



# Review of the fixed narrowband services wholesale markets

Statement on the markets, market power  
determinations and remedies including further consultation

Statement and  
consultation

Publication date: 15 September 2009

Closing date for responses: 16 October 2009



# Contents

Section	Page
1 Summary	2
2 Introduction	5
3 Background	10
4 Approach to the market review process	16
5 Wholesale fixed narrowband exchange line services	24
6 Call origination	39
7 Call termination	48
8 Local-tandem conveyance and transit	57
9 Wholesale Transit Services	82
10 Interconnection circuits and PPP	87
11 General Remedies	93
12 Call termination remedies	118
13 Wholesale Line Rental	133
14 Carrier Selection and Carrier Pre-Selection	139
15 Number Translation Services Call Origination	145
16 Charge controls	152
17 Price regulation of wholesale ISDN30 exchange lines	159
18 Revocation and amendment of regulation	161
19 Additional Consultation	176
 Annex	 Page
1 Responding to this consultation	214
2 Ofcom's consultation principles	216
3 Consultation response cover sheet	217
4 Consultation questions	219
5 Impact Assessment	221
6 Regulatory Framework	225
7 Legal Instruments	237
8 Legal Instruments: Direction	292
9 Legal Instruments: Direction	299
10 Legal Instrument: Withdrawal of Direction	304
11 Legal Instrument: Withdrawal of Direction	307

12	Legal Instrument: Withdrawal of Direction	310
13	Legal Instrument: Revised Proposals	313
14	Guidance on interpretation of cost orientation	334

## Section 1

# Summary

## Introduction

- 1.1 In this review we assess the state of competition in the wholesale fixed narrowband services markets. Where competition is not effective we assess how best we should regulate the behaviour of any company we find to have Significant Market Power (SMP), which is the power to influence markets in a way that could be detrimental to consumers.
- 1.2 The wholesale fixed narrowband services are the markets that provide wholesale products for access (exchange lines) and calls on fixed networks. These wholesale products are used by retailers to provide products to citizens and consumers.
- 1.3 In this statement we explain how we are going to regulate these markets.
- 1.4 We also include consultation on two issues arising from our previous consultation:
  - Regulation in wholesale transit markets; and
  - An additional obligation on communications providers to publish their geographic call termination rates.
- 1.5 We are not concluding on our market definition, market power assessment or relevant remedies in the ISDN30 exchange lines market in this review. Following our consultation BT has provided additional forecasts for this market, as well as its view on future developments that may impact the market. We think this information requires further consideration and that other communications providers (CPs) should be able to express their views. Therefore, we are going to progress ISDN30 exchange lines in a separate review. In the meantime, the remedies imposed in 2003 as a result of the last market review will continue to apply.

## Background

- 1.6 We have reviewed the different wholesale components that are required to provide retail access and calls products. These relate to the supply of wholesale exchange lines, call origination, call termination and various conveyance and transit markets that provide connectivity across narrowband networks.
- 1.7 We last reviewed all these markets in 2003. In 2005, we reviewed a subset of them again (local-tandem conveyance and transit and inter-tandem conveyance and transit) due to significant developments that were occurring in these markets. This led to us deregulating the inter-tandem conveyance and transit market.
- 1.8 The outcome of the 2003 and 2005 reviews was that we found that British Telecommunications plc (BT) had SMP in the UK except the Hull Area in the following markets:
  - Exchange lines;
  - Call origination;

- Fixed geographic call termination;
  - Local-tandem conveyance and local-tandem transit (LTC/LTT); and
  - Single transit.
- 1.9 We also found that KCOM plc (KCOM) (which previously traded under the name Kingston Communications and retains this name as a brand for narrowband services in the Hull Area) had SMP in the Hull Area in the following markets:
- Exchange lines;
  - Call origination; and
  - Fixed geographic call termination.
- 1.10 We also found that all providers of fixed geographic call termination had SMP for termination on their own networks.
- 1.11 We have also reviewed several related areas. These are interconnection circuits, BT's product management, policy and planning activities related to providing SMP products.
- 1.12 Since we last reviewed these markets there have been a number of developments. There has been significant growth in the use of wholesale products provided by BT, growth in the use of local loop unbundling (LLU) to provide narrowband services and an increase in the interconnection of CPs to BT's local exchanges. We therefore consider it appropriate to review these markets based on these developments.

## Summary of conclusions

- 1.13 This document must be read in conjunction with our consultation document where our original analysis was set out in full. Our conclusions in this statement are drawn from that original analysis and the further consideration we have afforded to each issue after carefully considering each and every response we received to our consultation. Our conclusions are as follows.
- 1.14 BT retains SMP in the markets for analogue and ISDN2 exchange lines, call origination and call termination in the UK outside Hull. KCOM retains SMP in the markets for exchange lines, call origination and call termination in Hull. Further, all providers offering fixed geographic call termination retain SMP in call termination on their own networks.
- 1.15 Since the last review, several CPs have deployed their own networks to interconnect to BT at the local level in the BT network. This means they are less reliant on BT to provide services that carry traffic from its local exchanges to their own networks. These services constitute the local-tandem conveyance and transit market. We have found that BT no longer has SMP in local-tandem conveyance and transit.
- 1.16 Therefore, we are revoking the remedies imposed on BT in the LTC/LTT market. However, in order to avoid any disruptive effects in the market, the following remedies will remain in place for a transitional period of twelve months: requirement to provide network access on reasonable request, requirement not to unduly discriminate, basis of charges, requirement to notify charges, terms and conditions and the requirement to publish a reference offer.

