (over 1Gbit/s) Services Basket, or Dark Fibre Access.

## **Annex to Condition 10E**

### **Services subject to charge control pursuant to Condition 10E**

#### **Section 1**

##### **Meaning of “Ethernet TRC Services”**

For the purposes of **Condition 10E**, the expression “**Ethernet TRC Services**” shall include the following services defined in **Condition 10E.10**:

- (a) Standard Chargeable Visit;
- (b) Additional Hour;
- (c) Supplementary Charges (Per Visit);
- (d) Supplementary Charges (Per Hour);
- (e) Internal and External Shifts; and
- (f) Additional Line Shifted

subject to such changes as Ofcom may agree to from time to time, such agreement to be given in writing or by way of direction, as Ofcom considers appropriate, following any proposal by the Dominant Provider to introduce a new service or withdraw or substitute one or more of these services for another (in which case this list shall be construed accordingly).

##### **Interpretation of Annex to Condition 10E**

Except insofar as the context otherwise requires, the terms or descriptions of services referred to in this Annex shall be construed as having the same meaning as those provided by the Dominant Provider on its website for definitions and explanations of its services in addition to future updates. These are currently found as follows:

- Services within the meaning of “**Ethernet TRC Services**”, please refer to:  
<https://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=pBzHTRfO4GXC12qz7DCzqUP54d5RrQ9TQD%2BRDuYwQUEIMnGHsqdC0vzO163bJmh34D910D7M0q8u%2FIISgtIFAKw%3D%3D>

## Condition 11 – Regulatory Financial Reporting

- 11.1 The Dominant Provider must maintain a separation for accounting purposes between such different matters relating to network access to the relevant network or the availability of the relevant facilities, as required by **Conditions 11.3 to 11.35** including as Ofcom may from time to time direct under those **Conditions 11.3 to 11.35**.
- 11.2 The Dominant Provider must comply with such rules made by Ofcom about the use of cost accounting systems as required by **Conditions 11.3 to 11.35** and must comply with such requirements about the description to be made available to the public of the cost accounting system as required by **Conditions 11.3 to 11.35** in each case including as Ofcom may from time to time direct under **Conditions 11.3 to 11.35**.
- 11.3 Except in so far as Ofcom may consent otherwise in writing, the Dominant Provider shall act in the manner set out in this **Condition 11**.
- 11.4 Ofcom may from time to time make such directions as they consider appropriate in relation to the Dominant Provider's obligations under this **Condition 11**.
- 11.5 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this **Condition 11**.
- 11.6 Where the Dominant Provider is required to comply with:
- (i) this **Condition 11**; and
  - (ii) the Regulatory Accounting Principles,
- and it appears to the Dominant Provider that any of these requirements conflict with each other in a particular case, the Dominant Provider must resolve such conflict by giving priority to them in the order in which they are set out above.
- 11.7 For the purpose of **Condition 11**, publication shall be effected by:
- (i) placing a copy of the relevant information on any relevant publicly available website operated or controlled by the Dominant Provider; and
  - (ii) 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

- 11.8 The Dominant Provider shall in respect of the Market, Technical Areas, Products, Network Components and Network Services (as applicable), for each Financial Year:

- (i) prepare such Regulatory Financial Statements as directed by Ofcom from time to time in accordance with this **Condition 11**, the Regulatory Accounting Principles and the Accounting Methodology Documents (the relevant Accounting Methodology Documents to be identified in the Regulatory Financial Statements by reference to their date);
- (ii) prepare a reconciliation report as set out in **Condition 11.23**;
- (iii) secure the expression of an audit opinion upon the Regulatory Financial Statements as notified by Ofcom from time to time and on the reconciliation report as set out in **Condition 11.24**;
- (iv) secure the approval of the Regulatory Financial Statements by the board of directors of the Dominant Provider and secure the signature of the Regulatory Financial Statements by a director of the Dominant Provider for and on behalf of the board of directors;
- (v) deliver to Ofcom copies of the Regulatory Financial Statements, the reconciliation report 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;
- (vi) publish the Regulatory Financial Statements, the reconciliation report and any corresponding audit opinion, within four months after the end of the Financial Year to which they relate;
- (vii) ensure that any Regulatory Financial Statement 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
- (viii) publish with the Regulatory Financial Statements any written statement made by Ofcom and provided to the Dominant Provider commenting on the figures in, the notes to or the presentation of any or all of the Regulatory Financial Statements, the reconciliation report and/or the Accounting Methodology Documents.

11.9 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 11**. 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.

11.10 The Dominant Provider shall prepare all Regulatory Financial Statements, explanations or other information required by virtue of this **Condition 11** on a regulatory asset value adjusted current cost basis as directed by Ofcom from time to time and shall be capable of doing so in relation to any period. Such Regulatory Financial Statements, explanations or other information shall be, in the opinion of Ofcom, meaningfully reconcilable to the Statutory Financial Statements.

- 11.11 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 the Statutory Accounting Standards.

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

- 11.12 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 Regulatory Auditor appointed to secure compliance with this **Condition 11** before the Regulatory 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.
- 11.13 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:
- (i) carries out such on-going duties as are required to secure compliance with this **Condition 11**;
  - (ii) 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 11** as are of concern to Ofcom and notified to the Dominant Provider in writing; and/or
  - (iii) 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.
- 11.14 The Dominant Provider shall extend to the Alternative Regulatory Auditor such assistance and co-operation 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.
- 11.15 The Dominant Provider's letter of engagement appointing the Regulatory Auditor or Alternative Regulatory Auditor shall include such provisions acknowledging the acceptance by the Regulatory Auditor or Alternative 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.

- 11.16 The Dominant Provider shall use its best endeavours to obtain from the Regulatory Auditor or Alternative Regulatory Auditor any further explanation and clarification of any audit opinion required under this **Condition 11** and any other information in respect of the matters which are the subject of that audit opinion as Ofcom shall require.
- 11.17 The Dominant Provider shall obtain such assurance statement in the form of the Agreed Upon Procedures in relation to the Dominant Provider's obligations under this **Condition 11** as directed by Ofcom.

#### **Requirements relating to the Accounting Methodology Documents**

- 11.18 The Dominant Provider must prepare, maintain and keep up-to-date the Accounting Methodology Documents in accordance with this **Condition 11** and the Regulatory Accounting Principles.
- 11.19 The Dominant Provider must include in the Accounting Methodology Documents documentation setting out a description of each of the Attribution Methods, the Transfer Charge System Methodology, the Accounting Policies and the Long Run Incremental Cost Methodology.
- 11.20 The Dominant Provider must deliver an up-to-date version of the Accounting Methodology Documents to Ofcom when it delivers the Regulatory Financial Statements to Ofcom in accordance with **Condition 11.8** and publish such up-to-date version on or before the day of publication of the Regulatory Financial Statements which have been prepared in accordance with such version.

#### **Requirements relating to changes to the Regulatory Accounting Methodology and the correction of Material Errors**

- 11.21 The Dominant Provider must publish and deliver to Ofcom a list of each and every change to the Regulatory Accounting Methodology, by 31 March of the Financial Year in which the change to the Regulatory Accounting Methodology is to be made (the "Change Control Notification"). The Change Control Notification must be accompanied by a description of each of the changes, the reason for making each of the changes (including by reference to their compliance with the Regulatory Accounting Principles), and the impact of each of the changes on the figures at the level of the Markets and Technical Areas (as applicable) by setting out the figures which were presented in the previous Financial Year alongside the figures that would have been presented had such changes been made in the previous Financial Year. The requirement to submit the Change Control Notification by the date specified in this **Condition 11.21** does not apply to any change to the Regulatory Accounting Methodology which the Dominant Provider is required to make by the Regulatory Auditor after that date.
- 11.22 Where in Ofcom's opinion any change referred to in **Condition 11.21** does not comply with this **Condition 11** or the Regulatory Accounting Principles, the Dominant Provider shall not make such change, if so directed by Ofcom.