- 1.17 In the markets where BT retains SMP, we are imposing remedies so that other CPs are able to gain access to services that allow them to provide retail products in competition with BT's own retail operations. The majority of these remedies are unchanged from those currently in place, although we are updating some remedies to reflect the developments that have occurred in the market.
- 1.18 The key changes in the obligations we are imposing on BT in markets where it retains SMP are:
- to remove the requirement for BT to comply with specific functional specifications set out by Ofcom when it provides certain exchange line services (Wholesale Line Rental (WLR)) and call origination services (Carrier Pre-Selection (CPS)). These products are now mature. We consider the functional specifications are no longer proportionate and could, potentially, inhibit future development of services;
  - to reduce notification periods for price changes related to WLR (analogue and ISDN2) products, except for the core rental charges; and
  - to update reporting obligations to focus on demonstrating BT's compliance with its SMP obligations (whereas it now reports a wider set of data).
- 1.19 In the markets where KCOM retains SMP, we are imposing remedies so that other CPs are able to gain access to services that allow them to provide retail products in competition with KCOM's own retail operations. These remain unchanged (except for the same changes we are applying to BT, stated above).
- 1.20 In the markets where CPs retain SMP for terminating fixed geographic calls on their networks, we are imposing the same remedy as is currently in place. This remedy requires these CPs to provide call termination on fair and reasonable terms. In addition, we are consulting on imposing an obligation requiring all CPs to publish their termination rates.
- 1.21 We proposed in our consultation that there was a single market for wholesale transit services and that no provider had SMP in that market. However, based on responses to consultation, we have reconsidered this proposal. As a result, we are re-consulting in this document. This consultation proposes:
- Inter-tandem conveyance/transit and single transit are in separate markets;
  - BT has SMP in single transit, but not in inter-tandem conveyance/transit; and
  - We should impose on BT the following remedies in the single transit market: requirement to provide network access on reasonable request, requirement not to unduly discriminate, basis of charges, requirement to notify charges, the requirement to publish a reference offer, cost accounting and accounting separation.

## Section 2

# Introduction

## Scope of this statement

- 2.1 This document considers the markets for the wholesale provision of fixed narrowband services. These markets relate to the supply of wholesale exchange lines, call origination, call termination and various conveyance and transit markets that provide connectivity across narrowband networks. We also include an associated technical area – interconnection circuits – and BT’s product management, policy and planning activities (PPP) in this review.
- 2.2 In this statement we define these markets, conclude whether any undertakings have Significant Market Power (SMP) in any of these markets and, where SMP exists, impose appropriate remedies.
- 2.3 In Section 3 of this document we provide background to the review. Section 4 of this document explains the market review process that we have followed. Sections 5 to 10 review the markets, the associated technical area of interconnection circuits and PPP. Sections 11 to 18 then discuss the remedies to be applied where we have found that an undertaking has SMP. Section 19 outlines our re-consultation on Single Transit and the application of an obligation to publish charges for all other CPs in the call termination market.

## The Regulatory Framework

- 2.4 The regulatory framework that applies to the issues covered in this document is discussed in detail at Annex 6. The Framework is based upon five EU Communication Directives, four of which were implemented into UK law by the Communications Act 2003 (“the Act”) on 25 July 2003. The fifth directive was implemented by regulation on 11 December 2003.
- 2.5 The Act sets out, at Section 3, general duties of Ofcom where we must, in carrying our functions, further the interests of citizens in relation to communications matters and the interests of consumers in relevant markets, where appropriate by promoting competition.
- 2.6 Section 4 of the Act sets out duties of Ofcom for the purpose of fulfilling Community obligations.
- 2.7 The framework, as implemented by the Act, sets out the procedure to be followed when undertaking market reviews.
- 2.8 A market review normally has three stages:
  - Definition of relevant markets (market definition);
  - Assessment of competition in each market; in particular whether any undertakings have SMP in a given market (market analysis); and
  - Assessment of appropriate regulatory obligations where there has been a finding of SMP (remedies).



- 2.9 The regulatory framework requirements relating to the market definition stage are considered in detail at paragraphs A6.18 – A6.24 of Annex 6 of this document. In considering market definitions we have had regard to the European Commission's Recommendation on relevant product and services markets.
- 2.10 The regulatory framework requirements relating to the market analysis stage are considered in detail at paragraphs A6.25 – A6.33 of Annex 6. In considering market analysis we have taken due account of both the Commission guidelines (Guidelines for market analysis and the assessment of SMP) and guidance produced by Oftel in relation to the criteria to assess effective competition.
- 2.11 The regulatory framework requirements relating to the remedies stage are considered in detail at paragraphs A6.36 – A6.62 of Annex 6. Any remedy applied has to comply with section 47(2) of the Act, in that it has to be objectively justifiable, not unduly discriminatory, proportionate and transparent. Sections 87 and 88 also impose further tests on conditions that relate to network access and network access pricing.
- 2.12 SMP remedies can only be imposed following a finding of SMP in any particular market. However, remedies can apply to “technical areas” which are so closely related to the market in question that the remedy is the most appropriate method for addressing the identified market concern and that it is essential to render SMP obligations imposed on the market effective. Technical areas are specifically discussed in Section 10 of this document and at paragraphs A6.42 – A6.44 of Annex 6.

### **Markets and related areas considered in this review**

- 2.13 In this review we consider the markets for the wholesale provision of fixed narrowband services. These services are necessary for the provision of retail narrowband services.
- 2.14 Narrowband services include those services that use the public switched telephone network (PSTN). These services include basic telephony, facsimile traffic (fax) data modem traffic such as dial-up Internet access (typically up to a speed of 56kb/s) and services that make use of the Integrated Services Digital Network (ISDN). The relevant markets that we defined in our consultation were:
- Wholesale analogue exchange lines;
  - Wholesale ISDN2 exchange lines;
  - Wholesale ISDN30 exchange lines;
  - Wholesale call origination on a fixed narrowband network;
  - Wholesale fixed geographic call termination;
  - Local-tandem conveyance and transit; and
  - Wholesale transit services.
- 2.15 The majority of these market definitions remain unchanged in this statement. However, we are re-consulting in this document on:

- Whether the wholesale transit service market we previously defined should instead be defined as two markets: an inter-tandem conveyance and transit market and a single transit market.
- 2.16 In addition, we are not concluding on the wholesale ISDN30 market. Instead, we will progress this market separately. We explain our reasons for this in Section 5.
- 2.17 In parallel with this statement, Ofcom is also publishing a review of the retail narrowband services markets.
- 2.18 In addition to the markets above, we also consider interconnection. As explained above, the ability to connect networks together is vital in ensuring the effective functioning of the markets.
- 2.19 General Condition 1<sup>1</sup> of the General Authorisation Regime requires all CPs that provide public electronic communications networks (PECNs) to provide interconnection. However, in this market review, we consider whether further, specific interconnection obligations are required to ensure the effective functioning of each of the markets.
- 2.20 Interconnection is not a market in itself. However, the explanatory memorandum of the European Commission Recommendation on Relevant Products and Service Markets<sup>2</sup> identifies that, for some markets, obligations may need to be placed on associated services outside the market in order to ensure the effectiveness of competition within the market. We consider that interconnection is an associated service in relation to the markets described above.
- 2.21 In addition, we also consider BT's product management, policy and planning activities.

## Previous consultation

- 2.22 On 19 March 2009 we published a consultation<sup>3</sup> outlining our proposals for each of these markets.
- 2.23 We received responses to the consultation from:
- BT;
  - Cable & Wireless (C&W);
  - Federation of Communications Services (FCS);
  - KCOM;
  - O2;
  - Scottish and Southern Energy;

<sup>1</sup> [http://www.ofcom.org.uk/telecoms/loi/g\\_a\\_regime/gce/](http://www.ofcom.org.uk/telecoms/loi/g_a_regime/gce/)

<sup>2</sup> [http://ec.europa.eu/information\\_society/policy/ecomm/doc/library/proposals/sec2007\\_1483\\_final.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/library/proposals/sec2007_1483_final.pdf)

<sup>3</sup> *Review of the fixed narrowband services wholesale markets*, 19 March 2009 ([http://www.ofcom.org.uk/consult/condocs/review\\_wholesale/](http://www.ofcom.org.uk/consult/condocs/review_wholesale/))

- T-Mobile; and
- Zen Internet.

2.24 We also received eight confidential responses.

2.25 We summarise these responses and Ofcom's position in the relevant sections of this statement. This document must be read in conjunction with our consultation document where our original analysis was set out in full. Our conclusions in this statement are drawn from that original analysis and the further consideration we have afforded to each issue after carefully considering each and every response we received to our consultation.

## Outline of the rest of this document

2.26 The rest of this document is structured as follows:

- Section 3 provides background including the outcome of previous reviews, changes that have occurred since the last set of reviews that may impact the markets under consideration and NGNs;
- Section 4 explains the market review process;
- Sections 5 - 9 consider the first two stages of the market review process for the various markets. These sections first define the relevant wholesale market (market definition) before concluding whether any undertakings have SMP in the market. Remedies are considered separately in sections 11 to 17. The markets, and the section in which they are reviewed, are:
  - Section 5: Wholesale exchange lines;
  - Section 6: Wholesale call origination;
  - Section 7: Wholesale call termination;
  - Section 8: Local-Tandem Conveyance and Transit; and
  - Section 9: Wholesale transit services.
- Section 10 reviews interconnection circuits and whether these are required to be provided as a technical area associated with the above markets. It also discusses BT's product management, policy and planning (PPP);
- Section 11 discusses general remedies that we are imposing in the exchange lines and call origination markets and to interconnection;
- Sections 12 discuss the remedies we are imposing in the call termination markets;
- Sections 13 to 17 then discuss specific remedies as follows:
  - Section 13: Wholesale Line Rental (WLR);
  - Section 14: Carrier Selection(CS – also called Indirect Access (IA) in the UK) and Carrier Pre-Selection (CPS);

- Section 15: Number Translation Services (NTS) Call Origination;
  - Section 16: Charge controls; and
  - Section 17: Price regulation of wholesale ISDN30 exchange lines
- Section 18 discusses the revocation of previous regulation.
- Finally, Section 19 includes further consultation on the single transit market and an additional obligation in the call termination market requiring CPs other than BT and KCOM to notify charges.