- 11.23 The Dominant Provider must prepare a reconciliation report as referred to in **Condition 11.8** and as directed by Ofcom from time to time, which sets out changes to the Regulatory Accounting Methodology and the impact of such changes on the Regulatory Financial Statements, and Material Errors corrected in the Regulatory Financial Statements and the impact of such Material Errors on the Regulatory Financial Statements.
- 11.24 The Dominant Provider must obtain an audit opinion on the reconciliation report as directed by Ofcom from time to time.

#### **Requirements relating to the Regulatory Accounting System**

- 11.25 The Dominant Provider's Regulatory Accounting System must be able to produce the Regulatory Financial Statements as directed by Ofcom under **Condition 11.8** in accordance with this **Condition 11**, the Regulatory Accounting Principles and the Accounting Methodology Documents.
- 11.26 Where the Dominant Provider replaces the whole or part of its Regulatory Accounting System, or substantially modifies such Regulatory Accounting System, the Dominant Provider must:
- (i) notify Ofcom in a timely manner of the replacement or modification, and, where so requested by Ofcom, inform Ofcom of progress towards completion and such other information as Ofcom may reasonably request;
  - (ii) ensure, to the best of its ability, that the replacement or modification does not cause the figures contained in the Regulatory Financial Statements to be different from the figures that would have been contained in the Regulatory Financial Statements had such Regulatory Financial Statements been prepared using the old or unmodified Regulatory Accounting System;
  - (iii) in relation to the final Financial Year for which the Regulatory Financial Statements are prepared using the old or unmodified Regulatory Accounting System, prepare a systems reconciliation report, which must:
    - a. set out the difference between the Current Year Figures presented in the Regulatory Financial Statements and the Current Year Figures had such Regulatory Financial Statements been prepared on the basis of the new or modified Regulatory Accounting System, expressed as a percentage change; and
    - b. explain each and every Material Difference between the Current Year Figures presented in the Regulatory Financial Statements and the Current Year Figures had such Regulatory Financial Statements been prepared on the basis of the new or modified Regulatory Accounting System;

- (iv) publish and deliver the systems reconciliation report to Ofcom by 31 December of the Financial Year for which the figures will be prepared using the new or modified Regulatory Accounting System for the first time;
- (v) obtain an assurance statement in the form of Agreed Upon Procedures on the systems reconciliation report, which must report:
  - a. whether the figures in the systems reconciliation report referred to in **Condition 11.26(iii)(a)** have been properly extracted from the old or unmodified Regulatory Accounting System and the new or modified Regulatory Accounting System respectively;
  - b. whether each and every difference in the systems reconciliation report referred to in **Condition 11.26(iii)(a)** has been correctly calculated; and
  - c. whether the explanation of each and every Material Difference in the systems reconciliation report referred to in **Condition 11.26(iii)(b)** is an accurate representation of the cause of each such Material Difference.
- (vi) deliver the assurance statement in the form of the Agreed Upon Procedures to Ofcom when it delivers the systems reconciliation report to Ofcom in accordance with **Condition 11.26(iv)**;
- (vii) where the systems reconciliation report referred to in **Condition 11.26(iii)** indicates that the replacement or modification causes the Current Year Figures contained in the Regulatory Financial Statements to be significantly different, either individually or in aggregate, from the Current Year Figures that would have been contained in the Regulatory Financial Statements had such Regulatory Financial Statements been prepared using the new or modified Regulatory Accounting System, prepare, if so directed by Ofcom, the Regulatory Financial Statements on a basis consistent with the old or unmodified Regulatory Accounting System.

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

- 11.27 Where Ofcom have reasonable grounds to believe that any or all of the Regulatory Financial Statements and/or Accounting Methodology Documents are deficient, the Dominant Provider shall, where directed by Ofcom:
- (i) amend the Accounting Methodology Documents in order to remedy the deficiencies identified by Ofcom;
  - (ii) restate the Regulatory Financial Statements identified by Ofcom as requiring restatement in accordance with the Accounting Methodology Documents which have, where necessary, been amended pursuant to **Condition 11.27(i)**;

- (iii) prepare a reconciliation report as set out in **Condition 11.23**, whereby any reference to the Regulatory Financial Statements should be understood as a reference to the restated Regulatory Financial Statements;
- (iv) secure in accordance with any relevant notification of Ofcom under this Condition the expression of an audit opinion on the restated Regulatory Financial Statements;
- (v) deliver to Ofcom the restated Regulatory Financial Statements, the reconciliation report and corresponding audit opinion; and
- (vi) publish the restated Regulatory Financial Statements, the reconciliation report and corresponding audit opinion.

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

- 11.28 The Dominant Provider shall maintain accounting records for a period of six years from the date on which each Regulatory Financial Statement is delivered to Ofcom.
- 11.29 The Dominant Provider shall maintain the accounting records in accordance with this **Condition 11**, the Regulatory Accounting Principles and the Accounting Methodology Documents.
- 11.30 The Dominant Provider shall maintain accounting records in a form which, on a historical cost basis and on a current cost basis:
  - (i) separately identifies each of the Markets, Technical Areas, Products, Network Components and Network Services;
  - (ii) separately attributes the costs, revenues, assets and liabilities of each of the Markets, Technical Areas, Products, Network Components and Network Services; and
  - (iii) shows and explains the transactions underlying each of the Markets, Technical Areas, Products, Network Components and Network Services.
- 11.31 The Dominant Provider shall maintain the accounting records so that they are sufficient:
  - (i) to provide an adequate explanation of each Regulatory Financial Statement;
  - (ii) to show that charges are non-discriminatory; and
  - (iii) to provide a complete justification of the Dominant Provider's charges for Network Access.

#### **Requirement to facilitate on-demand reporting**

- 11.32 The Dominant Provider shall ensure that its Regulatory Accounting System and accounting records are sufficient to enable the Dominant Provider, at all times, to be capable of

preparing in relation to any specified calendar month or months a financial statement in accordance with the Accounting Methodology Documents.

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

- 11.33 The Dominant Provider must prepare, maintain and keep up-to-date a Wholesale Catalogue. Such Wholesale Catalogue should separately identify and describe:
- (i) External Wholesale Services;
  - (ii) Internal Wholesale Services;
  - (iii) Wholesale Services supplied both externally and internally; and
  - (iv) Network Services and the extent to which these activities are used in the course of supplying Wholesale Services.
- 11.34 The Dominant Provider must deliver an up-to-date version of the Wholesale Catalogue to Ofcom when it delivers the Regulatory Financial Statements to Ofcom in accordance with **Condition 11.8** and publish such up-to-date version on or before the day of publication of the Regulatory Financial Statements which have been prepared by reference to such version.