## Section 3

# Background

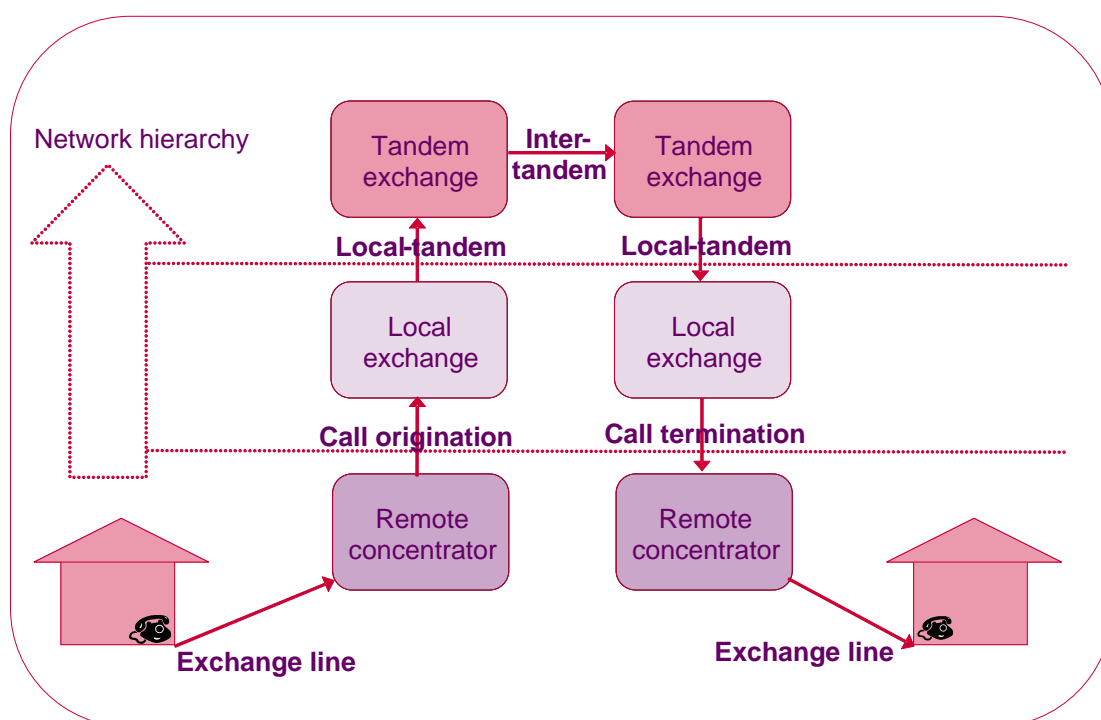
## Introduction

- 3.1 In this section we set out the regulation currently in place in the wholesale markets and the changes that have occurred in the market since the last review. We also discuss next generation networks and, in particular, their possible impact on the narrowband markets.

## Previous market reviews

- 3.2 In the previous round of reviews, the wholesale markets were defined as shown in Figure 3.1 below.

**Figure 3.1: Network segments considered in the wholesale fixed narrowband services market review**



- 3.3 Figure 3.1 shows the markets as applied to, in particular, BT's current network. Other CPs may structure their networks differently. In particular, in other networks, the Remote Concentrator Unit (RCU) is less likely to be physically remote from the Digital Local Exchange (DLE). Additionally, there is less likely to be separate local and tandem network layers.
- 3.4 These markets were last reviewed as follows:
- in 2003, Oftel reviewed the wholesale exchange lines, call origination, local-tandem conveyance and transit, inter-tandem conveyance and transit and single

transit markets. In addition this review considered the requirements for interconnection circuits as a technical area related to these markets<sup>4</sup>;

- separately in 2003, Oftel reviewed the fixed geographic call termination market<sup>5</sup>; and
- in 2005, Ofcom re-reviewed the local-tandem conveyance and transit and inter-tandem conveyance and transit markets<sup>6</sup>.

3.5 Table 3.2 below shows the regulation that is currently in place in the fixed narrowband services wholesale markets<sup>7</sup>. In Table 3.2 we refer to general remedies. These are remedies that were imposed in multiple markets where SMP was concluded to exist. The general remedies are:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Basis of charges;
- Requirement to publish a reference offer;
- Requirement to notify charges;
- Requirement to notify technical information;
- Cost accounting; and
- Accounting separation.

---

<sup>4</sup> Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, 28 November 2003 ([http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/nwe/](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/))

<sup>5</sup> Review of fixed geographic call termination markets, 28 November 2003 ([http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/Eureviewfinala1.pdf](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/Eureviewfinala1.pdf))

<sup>6</sup> Review of BT's Network Charge Controls, 18 August 2005 (<http://www.ofcom.org.uk/consult/condocs/charge/statement/>)

<sup>7</sup> KCOM plc ("KCOM") was previously referred to as Kingston Communications (Hull) plc ("Kingston").

**Table 3.2: Summary of existing regulation and remedies**

Market	SMP?	Obligations
Wholesale business analogue exchange lines	Y	BT: General remedies, WLR, charge control, transparency of quality of service, requests for new network access (SOR process) KCOM: General remedies
Wholesale residential analogue exchange lines	Y	BT: General remedies, WLR, charge control, transparency of quality of service, requests for new network access (SOR process) KCOM: General remedies
Wholesale residential ISDN2 exchange lines	Y	BT: General remedies (excl. basis of charges and cost accounting), requests for new network access (SOR process) KCOM: General remedies (excl. basis of charges and cost accounting)
Wholesale business ISDN2 exchange lines	Y	BT: General remedies, WLR, WLR Functional Specification, transparency of quality of service, requests for new network access (SOR process) KCOM: General remedies
Wholesale ISDN30 exchange lines	Y	BT: General remedies (excl. basis of charges, cost accounting), WLR, WLR Functional Specification, transparency of quality of service, requests for new network access (SOR process) KCOM: General remedies (excl. basis of charges, cost accounting)
Call origination	Y	BT: General remedies, charge control, CPS, CPS Functional Specification, IA, NTS call origination, FRIACO, BT's use of 'Cancel Other', BT's Credit Vetting Supplemental Agreement, transparency of quality of service, requests for new network access (SOR process) KCOM: General remedies, CPS, CPS Functional Specification, IA
Call termination	Y	BT: General remedies (excl. requirement to notify technical information), charge control, BT's Credit Vetting Supplemental Agreement KCOM: General remedies (excl. requirement to notify technical information) All other CPs that provide call termination: requirement to provide call termination on fair and reasonable terms
Local-tandem conveyance and transit	Y (BT only) <sup>8</sup>	BT: General remedies, requests for new network access (SOR process), charge control, FRIACO, BT's Credit Vetting Supplemental Agreement, LTT and ITT for IA (C&W)
Inter-tandem conveyance and transit	N <sup>9</sup>	
Single transit	Y (BT only)	BT: General remedies, requests for new network access (SOR process), charge control, BT's Credit Vetting Supplemental Agreement
Interconnection circuits	Y	BT: General remedies, requests for new network access (SOR process), charge control KCOM: General remedies

<sup>8</sup> In the 2003 review, Oftel concluded BT had SMP in this market and imposed remedies. In 2005, Ofcom reviewed this market again and found that BT still had SMP but stated the market was prospectively competitive.

<sup>9</sup> In the 2003 review, Oftel concluded BT had SMP in this market and imposed remedies. In 2005, Ofcom reviewed this market again and found BT no longer had SMP.