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

- 11.35 The Dominant Provider shall ensure that it is able to demonstrate that at any point in time:
- (i) 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 Service or combination of 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;
  - (ii) the same amount as applied and incorporated in the Transfer Charge for the Internal Wholesale Service in **Condition 11.35(i)** in respect of the use of the Network Service or combination of Network Services is applied to the Network Service or combination of Network Services whenever it is or they are used by the Dominant Provider in providing that same Internal Wholesale Service; and
  - (iii) the same amount as applied and incorporated in the Transfer Charge for the equivalent External Wholesale Service in **Condition 11.35(i)** in respect of the use of the Network Service or combination of Network Services is applied to the Network Service or combination of Network Services whenever it is or they are used by the Dominant Provider in providing that same External Wholesale Service;

(iv) the amount applied and incorporated in the Transfer Charge for the Internal Wholesale Service in **Condition 11.35(i)** in respect of the use of the Network Service or combination of Network Services shall be the cost of those Network Services unless the Network Service concerned is provided from a Market which is different from the Market which comprises the Internal Wholesale Service.

11.36 In this **Condition 11**:

- a) **“Accounting Methodology Documents”** means the documentation maintained by the Dominant Provider setting out in detail the rules, policies, methods, allocations, calculations, assumptions, procedures and Processes used by the Dominant Provider for the purpose of preparing Regulatory Financial Statements in accordance with the Regulatory Accounting Principles;
- b) **“Accounting Policies”** means the manner in which the Dominant Provider applies the requirements of the Regulatory Accounting Principles in each of the Regulatory Financial Statements;
- c) **“Agreed Upon Procedures”** means an engagement carried out in accordance with international standard (ISRS 4400) under which the Regulatory Auditor or another independent third party performs a set of audit procedures agreed by Ofcom and based on Ofcom’s specific requirements in relation to the Regulatory Financial Statements, and reports the findings of that work to Ofcom;
- d) **“Alternative Regulatory Auditor”** means any auditor not for the time being appointed as the Dominant Provider’s Regulatory Auditor;
- e) **“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;
- f) **“Current Year Figures”** means, in relation to any set of Regulatory Financial Statements, the amounts relating to the Financial Year to which the statements relate;
- g) **“External Wholesale Services”** means services supplied or offered to any Communications Provider other than the Dominant Provider;
- h) **“Financial Year”** means a financial year of the Dominant Provider in respect of which the Statutory Financial Statements are required to be (or to have been) prepared and audited in accordance with the requirements of the Companies Act 2006;
- i) **“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;

- j) **“Internal Wholesale Services”** means services supplied within the Dominant Provider;
- k) **“Long Run Incremental Cost Methodology”** means the long run incremental cost principles, procedures and Processes which form the framework under which long run incremental costs are calculated by the Dominant Provider;
- l) **“Market”** means the market to which this **Condition 11** applies;
- m) **“Material Difference”** means a difference identified in a systems reconciliation report which meets the materiality threshold as directed by Ofcom from time to time for the purpose of this **Condition 11**;
- n) **“Material Error”** means a deviation from accuracy or correctness which meets the materiality threshold as directed by Ofcom from time to time for the purpose of this **Condition 11**;
- o) **“Network Component”** means an element of the network that is used to provide Wholesale Services, and, to the extent the network components are used in the Market or Technical Area (as applicable), specified in a direction given by Ofcom from time to time for the purposes of this **Condition 11**;
- p) **“Network Services”** means those groups of Network Components used directly (or which in the absence of horizontal or vertical integration would be used directly) in the course of supplying Wholesale Services;
- q) **“Prior Year Comparatives”** means, in relation to any set of Regulatory Financial Statements, the amounts relating to the Financial Year immediately preceding the Financial Year to which the Regulatory Financial Statements relate, re-evaluated if necessary to ensure that such figures are comparable to the Current Year Figures;
- r) **“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;

- s) **“Product”** means any product or service comprised in a Market or Technical Area to which this **Condition 11** applies;
- t) **“Regulatory Accounting Methodology”** means the rules, policies, methods, allocations, calculations, assumptions and procedures used by the Dominant Provider for the purpose of preparing Regulatory Financial Statements;
- u) **“Regulatory Accounting Principles”** means the principles as directed by Ofcom from time to time for the purpose of this **Condition 11**;
- v) **“Regulatory Accounting System”** means the set of computerised and manual accounting methods, procedures, Processes and controls established to determine and attribute the costs, revenues, assets and liabilities and summarise, interpret, and present the resultant financial data in an accurate and timely manner;
- w) **“Regulatory Auditor”** means the auditor for the time being appointed by the Dominant Provider in accordance with this **Condition 11**;
- x) **“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 11**;
- y) **“Retail Products”** means services used by or offered to any end users (including the Dominant Provider”;
- z) **“Retail Segments”** means groups of Retail Products;
- aa) **“Statutory Accounting Standards”** means the accounting standards, including the requirements of the Companies Act 2006, by reference to which the Dominant Provider is required to prepare the Statutory Financial Statements;
- bb) **“Statutory Auditor”** means the auditor for the time being appointed by the Dominant Provider in accordance with the requirements of the Companies Act 2006;
- cc) **“Statutory Financial Statements”** means any annual account required to be prepared by the Dominant Provider in accordance with the requirements of the Companies Act 2006;
- dd) **“Technical Area”** means the technical area to which this **Condition 11** applies;
- ee) **“Transfer Charge”** means the charge or price that is applied, or deemed to be applied, within the Dominant Provider by one division or business unit of the Dominant Provider to another 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 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);

ff) **“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 at an appropriate amount);

gg) **“Wholesale Catalogue”** means the documentation required to be produced by the Dominant Provider under **Condition 11.33**;

hh) **“Wholesale Segments”** means groups of Wholesale Services; and

ii) **“Wholesale Services”** means services related to network access on the Dominant Provider’s network used by or offered to any Communications Provider (including the Dominant Provider).



## Schedule 2: SMP conditions (KCOM)

### Part 1: Application

1. The SMP Conditions in Part 3 of this Schedule 2 shall, except where specified otherwise, apply to the Dominant Provider in each of the relevant markets listed in Column 1 of **Table 1** to the extent specified in Column 2 of **Table 1**.
2. Nothing in these Conditions shall require the Dominant Provider to provide:
  - a. Ethernet First Mile copper services (EFMcu) (as defined in IEEE standard 802.3.1-2013); or
  - b. Symmetrical Digital Subscriber Line services.

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

<i>Column 1: Relevant market</i>	<i>Column 2: Applicable SMP conditions as set out in Part 3 of this Schedule 7</i>
Wholesale market for <b>CI Access</b> services in the <b>Hull Area</b>	Conditions 1 to 7

The Conditions referred to in Column 2 of **Table 1** are entitled as follows—

Condition 1	Network access on reasonable request
Condition 2	No undue discrimination (wholesale)
Condition 3	Publication of a Wholesale Reference Offer
Condition 4	Notification of charges and terms and conditions
Condition 5	Notification of technical information
Condition 6	Provision of a Wholesale Pricing Transparency Report
Condition 7	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 2** —

**“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**;

**“Access Charge Change Notice”** means a notice given by the Dominant Provider of an Access Charge Change;

**“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;

**“Dominant Provider”** means KCOM Group plc, whose registered company number is 2150618, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;

**“First Relevant Period”** means a period beginning on the date on which this Schedule enters into force and ending on 31 March 2020;

**“Relevant Period”** means each of the following two periods:

- (i) the First Relevant Period; and
- (ii) the Subsequent Relevant Period;

**“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;

**“Subsequent Relevant Period”** means a period beginning on 1 April 2020 and ending on 31 March 2021;

**“Third Party”** means a person providing a public electronic communications service or a person providing a public electronic communications network;

**“Wholesale Pricing Transparency Report”** means a report required under **Condition 6** to be provided to Ofcom; and

**“Wholesale Reference Offer”** means the terms and conditions on which the Dominant Provider is willing to enter into an Access Agreement.