## Developments since the last review

- 3.6 Since the last round of market reviews, there have been a number of developments impacting the narrowband markets. We discussed these developments in the consultation to provide background to our consideration of the narrowband wholesale markets. We considered three areas: regulatory developments, market developments and future developments. Regulatory developments included:
- Same/Adjacent DLEs (SAD);
  - BT's Product Management, Policy and Planning charges (PPP);
  - Network Charge Control (NCC); and
  - Strategic Review of Telecommunications (TSR).
- 3.7 Market developments we considered were:
- WLR; and
  - CPS.
- 3.8 Future developments we discussed were:
- Next Generation Networks (NGNs).
- 3.9 In relation to NGNs, we highlighted that BT was reviewing its own approach to supporting voice services on its NGN, the 21<sup>st</sup> Century Network (21CN). We explained that a number of impacts may flow from 21CN.
- 3.10 In 21CN, narrowband traffic would be carried over IP (e.g. as VoIP). As other CPs have already deployed, or are planning to deploy, their own NGNs, interconnecting via IP becomes the most efficient mechanism for connecting the two NGNs. We set out that BT had discussed IP interconnection with industry. In particular, the Multi-Service Interconnect Link (MSIL) provides the physical connectivity to support IP interconnection, and the NGN Call Conveyance product provides the call routing.
- 3.11 We also said that the NGN architecture made other products possible. One such product is Wholesale Voice Connect (WVC). WVC is attractive in that it places control of the voice service into the CP's network to a much greater extent than is possible in TDM networks. WVC allows the CP's call server to control the BT owned MSAN to which the customer is connected. As such, the CP can control the line associated features (for example tones and announcements), call routing of traffic to and from the end customer (whereas in the current WLR and CPS product set the CP is not involved in termination to customers connected to the BT network) and additional features (such as dialling plans, voicemail services, etc.)
- 3.12 We also said that, under the plans for 21CN available at the time, the separate local and tandem layers evident in the TDM network would no longer exist and, as such, the LTC/LTT market would no longer be relevant.
- 3.13 Since we published our consultation, BT has announced it expects to maintain service on its current voice network for a considerable time. Migration to 21CN will occur but, during the period with which this review is concerned, significant migration to 21CN based voice services is much less likely to occur and there will not be a full



migration plan set out at the start of migration. BT also announced it was not progressing with development of WVC. This means that:

- Existing TDM interconnection is likely to remain in place longer and to a greater extent than previously expected;
- Any customers that are moved onto 21CN will be supported using a WLR type product, not a WVC type product; and
- The LTC/LTT market will continue to be a significant market for the lifetime of this market review period.

3.14 Ofcom has reflected on the first two of these in its NGN strategy consultation<sup>10</sup>. In that consultation we seek views on the right way to approach interconnection in an environment where TDM and IP co-exist. Whilst we are not imposing an obligation on BT to provide IP interconnection in this market review, it may be that our NGN strategy work concludes that such an obligation is needed. In that case we would need to re-visit the interconnection remedies imposed on BT in this document.

3.15 In relation to WVC, we are not imposing an obligation on BT to provide such a product in this market review. It would not be appropriate to impose such an obligation, because the network to provide it has not been deployed to any great extent, and the rollout of 21CN is not certain. However, we have found BT to have SMP in exchange lines, call origination and call termination. WVC provides capabilities across these markets. BT has an obligation in each of these markets to provide network access on reasonable request. Therefore, if BT rolls out 21CN during the period of this review, it would be required to supply WVC or a similar product if it is reasonably requested to do so.

3.16 In our NGN strategy consultation we also set out Ofcom's view on xMPF, which is a product discussed by industry to provide a voice only LLU product. xMPF may be considered to fall into the Wholesale Local Access (WLA) market in which BT has been found to have SMP and has the general obligation to provide network access on reasonable request. Therefore, as for WVC, BT would need to provide xMPF in response to a reasonable request to supply it.

3.17 Since our consultation, BT has also indicated it plans a much more comprehensive rollout of Next Generation Access (NGA) than it had previously announced. We said in our consultation that we expected the impact of NGA on narrowband markets to be minimal given the scale of deployment and that, in its initial plans, BT was not intending to remove the copper access network or the connection onto the RCU.

3.18 However, in the forward look period of this review, it is now more likely that the copper access connection onto the RCU may be removed in a subsequent stage of deployment. However, it is still unclear the extent to which the volume of lines delivered by this approach will be material. There are two ways this could occur:

- Removal of the copper connection to the RCU in a Fibre To The Cabinet (FTTC) deployment; or
- Fibre To The Premise (FTTP) deployment replacing the copper network or to new build where no copper has been deployed.

---

<sup>10</sup> *Next Generation Networks*, 31 July 2009, <http://www.ofcom.org.uk/consult/condocs/ngndevelopments/main.pdf>

- 3.19 We have considered the impact of this in Section 5 of this statement in relation to how NGA impacts the exchange lines markets and in Section 6 how it impacts call origination.

## Section 4

# Approach to the market review process

## Introduction

- 4.1 In this section we set out the process that we have followed in defining the markets within this review.
- 4.2 Section 79(1) of the Act provides that before a market power determination may be considered, Ofcom must identify the markets which are, in our opinion, the ones which, in the circumstances of the United Kingdom, are the markets in relation to which it is appropriate to consider such a determination and to analyse that market. Ofcom is, as noted above, required to take due account of all applicable guidelines and recommendations issued by the European Commission. We are required to issue a notification of our proposals. We are entitled, by virtue of section 80(2) of the Act, to issue this notification with its proposal as to a market determination and with his proposals for setting SMP services conditions. We issued such a single Notification at Annex 7 to our consultation, *the review of the wholesale fixed narrowband markets*, published on 19 March 2009 ("the March consultation"). We may, following the appropriate consultation period give effect to those proposals in accordance with section 80(6) of the Act. Where we choose to give effect to our proposals we are required under sections 79(4) and 48(1) of the Act to publish a notification containing our decisions. The notifications at Annex 7 to 12 are a notification containing all our decisions. The notification at Annex 13 is a further Notification under section 80(2) containing proposals upon which are seeking the further views of stakeholders.
- 4.3 We set out further detail on the legal framework pertaining to the market review process is set out in Annex 6.