## **Part 3: SMP conditions**

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

- 1.1 Except insofar as Ofcom may from time to time otherwise consent in writing, the Dominant Provider must provide network access to a Third Party where that 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 a Third Party;
  - (b) be on fair and reasonable terms, conditions and charges; and
  - (c) be on 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 shall 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.

## Condition 2 – No undue discrimination

- 2.1 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**.
- 2.2 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 3 – Publication of a Reference Offer

- 3.1 Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider shall publish a Reference Offer.
- 3.2 Subject to **Condition 3.8**, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of network access 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 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;

- (i) details of any relevant intellectual property rights;
- (j) a dispute resolution procedure to be used between the parties;
- (k) details of duration and renegotiation of agreements;
- (l) provisions regarding confidentiality of the agreements;
- (m) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);
- (n) the standard terms and conditions for the provision of network access.

3.3 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 other person; or
- (b) may be used for a purpose that is the same, similar or equivalent to the network access provided to any other person;

in a manner that differs from that detailed in a Reference Offer in relation to network access provided to any other person, the Dominant Provider shall 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 **Condition 3.2**.

3.4 The Dominant Provider shall, on the date that this Condition enters into force, publish a Reference Offer in relation to any network access that it is providing as at the date that this Condition enters into force.

3.5 The Dominant Provider shall, as soon as reasonably practicable, 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.

3.6 The publication referred to above shall be effected by the Dominant Provider —

- (a) placing a copy of the Reference Offer on any relevant publicly available website operated or controlled by the Dominant Provider; and
- (b) sending a copy of the Reference Offer to Ofcom.

3.7 The Dominant Provider shall 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).

- 3.8 The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.
- 3.9 The Dominant Provider shall provide network access on the terms and conditions including charges in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.
- 3.10 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.



## Condition 4 – Notification of charges and terms and conditions

- 4.1 Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider shall publish charges, terms and conditions and comply with the requirements set out in this Condition.
- 4.2 Where it proposes an Access Charge Change, the Dominant Provider shall send to Ofcom, and to every person with which it has entered into an Access Agreement pursuant to **Condition 1**, an Access Charge Change Notice.
- 4.3 The obligation in **Condition 4.2** shall not apply where the Access Charge Change is directed or calculated by Ofcom or required by a notification or enforcement notification issued by Ofcom under sections 96A or 96C of the Act.
- 4.4 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.
- 4.5 The Dominant Provider shall 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; and
  - (c) the date on which, and the period for which, the Access Charge Change will take effect (the "effective date").

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

4.7 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 other person; or

(b) may be used for a purpose that is the same, similar or equivalent to the network access provided to any other person, in a manner that differs from that detailed in an Access Charge Change Notice in relation to network access provided to any other person,

the Dominant Provider shall 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 **Condition 4.5** and, where the Dominant Provider amends the charges, terms and conditions on which it provides itself with provides network access, it shall ensure it sends to Ofcom a notice equivalent to an Access Charge Change Notice.

## Condition 5 – Notification of technical information

- 5.1 Except in so far as Ofcom may from time to time otherwise consent in writing, in relation to network access pursuant to **Conditions 1 and 2**, where the Dominant Provider 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. Other than where the new or amended terms and conditions are a consequence of new or amended technical specifications determined by NICC Standards Limited (whose registered company number is 6613589), that reasonable notice must be 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 an existing Access Agreement come into effect.
- 5.2 The obligation in **Condition 5.1** shall not apply where the new or amended terms and conditions are directed or determined by Ofcom or are required by a notification or enforcement notification issued by Ofcom under sections 96A or 96C of the Act.
- 5.3 The Dominant Provider shall 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 current Reference Offer of the terms and conditions associated with the provision of that network access; and
  - (c) the date on which, and the period for which, an Access Agreement to provide the new network access will be available or the amended terms and conditions will take effect (the “effective date”).
- 5.4 The Dominant Provider shall 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.

5.5 The publication referred to in **Condition 5.1** shall be effected by the Dominant Provider:

(a) placing a copy of the Notice on any relevant publicly available website operated or controlled by the Dominant Provider;

(b) where the Notice identifies an amendment 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 **Conditions 1** and **2** (as applicable); and

(c) 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 6 – Provision of a Wholesale Pricing Transparency Report

- 6.1 Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider shall prepare and provide to Ofcom for each Relevant Period a Wholesale Pricing Transparency Report in relation to the provision of network access under **Condition 1**.
- 6.2 Subject to **Condition 6.4**, the Dominant Provider must, in each Wholesale Pricing Transparency Report, set out the following:
- (a) each service being provided to a Third Party by the Dominant Provider under **Condition 1** on the last day of the Relevant Period;
- (b) in relation to each service referred to in **Condition 6.2(a)** above:
- i. a specification of each of the service type, interface, bandwidth and circuit orientation;
  - ii. the amount of the connection charge;
  - iii. the date on which the rental charge was agreed;
  - iv. any fixed or minimum term which have been agreed by the Dominant Provider and a Third Party in respect of the rental charge;
  - v. the amount and the frequency of the rental charge; and
  - vi. such characteristics of each connection as required to fully determine the connection charge and the annual rental charge from the KCOM price list.
- 6.3 Provision referred to in **Condition 6.1** shall be effected by sending the Wholesale Pricing Transparency Report in Excel spreadsheet format by email to the designated person in the form notified by Ofcom from time to time within one month after the end of each Relevant Period to which the Wholesale Pricing Transparency Report relates.
- 6.4 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

## Condition 7 – Regulatory Financial Reporting

- 7.1 Except in so far as Ofcom may consent otherwise in writing, the Dominant Provider shall act in the manner set out in this **Condition 7**.
- 7.2 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 7**.
- 7.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this **Condition 7**.
- 7.4 For the purpose of this **Condition 7**, 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

- 7.5 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 7.6(a)**;
  - (d) publish the Regulatory Financial Statements and corresponding audit opinion as directed by Ofcom from time to time and in accordance with **Condition 7.6(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.

7.6 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.

7.7 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 7**. 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.

7.8 The Dominant Provider shall prepare all Regulatory Financial Statements, explanations or other information required by virtue of this **Condition 7** 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.

7.9 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.

- 7.10 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 7**.
- 7.11 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**

- 7.12 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 7** 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.
- 7.13 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 7**;
  - (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 7** 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.

- 7.14 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.
- 7.15 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.
- 7.16 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 7** 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**

- 7.17 The Dominant Provider shall review the Primary Accounting Documents as they exist before the coming into force of this **Condition 7**, and to the extent these documents do not comply with this **Condition 7**, the Dominant Provider shall by four months after the date on which this **Condition 7** 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 7** 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.
- 7.18 Following the review of the Primary Accounting Documents in accordance with **Condition 7.17**, the Dominant Provider shall prepare the Secondary Accounting Documents in accordance with the Primary Accounting Documents and the requirements of this **Condition 7**. The Secondary Accounting Documents shall be delivered to Ofcom eight

months after the date on which this **Condition 7** comes into force.

7.19 The Dominant Provider shall,

- (a) publish the Primary Accounting Documents on or by four months after the date on which this **Condition 7** comes into force following their first review in accordance with **Condition 7.17**;
- (b) publish the Secondary Accounting Documents following their first review in accordance with **Condition 7.18** on or prior to the date of publication of the Regulatory Financial Statements in accordance with **Conditions 7.5** and **7.6**; 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.

7.20 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**

7.21 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; the Accounting Documents; and
- (b) 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**

7.22 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**

7.23 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 Network Services, and, insofar as they have been disaggregated in terms of Network Activities, each of the Network Activities, to be separately identified; and the costs, revenues, assets and liabilities of the Network Services, and, insofar as they have been disaggregated in terms of Network Activities, each

- of the Network Activities, to be separately attributable;
- (b) 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
- (c) 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.

7.24 The accounting records referred to in **Condition 7.23** 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 7**;
- (c) sufficient to enable the Regulatory Financial Statements to have expressed upon them any relevant audit opinion required under this **Condition 7**;
- (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

7.25 The Dominant Provider shall ensure that by three months after the date on which this **Condition 7** comes into force,

- (a) all of its Wholesale Services as at the date on which this **Condition 7** 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 7** 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 7** 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.

7.26 The Wholesale Catalogue shall be delivered to Ofcom as soon as practicable after the date on which this **Condition 7** comes into force and in any event by four months after that date.

7.27 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 7** 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**

7.28 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**

7.29 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;
- (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; and
- (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.

#### Setting of directions

7.30 The directions concerning:

- a) Network components;
- b) Transparency;
- c) Preparation, audit, delivery and publication of the Regulatory Financial Statement;
- d) Form and content of the Regulatory Financial Statement;
- e) Form of the FPIA opinion for financial statements; and
- f) Form of the PPIA opinion for financial statements;

made under condition OB2 of the July 2004 (KCOM) Notification, as amended from time to time, shall have force until such time as it is modified or withdrawn, as if they have been given under **Condition 7.2** from the date that this condition enters into force and those

directions must be read accordingly.

## Definitions

For the purpose of interpreting this **Condition 7** 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 7**;

**‘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;

**‘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 7.25** as amended from time to time under **condition 7.27**;

**‘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;



**‘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 7.25** as amended from time to time under **Condition 7.27**;

**‘July 2004 (KCOM) Notification’** means the notification under sections 48(1) and 86(1) of the Act and published at Annex 3 to the document titled *“The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification – Accounting separation and cost accounting: Final Statement notification”* published by Ofcom on 22 July 2004, as subsequently amended by Ofcom;

**‘Market’** means the market to which this **Condition 7** applies in accordance with **Schedule 2** 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:

- a) organisation, storage, adaptation, or alteration of the data or information;
- b) retrieval, consultation, computation or use of the data or information;
- c) disclosure of the data or information by transmission, dissemination, or otherwise making available; or
- d) 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 7**;

**‘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 at an 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;

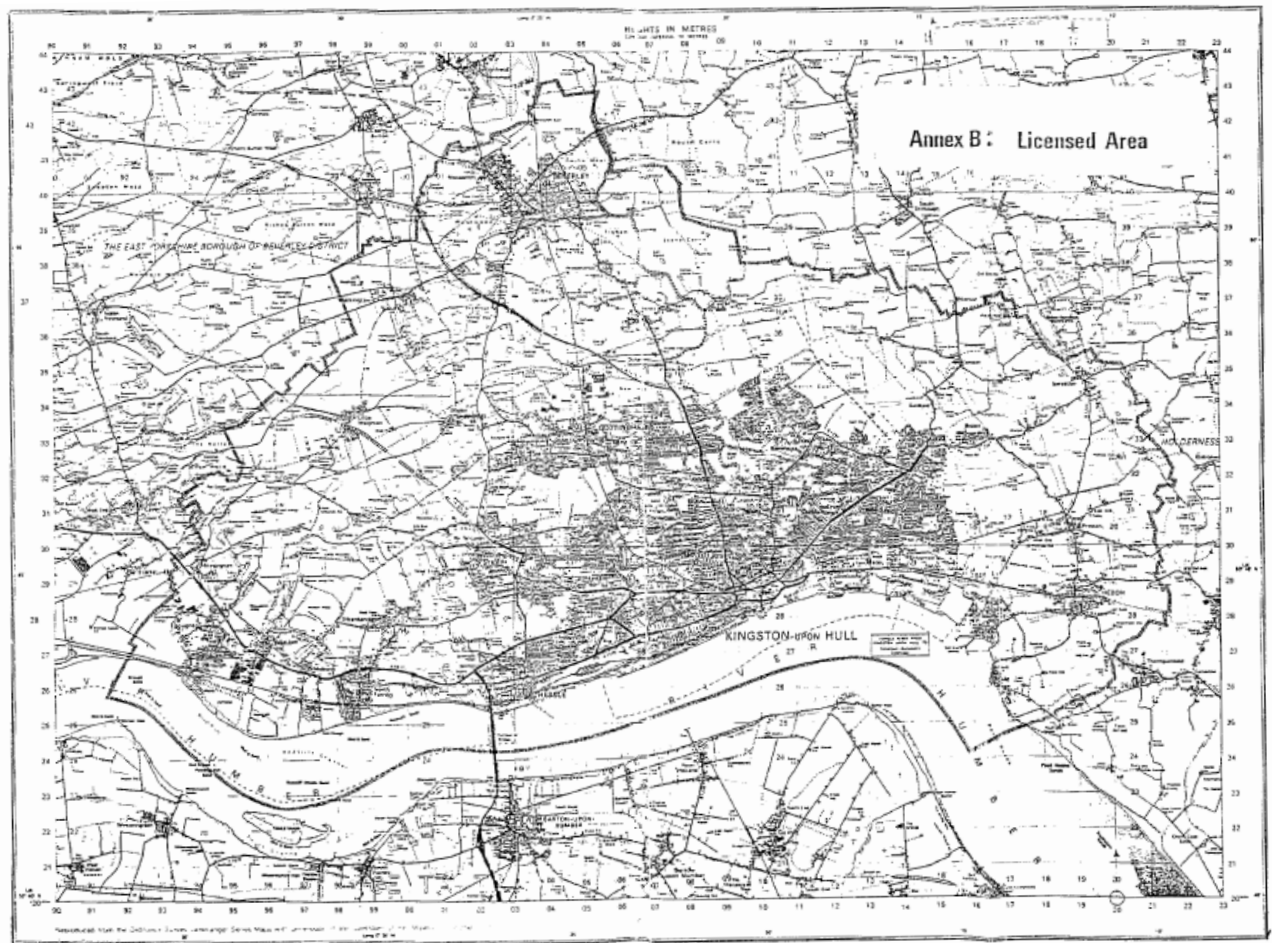
**'Wholesale Activities'** means any activities wholly and exclusively carried out (or which in the absence of horizontal or vertical integration would wholly and exclusively be carried out) in the course of supplying Wholesale Services and any activities wholly and exclusively carried out in the course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

**'Wholesale Catalogue'** means the documentation required to be produced by The Dominant Provider under **Condition 7.25** as amended from time to time in accordance with **Condition 7.27**;

**'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).

### Schedule 3: Map of the Hull Area



## Schedule 4: classification of new postcode sectors

If a postcode sector with a new name is created following the date of a notification adopting the proposals in this notification it shall be classified in accordance with the following hierarchy:

- a) If the postcode sector overlaps in whole or in part with the **Central London Area** it shall be considered within the **Central London Area**;
- b) If (a) does not apply: if the postcode sector overlaps in whole or in part with the **High Network Reach Areas of Birmingham, Bristol, Edinburgh, Glasgow, Leeds or Manchester**, it shall be considered within the **High Network Reach Areas of Birmingham, Bristol, Edinburgh, Glasgow, Leeds or Manchester**, respectively;
- c) If (b) does not apply: if the postcode sector overlaps in whole or in part with the **Hull Area** it shall be considered within the **Hull Area**;
- d) If (c) does not apply: if the postcode sector overlaps in whole or in part with the **High Network Reach Areas in the Rest of UK** it shall be considered within the **High Network Reach Areas in the Rest of UK**;
- e) If (d) does not apply: the postcode sector should be considered within the **BT+1 Areas**.