## Key features of the Commission's approach to market definition

- 4.4 In formulating its approach to market definition, Ofcom has taken due account of the Commission's approach, which is primarily set out in the Recommendation and the accompanying explanatory memorandum (the "EM")<sup>11</sup>.
- 4.5 Recital (4) of the Recommendation clearly states that the starting point for market definition is a characterisation of the retail market over a given time horizon taking into account the possibilities for demand and supply side substitution. The wholesale market is identified based on this retail market. This approach is repeated in section 3.1 of the EM.
- 4.6 Section 3.1 of the EM also states that, because any market analysis is forward-looking, markets are to be defined prospectively taking account of expected or foreseeable technological or economic developments over a reasonable horizon linked to the timing of the next market review.

---

<sup>11</sup> Commission Staff Working Document, *Explanatory Note to the Commission Recommendation on Relevant Product and Service Markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services (Second edition)* ([http://ec.europa.eu/information\\_society/policy/ecomms/doc/library/proposals/sec2007\\_1483\\_final.pdf](http://ec.europa.eu/information_society/policy/ecomms/doc/library/proposals/sec2007_1483_final.pdf))

- 4.7 Furthermore, section 3.1 of the EM states that market definition is not an end in itself, but a means to assessing effective competition for the purposes of ex-ante regulation. Ofcom has adopted an approach by which this consideration is at the centre of its analysis. The purpose of market definition is to illuminate the situation with regard to competitive pressures. For example, Ofcom's approach to supply side substitution explicitly identifies as the key issue the question of whether additional competitive constraints on pricing are brought to bear by additional suppliers entering the market. Thus, the key issue is not the market definition for its own sake, but an identification of the extent and strength of competitive pressures.
- 4.8 Section 4 of the EM states that retail markets should be examined in a way that is independent of the infrastructure being used, as well as in accordance with the principles of competition law. Again this approach is key to Ofcom's analysis. Ofcom's approach is based on a competition law assessment of markets and an assessment of the extent to which switching among services by consumers constrains prices, irrespective of the infrastructure used by the providers of those services.

### General approach to market definition

- 4.9 There are two dimensions to the definition of a relevant market: the relevant products to be included in the same market and the geographic extent of the market. Ofcom's approach to market definition follows that used by UK competition authorities<sup>12</sup> and is in line with those used by European and US competition authorities.
- 4.10 Market boundaries are determined by identifying constraints on the price-setting behaviour of firms. There are two main competitive constraints to consider: how far it is possible for customers to substitute other services for those in question (demand side substitution); and how far suppliers could switch, or increase, production to supply the relevant products or services (supply-side substitution) following a price increase. In this assessment, supply side substitution will be considered as a low cost form of entry, which could take place within a relatively short period of time. The OFT Guidelines on Market Definition, OFT 403, December 2004, consider the relatively short period to be within a year. That is, for supply side substitution to be relevant, there would need to be additional competitive constraints arising from entry into the supply of the service in question, from suppliers who are able to enter quickly and at low cost, by virtue of their existing position in the supply of other services. As discussed below, only those supply side substitution possibilities that are viable in the absence of unregulated wholesale inputs will be considered as relevant to the analysis.
- 4.11 The 'hypothetical monopolist test' is a useful tool to identify close demand side and supply side substitutes. A product is considered to constitute a separate market if a hypothetical monopoly supplier could impose a small but significant, non-transitory price increase ("SSNIP") above the competitive level without losing sales to such a degree as to make this unprofitable. If such a price rise would be unprofitable, because consumers would switch to other products, or because suppliers of other products would begin to compete with the monopolist, then the market definition should be expanded to include the substitute products.
- 4.12 There might be suppliers who provide other retail and wholesale services but who might also be materially present in the provision of demand side substitutes to the

<sup>12</sup> Office of Fair Trading Market Definition Guideline ("Understanding Competition Law"), OFT 403, December 2004 ([http://www.of.gov.uk/advice\\_and\\_resources/resource\\_base/legal/competition-act-1998/publications](http://www.of.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/publications))

service for which the hypothetical monopolist has raised its price. However, such suppliers are not relevant to supply side substitution, as they supply services already identified as demand side substitutes. As such, their entry has already been taken into account and so supply side substitution cannot provide an additional competitive constraint on the hypothetical monopolist. However, the impact of expansion by such suppliers can be taken into account in the assessment of market power.

- 4.13 Sometimes an additional consideration is whether there are common pricing constraints across customers, services or areas such that they should be included within the same relevant market even if demand and supply side substitution are not present.

#### *Relationship between retail and wholesale markets*

- 4.14 This market review is focused on the fixed narrowband services markets at the wholesale level. However, consideration of competitive conditions in the retail markets logically precedes the analysis of the wholesale markets, since the demand for wholesale services is derived from the demand for retail services – the wholesale markets provide the relevant components in order to deliver the retail services.
- 4.15 Because of this, competitive conditions in both the wholesale and the retail markets need to be considered. Competitive constraints at the retail level can impact the definition of wholesale markets through the mechanism of indirect substitution. In defining markets at the wholesale level, indirect competitive constraints can sometimes be more important than direct competitive constraints. For example, there might be no direct alternative substitute to BT's call origination and/or conveyance services in some geographic areas. Nevertheless, BT may not be able to raise its prices for these wholesale services in these areas if such a move would cause consumers to substitute fixed calls for mobile calls<sup>13</sup>.
- 4.16 For the purpose of defining wholesale markets, retail competition should be considered absent regulation (and any remedies) in the *only* wholesale market under consideration. Whilst this counterfactual might not be significantly different to the situation where wholesale regulation exists, it may be problematic to establish. We have taken the utmost care to consider the retail market absent regulation.