## **Schedule 5: list of postcode sectors for CI Access services**

The list of postcode sectors for the purposes of identifying the markets for CI Access services set out at paragraph 5 of the Notification can be accessed at the following link:

[https://www.ofcom.org.uk/\\_data/assets/excel\\_doc/0012/125031/schedule-5-postcode-sectors.xlsx](https://www.ofcom.org.uk/_data/assets/excel_doc/0012/125031/schedule-5-postcode-sectors.xlsx)

## **Schedule 6: list of exchanges for Inter-exchange Connectivity Services**

The list of exchanges for the purposes of identifying the markets for Inter-exchange Connectivity Services set out at paragraph 5 of the Notification can be accessed at the following link:

[https://www.ofcom.org.uk/\\_data/assets/excel\\_doc/0013/125032/schedule-6-exchanges.xlsx](https://www.ofcom.org.uk/_data/assets/excel_doc/0013/125032/schedule-6-exchanges.xlsx)

# Notification of Proposed Directions to BT under sections 49 and 49A of the Communications Act 2003 and the SMP conditions

## Background

1. In the 2018 BCMR Consultation, Ofcom is consulting on proposals to identify markets, make market power determinations and set SMP services conditions on BT and KCOM. Ofcom propose to find that BT has SMP in markets in certain geographic areas in the United Kingdom for the wholesale provision of (i) CI Access services; and (ii) Inter-Exchange Connectivity services.
2. The 2018 BCMR Consultation proposes the imposition on BT of SMP conditions requiring it, among other things, to (i) provide network access to relevant services on fair and reasonable terms;<sup>24</sup> (ii) not to unduly discriminate when providing network access;<sup>25</sup> and (iii) to comply with all such quality of service requirements as Ofcom may from time to time direct.<sup>26</sup>
3. Pursuant to proposed SMP condition 7, Ofcom propose two directions requiring BT:
  - a. to comply with quality of service standards in respect of the provision of wholesale CI Access services in BT Only Areas and BT+1 Areas in the UK (excluding the Hull Area) and CI Inter-exchange Connectivity services along Non-competitive IEC Routes in the UK (excluding the Hull Area and the Central London Area) ("**Direction 1**"); and
  - b. to comply with transparency and publication requirements in respect of the provision of wholesale CI Access services and CI Inter-exchange Connectivity services in all markets in which BT has been identified as having SMP ("**Direction 2**").

## Ofcom's duties and legal tests

4. The effect of these proposed Directions, and Ofcom's reasons for proposing them, are set out in the 2018 BCMR Consultation accompanying this draft notification and, for the reasons therein, Ofcom provisionally considers that the Directions would comply with the requirements of section 49(2) of the Act. Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act, the six community requirements in section 4 of the Act and the duty to take account of European Commission recommendations for harmonisation in section 4A of the Act.

## Making representations

5. Representations may be made to Ofcom about any of the proposals set out in this notification and the accompanying consultation document by no later than 18 January 2019.

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<sup>24</sup> Condition 1 of the proposed SMP Conditions, with specific forms of access set out in Condition 2.

<sup>25</sup> Condition 3 of the proposed SMP Conditions.

<sup>26</sup> Condition 7 of the proposed SMP Conditions.



6. In accordance with section 49C(1)(a) of the Act, a copy of the notification, together with the Schedule, has been sent to the Secretary of State.

### Interpretation

7. For the purposes of interpreting the proposed Directions, the following definitions shall apply:

**‘Accepted Order’** means an Order that has been validated and accepted by the Dominant Provider;

**‘Completed Order’** means an Accepted Order that has been provisioned and for which all related work has been carried out;

**‘Contractual Delivery Date’** means a date provided by the Dominant Provider to a Third Party Customer on which the Dominant Provider contracts for an Order to become a Completed Order;

**‘Customer Caused Delay’** means a delay in an Accepted Order becoming a Completed Order which the Dominant Provider can reasonably attribute to being caused either by a Third Party Customer or a customer of that Third Party Customer (including an end user);

**‘Dark Fibre Access’** means a service providing network access to one or more optical fibres suitable for the transmission of electromagnetic energy to convey signals;

**‘Deemed Consent Code’** means a code applied by the Dominant Provider when it notifies a Third Party Customer of its intention to deem that the Third Party Customer has consented to a change to the Contractual Delivery Date, which categorises the reason for that change;

**‘Fault’** means a degradation or problem with network access that is identified by the Dominant Provider or a Third Party Customer and which is registered on the Dominant Provider’s operational support system;

**‘Final Contractual Delivery Date’** means the last Contractual Delivery Date after which, in respect of the relevant Order, no other Contractual Delivery Dates were provided;

**‘Final Contractual Delivery Period’** means the total number of Working Days from the date on which an Order becomes an Accepted Order to the Final Contractual Delivery Date, excluding only Working Days attributable to Customer Caused Delay which occurred before the Final Contractual Delivery Date;

**‘First Relevant Period’** means a period beginning on the date on which any subsequent notification implementing the proposed Directions enters into force and ending on 31 March 2020;

**‘Initial Contractual Delivery Date’** means the first date provided by the Dominant Provider to a Third Party Customer on which the Dominant Provider contracts for an Order to become a Completed Order;

**‘Initial Contractual Delivery Period’** means the total number of Working Days from the date on which an Order becomes an Accepted Order to the Initial Contractual Delivery Date, but

excluding Working Days attributable to Customer Caused Delay which occurred before the Initial Contractual Delivery Date was issued;

**'KPI'** means a key performance indicator;

**'Order'** means a request submitted to the Dominant Provider by a Third Party for a Relevant Ethernet Service, Relevant WDM Service or Dark Fibre Access (as applicable), including (i) a request for an upgrade on bandwidth of an existing Relevant Ethernet Service or Relevant WDM Service; or (ii) a request for a change to the product variant of an existing Relevant Ethernet Service, Relevant WDM Service, or Dark Fibre Access;

**'Provision Category'** means such categories, as may be specified from time to time in the Dominant Provider's Reference Offer in relation to its ordering and provisioning procedures, which identify an Order by reference to one or more of the following:

- a. a specified level of provisioning work; and
- b. a specified lead time.

**'Quarter'** means each of the following periods within each Relevant Period:

- a. 1 April to 30 June;
- b. 1 July to 30 September;
- c. 1 October to 31 December; and
- d. 1 January to 31 March;

If these Directions come into force after the start of a Quarter, in respect of the First Relevant Period the first Quarter will cover the period from the Directions coming into force to the end of the subsequent Quarter;<sup>27</sup>

**'Relevant Customers'** means:

- a. the seven Third Party Customers who purchased the largest total volumes of the Relevant Ethernet Services during the period beginning on 1 April 2016 and ending on 31 March 2019; and
- b. a notional customer representing the remainder of all other Third Party Customers;

**'Relevant Ethernet Services'** means those Ethernet Services offered by the Dominant Provider to a Third Party under the product or service names of (i) Ethernet Access Direct, (ii) Ethernet Backhaul Direct or (iii) Cablelink including, in relation to each:

- a. all product variants except where Ofcom agrees otherwise, and
- b. the introduction by the Dominant Provider of a new product and/or service wholly or substantially in substitution for that existing product and/or service;

**'Relevant Regions'** mean the following six nations and regions, as defined by the Dominant Provider:

- a. Northern Ireland;
- b. Scotland;
- c. Wales;

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<sup>27</sup> For example, if the direction came into force on 1 June 2019, the first Quarter would run from 1 June 2019 to 30 September 2019.

- d. England – North;
- e. England – East; and
- f. England – West;

or other such regions as Ofcom may agree with the Dominant Provider or direct from time to time;

**‘Relevant WDM Services’** means those WDM Services offered by the Dominant Provider to a Third Party under the product or service names of (i) Optical Spectrum Access; (ii) Optical Spectrum Extended Access; or (iii) Optical Filter Connect including, in relation to each:

- a. all product or service variants except where Ofcom agrees otherwise; and
- b. the introduction by the Dominant Provider of a new product and/or service wholly or substantially in substitution for that existing product and/or service;

**‘Relevant Period’** means the First Relevant Period and each Subsequent Relevant Period;

**‘Restored Service’** means the point at which any Relevant Ethernet Service, Relevant WDM Service, or Dark Fibre Access, which has been subject to a Fault, is available for use by the Third Party without the relevant degradation or problem with network access;

**‘Subsequent Relevant Period’** means a period of twelve (12) months, the first of which begins on 1 April 2020 and ends on 31 March 2021, repeating thereafter for periods of twelve (12) months from 1 April to 31 March inclusive;

**‘Third Party’** means a person providing a public electronic communications network or a person providing a public electronic communications service;

**‘Third Party Customer’** means a Third Party purchasing a Relevant Ethernet Service, Relevant WDM Service, or a Dark Fibre Access (as applicable) from the Dominant Provider;

**‘Time To Provide’** means the total number of Working Days from the date on which an Order becomes an Accepted Order to the date when that Accepted Order becomes a Completed Order, excluding only Working Days attributable to Customer Caused Delay;

**‘WDM Services’** means services provided using wavelength division multiplexing equipment located at the customer’s premises and which is capable of supporting multiple leased line services over a single fibre or pair of fibres; and

**‘Working Day’** means any day other than Saturdays, Sundays, public holidays or bank holidays in the United Kingdom.

To the extent not otherwise defined above, words or expressions used shall have the same meaning as they have been ascribed in this notification and in the SMP services conditions set out in Schedule 1 of this Annex 23 of the 2018 BCMR Consultation. Otherwise any word or expression shall have the same meaning as it has in the Act.

Signed

A handwritten signature in black ink, appearing to be 'A. Ali', written in a cursive style.

Ali-Abbas Ali  
**Competition Policy Director, Ofcom**

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

2 November 2018

## [DRAFT] Direction 1: Quality of Service Standards

### Direction

A. This Direction is made under section 49 of the Act and Condition 7 of the BCMR SMP conditions imposed on BT, and requires the Dominant Provider to comply with quality of service standards in relation to the provision of (i) CI Access services in BT Only Areas and BT+1 Areas in the United Kingdom (excluding the Hull Area and the Central London Area); and (ii) CI Inter-exchange Connectivity services along Non-competitive IEC Routes.

B. Ofcom hereby directs that the Dominant Provider comply with this Direction with effect from *[the date on which Direction enters into force]*.

### Quality of Service Standards

#### Application

1. Except insofar as Ofcom may from time to time otherwise consent in writing, the Dominant Provider must comply with the following quality of service standards in respect of the provision of Orders for:
  - a. Relevant Ethernet Services; and
  - b. Dark Fibre Access.
2. The obligation referred to in paragraph 1 above shall apply in the First Relevant Period and Subsequent Relevant Periods to Orders under paragraph 1(a) that became Accepted Orders on or after *[the date on which this Direction enters into force]*, or that were Accepted Orders before *[the date on which this Direction enters into force]* but were not Completed Orders on *[the date on which this Direction enters into force]*, and that relate to:
  - a. CI Access Services in BT Only Areas in the UK (excluding the Hull Area and Central London Area); or
  - b. CI Access Services in BT+1 Areas in the UK (excluding the Hull Area and Central London Area); or
  - c. CI Inter-exchange Connectivity services along Non-competitive IEC Routes in the UK (excluding the Hull Area).
3. The obligation referred to in paragraph 1 above shall additionally apply in Subsequent Relevant Periods to Orders under paragraph 1(b) that became Accepted Orders on or after 1 April 2020, or that were Accepted Orders before 1 April 2020 but were not Completed Orders on 1 April 2020, and that relate to CI Inter-exchange Connectivity services along Non-competitive IEC Routes in the UK (excluding the Hull Area).

#### Mean Time to Provide

4. The Dominant Provider must ensure that the mean average Time To Provide of Completed Orders is no more than 38 Working Days in each Relevant Period.

### **Upper Percentile Limit**

5. The Dominant Provider must ensure that in no more than 3% of Completed Orders is the Time To Provide:
  - a. more than 138 Working Days in the First Relevant Period; and
  - b. more than 130 Working Days in each Subsequent Relevant Period.

### **Certainty (including certainty cross-link)**

6. The Dominant Provider must ensure that Time To Provide is less than or equal to the applicable Initial Contractual Delivery Period:
  - a. for at least 85% of Completed Orders in the First Relevant Period; and
  - b. for at least 88% of Completed Orders in each Subsequent Relevant Period.
7. The Dominant Provider must ensure that the mean average Initial Contractual Delivery Period of Completed Orders is no more than 53 Working Days in each Relevant Period.

### **Faults**

8. The Dominant Provider must ensure that at least 94% of Faults achieve a Restored Service within the period specified in the applicable service level agreement set out in the Dominant Provider's Reference Offer in each Relevant Period.

## **[DRAFT] Direction 2: Transparency and publication of KPIs**

### **Direction**

A. This Direction is made under section 49 of the Act and Condition 7 of the BCMR SMP Conditions, imposed on BT and requires transparency and the publication of KPIs by the Dominant Provider for the wholesale provision of all those wholesale CI Access services and CI Inter-exchange Connectivity services markets in which the 2018 BCMR has identified BT as having SMP.

B. Ofcom hereby directs that the Dominant Provider comply with this Direction with effect from *[date on which Direction enters into force]*.

### **Transparency and publication of KPIs**

1. Except insofar as Ofcom may from time to time otherwise consent in writing, the Dominant Provider must comply with the following transparency and publication requirements in respect of the provision of Relevant Ethernet Services, Relevant WDM Services, and Dark Fibre Access.

#### **Publication of information**

2. For each Quarter, the Dominant Provider must publish an average of the three months in that Quarter of the information required in each of KPIs (a) to (e), and (h) for the United Kingdom as a whole and, for each of KPIs (a) to (e), split by reference to (i) each Relevant Region; and (ii) by reference to whether or not Orders related to products and services to which Direction 1 (Quality of Service Standards) applies in the Relevant Period.<sup>28</sup>
3. Publication referred to in paragraph 2 above must be effected by the Dominant Provider placing the information on a publicly available website operated or controlled by the Dominant Provider within 15 Working Days after the end of the Quarter to which it relates.