#### *Geographic market*

- 4.17 In addition to the products to be included within a market, market definition also requires the geographic extent of the market to be specified. The geographic market is the area within which demand side and/or supply side substitution can take place and is defined using a similar approach to that used to define the product market. Ofcom has considered the geographic extent of each relevant market covered in this market review.
- 4.18 There are a number of possible approaches to geographic market definition. One approach would be to begin with a narrowly-defined area and then consider whether a price increase by a hypothetical monopolist in that narrowly defined area would encourage customers to switch to suppliers located outside the area (demand-side substitution) or operators outside the area to begin to offer services in the area (supply-side substitution). If supply and/or demand side substitution is sufficient to constrain prices then it is appropriate to expand the geographic market boundary.

---

<sup>13</sup> One necessary condition for indirect substitution to occur is that wholesale price increases translate into higher retail prices so that mobile call prices become sufficiently close to fixed calls prices.

- 4.19 Ofcom recognises that in certain telecommunications (product) markets in the UK, there could be different competitive pressures in different geographic areas. For example BT competes in the provision of local access with Virgin Media where it has cable access network infrastructure. We have to consider whether, in this case, it would be appropriate to identify separate geographic markets for some services. We have, for example, defined separate geographic markets in our Wholesale Broadband Access Market Review<sup>14</sup>. However, defining such geographic markets may be problematic because, due to the dynamic nature of telecommunications markets, the boundary between areas where there are different competitive pressures may be unstable and change over time, rendering the market definition obsolete.
- 4.20 Therefore, defining separate geographic markets is only likely to be a worthwhile exercise where the market conditions are considered to be sufficiently different on an ongoing basis.
- 4.21 An alternative approach is to define geographic markets in a broader sense. This involves defining a single geographic market but recognising that this single market has local geographical characteristics. That is to say, recognising that within the single market there are areas where competition is more developed than in other areas. This avoids the difficulties of proliferation and instability.
- 4.22 In carrying out this particular market review, Ofcom has taken into account the guidance on geographic markets produced by the European Regulators Group (ERG), *ERG Common position on Geographic Aspects of Market Analysis*, published in October 2008.

### Commission's Recommendation on Markets

- 4.23 In 2003, the Commission produced *The Recommendation on relevant product and services markets* identifying product and service markets within the electronic communication sector, in which *ex ante* regulation may be warranted.
- 4.24 The Commission reviewed its recommendation in 2007 and removed some markets from its list. In particular, the following market (formerly market 10 in the 2003 Recommendation) relevant to this review has now been removed:
- Transit services in the fixed public telephone network.
- 4.25 The Commission sets out the basis upon which it has identified markets at paragraph 2.2 of the EM. They identify three specific cumulative criteria (*'the three criteria test'*) that should be considered when identifying which markets are susceptible to *ex ante* regulation, where the relevant market(s) differ from those defined in the Recommendation. Those criteria are:
- Barriers to entry and to the development of competition;
  - Dynamic Aspects – no tendency to competition; and
  - Relative efficiency of competition law and complementary *ex ante* regulation.

<sup>14</sup> *Review of the wholesale broadband access markets*, 21 May 2008  
(<http://www.ofcom.org.uk/consult/condocs/wbamr07/statement/>)

*Barriers to entry and to the development of competition*

- 4.26 The presence of high and non-transitory entry barriers is a necessary condition for a market to be susceptible to ex ante regulation. The Commission identifies two types of barrier to entry, structural barriers and legal/regulatory barriers.

*Dynamic Aspects – no tendency to competition.*

- 4.27 The market must demonstrate characteristics such that it will not tend towards effective competition without ex ante regulatory intervention. The application of this criteria involves examining the state of competition behind the barrier to entry, taking account of the fact that even when a market is characterised by high barriers to entry, other structural factors or market characteristics and developments may mean that the market tends towards effective competition.

*Relative efficiency of competition law and complementary ex ante regulation*

- 4.28 Ex ante regulation would be considered to constitute an appropriate complement to competition law in circumstances where the application of competition law would not adequately address the market failures concerned.
- 4.29 In particular where we propose to identify a market that differs from a market set out in the Commission's list, or that does not appear in the current list, we will have utmost regard to the 3 criteria test set out in the EM.

**Market power assessment**

*Definition of SMP*

- 4.30 Sections 45, 46 and 78 *et seq.* of the Communications Act ('the Act') grant Ofcom the power under certain circumstances to set conditions binding Communication Providers, namely persons who provide an electronic communications network and/or an electronic communications service. Specifically, Section 46(7) states that SMP services conditions may be imposed on a particular person who is either a Communications Provider or a person who makes associated facilities available, and who has been determined to have SMP in a "services market" (i.e. a specific market for electronic communications networks, electronic communications services or associated facilities).
- 4.31 Accordingly, having identified the relevant product and geographic markets, Ofcom is required to analyse each market in order to assess whether any person or persons have SMP as defined in Section 78 of the Act (Article 14 of the Framework Directive<sup>15</sup>).
- 4.32 Under the Directives and Section 78 of the Act, SMP has been newly defined so that it is equivalent to the competition law concept of dominance. Article 14(2) of the Framework Directive provides:

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

---

<sup>15</sup> Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the "Framework Directive")  
([http://ec.europa.eu/information\\_society/policy/ecomm/current/index\\_en.htm](http://ec.europa.eu/information_society/policy/ecomm/current/index_en.htm))



*appreciable extent independently of competitors, customers and ultimately consumers."*

4.33 Further, Article 14(3) of the Framework Directive states that:

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

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

#### *The Criteria for assessing SMP*

4.35 In assessing whether an undertaking has SMP, Ofcom has taken due account of the EC's "Guidelines on market analysis and the assessment of SMP" ('SMP Guidelines') as it is required to do under Section 79 of the Act. Ofcom has also considered the application of the equivalent Oftel Guidelines<sup>16</sup>.

4.36 The SMP guidelines require NRAs to assess whether the competition in a market is effective (i.e. no operator is found individually or jointly dominant). This is undertaken through a forward looking evaluation of the market, determining whether the market is prospectively competitive, taking account of foreseeable developments.