#### **Provision of information to Ofcom**

4. For all Orders to which this Direction 2 relates, the Dominant Provider must provide to Ofcom each month the information specified in KPIs (a) to (r) for the United Kingdom as a whole, and splits according to each of the following:
  - a. KPIs (a) to (r) by reference to Orders for (i) EAD (including EAD LA); (ii) EBD; (iii) Cablelink; (iv) WDM; and (v) Dark Fibre Access; and
  - b. KPIs (a) to (k), (m), (o), and (s) by reference to whether or not Orders related to the High Network Reach Areas identified in Schedule 5 of the SMP conditions;
5. For Orders which relate to products and services to which Direction 1 (Quality of Service Standards) applies in the Relevant Period, the Dominant Provider must also provide to Ofcom each month the information the information specified in KPIs (a) to (r) as a whole, and splits according to each of the following:

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<sup>28</sup> For example, regarding KPI (i), the information averaged over the three months in the July to September quarter in the First Relevant Period would be the sum of the average Time to Provide for July, for August and for September, divided by three.

- a. KPIs (a) to (i), and (p) to (r) by reference to each Relevant Region;
  - b. KPIs (a) to (h), (j) to (o), and (r) by reference to each Relevant Customer;
  - c. KPIs (a), (c), (e) to (i), (k), and (n) to (q) by reference to each Provision Category.
  - d. KPIs (a) to (h), (j), and (n) by reference to (i) Orders for the Dominant Provider; and (ii) Orders for Third Party Customers; and
  - e. KPIs (a) to (d), (h), (k), (n) to (p), and (r) by reference to Orders relating to (i) CI Inter-exchange Connectivity services; (ii) CI Access services in BT only areas; and (iii) CI Access services in BT+1 areas.
6. In relation to each of the requirements set out in paragraphs 4 and 5 above, for all KPIs except (h) and (s), the Dominant Provider must include in information provided to Ofcom:
- a. the denominator representing the volume of the applicable Relevant Ethernet Services over which the average or the percentage (as applicable) is calculated; and
  - b. the numerator representing the value corresponding to the denominator from which the average or the percentage (as applicable) is calculated.
7. For Orders which relate to products and services to which Direction 1 (Quality of Service Standards) applies in the Relevant Period, the Dominant Provider must also provide to Ofcom each Quarter a narrative report summarising causes of delay in respect of Orders that either:
- a. became Closed Orders in the relevant Quarter that had a Time To Provide of more than 138 Working Days in the First Relevant Year or more than 130 Working Days in Subsequent Relevant Periods; or
  - b. were Accepted Orders but not Closed Orders at the end of the relevant Quarter and that would have had a Time To Provide of more than 138 Working Days in the First Relevant Period or of more than 130 Working Days in Subsequent Relevant Periods had they become Completed Orders on the last day of the relevant Quarter.
8. Provision of information to Ofcom referred to under paragraphs 4 to 7 above must be effected by the Dominant Provider by sending an email to a person designated by Ofcom, in the form notified by Ofcom from time to time (which may include requirements as to who within the Dominant Provider must confirm accuracy of contents), within 15 Working Days after the end of the relevant month or Quarter to which it relates.

### List of KPIs relating to quality of service

#### KPI (a) - Mean time to provide

In relation to all Orders that became Completed Orders in the relevant month, the mean Time To Provide.

#### KPI (b) - Fault repair performance



The percentage of Faults during the relevant month that achieved a Restored Service within the period specified in the applicable service level agreement set out in the Dominant Provider's Reference Offer.

**KPI (c) - Delivery date certainty**

In relation to all Orders that became Completed Orders in the relevant month, the percentage of Completed Orders which were completed with a Time to Provide that is less than their Initial Contractual Delivery Period.

**KPI (d) - Time to provide (lower percentile)**

In relation to all Orders that became Completed Orders in the relevant month, the percentage of Completed Orders in respect of which the Time To Provide was 29 Working Days or less.

**KPI (e) - Time to provide (upper percentile)**

In relation to all Orders that became Completed Orders in the relevant month, the percentage of Completed Orders in respect of which the Time To Provide was:

- (i) 138 Working Days or more in the First Relevant Period;
- (ii) 130 Working Days or more in each Subsequent Relevant Period.

**KPI (f) - Mean initial contractual delivery period**

In relation to all Orders that became Completed Orders in the relevant month, the average Initial Contractual Delivery Period.

**KPI (g) - Monitoring the tail (closed work stack)**

In relation to all Orders that became Completed Orders in the relevant month, the average Time To Provide of those Completed Orders whose Time To Provide was:

- (i) 138 Working Days or more in the First Relevant Period;
- (ii) 130 Working Days or more in each Subsequent Relevant Period.

**KPI (h) - Monitoring the tail (open work stack)**

In relation to all Orders that were Accepted Orders but not Completed Orders by the end of the relevant month:

- (i) the percentage that, had they become Completed Orders on the last day of the relevant month, would have had a Time To Provide of 130 Working Days or more; and
- (ii) for those Orders only, the average Time to Provide had they been completed on the last day of the relevant month.

**KPI (i) - Time to provide of the tail extremities**

In relation to all Orders that became Completed Orders in the relevant month, the Time To Provide of the Completed Order corresponding to the 97<sup>th</sup> percentile of Completed Orders (i.e. the Completed Order with a Time to Provide greater than 97% of Completed Orders).

**KPI (j) - Order validation**

In relation to all Orders that became Accepted Orders in the relevant month, the percentage that became Accepted Orders within the timescales set out in the applicable service level agreement set out in the Dominant Provider's Reference Offer.

**KPI (k) – Mean time to issue initial contractual delivery dates**

In relation to all Orders in respect of which an Initial Contractual Delivery Date was issued in the relevant month, the average number of Working Days that elapsed between the Order becoming an Accepted Order and the issue of an Initial Contractual Delivery Date.

**KPI (l) - Performance in issuing initial contractual delivery dates**

In relation to all Orders in respect of which an Initial Contractual Delivery Date was issued in the relevant month, the percentage for which it was issued within the timescales set out in the applicable service level agreement set out in the Dominant Provider's Reference Offer.

**KPI (m) - Changes to contractual delivery dates**

In relation to all Orders that became Completed Orders in the relevant month, the percentage of Completed Orders subject to a change to the Contractual Delivery Date not attributable to Customer Caused Delay;

**KPI (n) - Mean delay due to contractual delivery date changes**

In relation to changes to the Contractual Delivery Date not attributable to Customer Caused Delay for each Completed Order in the relevant month, the average number of Working Days incurred for each Completed Order as a result of such changes.

**KPI (o) - Mean customer caused delay**

In relation to all Orders that became Completed Orders in the relevant month and which were subject to one or more changes in the Contractual Delivery Date that were attributable to Customer Caused Delay, the average number of Working Days incurred for each Completed Order as a result of such changes.

**KPI (p) - Monitoring traffic management deemed consent applications**

In relation to all Orders that became Completed Orders in the relevant month:

- (i) the percentage that were subject to Deemed Consent Codes relating to traffic management; and
- (ii) for those Orders only, the mean number of Working Days associated with each Deemed Consent Code relating to traffic management.

**KPI (q) - Monitoring wayleave deemed consent applications**

In relation to all Orders that became Completed Orders in the relevant month:

- (i) the percentage that were subject to Deemed Consent Codes relating to wayleaves; and
- (ii) for those Orders only, the mean number of Working Days associated with each Deemed Consent Code relating to wayleaves.

**KPI (r) - Size of the installed base**

The total number of each of the following for which the Dominant Provider is charging Third Parties, at the end of the relevant month:

- (i) Relevant Ethernet Services;
- (ii) Relevant WDM Services;
- (iii) Dark Fibre Access.