4.37 Market share is an indicator of market power although the SMP Guidelines state that high market share alone is not sufficient to establish the possession of significant market power. The SMP Guidelines further state that, in the Commission's practice, single dominance normally arises where market shares are over 40%, and that in established case law, market shares of over 50% are taken as evidence for the presumption of a dominant position. This presumption of dominance is rebuttable and a thorough and overall analysis is required before coming to a conclusion on the existence of SMP. Non-exhaustive criteria are suggested to measure the power of a market undertaking. The relevant section from the Guidelines is set out in Annex 6.

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

#### The need for ex ante regulation

4.39 Before turning to the last market review stage concerning remedies, it is necessary to consider whether competition law remedies are sufficient to address the problem. This consideration is necessary to establish, in line with the 27<sup>th</sup> recital to the Framework Directive, whether or not a market is effectively competitive. (In this context it is to be noted that the importance of identifying the problem reappears

---

<sup>16</sup> Oftel's market review guidelines

([www.ofcom.org.uk/static/archive/oftel/publications/about\\_oftel/2002/smpg0802.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/about_oftel/2002/smpg0802.htm))



under Article 8(4) of the Access and Interconnection Directive. This is because obligations imposed in accordance with Article 8 shall be based on the nature of the problem identified, proportionate and justified in light of the objectives laid down in Article 8 of the Framework Directive.) In assessing the sufficiency of Competition Law, a number of considerations are taken into account.

*Appropriate to promote the development of competition*

- 4.40 As a competitive market is more likely to produce a more efficient outcome than a regulated market, the promotion of competition is central to securing the best deal for the consumer in terms of quality, choice and value for money.
- 4.41 Where markets are effectively competitive, ex post competition law is sufficient to deal with any competition abuses that may arise. However, without the imposition of ex ante regulations to promote actively the development of competition in a non-effectively competitive market, it is unlikely that ex post general competition law powers will be sufficient to ensure that effective competition becomes established. For example, this is because ex post powers prohibit abuse of dominance rather than the holding of a dominant position. Ex ante powers can be utilised to reduce the level of market power in a market and thereby encourage effective competition to become established.
- 4.42 The risk is not all one way as use of some ex ante measures can themselves limit or add little to the development of competition. Ofcom has recognised this in removing some regulation where markets are not effectively competitive.
- 4.43 Ofcom are proposing that ex ante regulation is necessary in most, but not all, of the markets covered by this document and Notification. The proposed remedies considered in Sections 11 to 17 are appropriate to promote the development of competition in downstream narrowband markets. A failure to regulate the legacy operator (BT or KCOM) in these markets is likely to affect the development of competition in that competing providers would be unlikely to provide intermediate or retail services without wholesale services provided by the legacy operator. In the absence of regulation, the legacy operator would have little incentive to provide such wholesale services.
- 4.44 It is preferable to apply regulation at the wholesale level as this both addresses SMP issues in the wholesale markets and promotes competition in downstream markets that rely on wholesale inputs. This fits with the requirement that NRAs take measures which meet the objective of encouraging efficient investment in infrastructure and promoting innovation (see Article 8(2) of the Framework Directive and section 4 of the 2003 Act). The regulation of wholesale markets encourages competing providers to purchase wholesale products and combine them with their own networks to create products in competition with the legacy operator.

*Market dominance*

- 4.45 Although communications markets have in general become increasingly competitive over time, this is from a position in which most were controlled by a legacy monopoly operator. The increase in competition that has occurred inevitably reflects the imposition of *ex ante* regulation to counter the market power of the legacy operator. Moreover, despite this, the legacy operator remains, in Ofcom's view, dominant in the majority of the markets in this review. Therefore, it would be appropriate to continue to impose *ex ante* regulations in these markets in order to ensure that effective competition can become established.

*Network externality effects*

- 4.46 Externality effects are present in the markets in this review. In particular, the network externality effect, which means that the value of a network to its users increases more than proportionately with the number of subscribers, gives the large incumbent network a great advantage over potential competitors. For example, the value of a large network might be little affected if it refused to deliver calls to or accept calls from a much smaller entrant, but the latter might find it impossible to attract subscribers as a result. As a consequence, this would enable the incumbent to exclude rivals from the market by refusing to interconnect with them or doing so only on onerous terms.
- 4.47 General *ex post* competition law powers may not be sufficient to address the effects of the network externality. This is because the network externality effect generally reinforces a dominant position and under general competition law there is no prohibition on holding a position of dominance in itself. Therefore, it may be more appropriate to address the impact of network externality through *ex ante* obligations, for example by requiring interconnection with the incumbent's network.

*Entry barriers*

- 4.48 The communications networks in this review are characterised by economies of scale, that is, average costs fall as output increases. Economies of scale result from the fact that a high proportion of the costs of a communications network are fixed while marginal costs (the costs of an extra unit of output) are relatively low.
- 4.49 While the extent of economies of scale varies in different parts of the network, their existence means that a large network will tend to have lower average costs than a smaller one. Successful entry by new network operators will therefore require significant investment and most of this will be sunk costs, in the sense that the costs will not be recoverable if the entrant decides to exit the market. Significant sunk costs create an asymmetry in the market between incumbents and potential entrants that the former could exploit to deter entry, if allowed to. Incumbents could exploit this asymmetry by signalling to a potential entrant that, if it were to enter the market, prices would be too low to cover sunk costs. Entry might therefore be deterred.
- 4.50 Also, although entry at the retail level by operators without their own networks is likely to require relatively smaller sunk investments, it is also likely to require regulated supply of wholesale inputs if retail competition is to become established where there is market power at the network level.
- 4.51 Therefore, in the communications markets covered by this document, especially where there is a requirement for larger sunk investments, *ex ante* regulation is appropriate to address the effect of this barrier to entry.
- 4.52 Ofcom does recognise, however, that inappropriate *ex ante* regulation can have the effect of limiting competition. In formulating remedies to overcome SMP, it is important to consider the extent to which the proposed remedies will address the specific problem identified.

## Section 5

# Wholesale fixed narrowband exchange line services

## Summary

- 5.1 This section focuses on fixed narrowband exchange lines markets that provide customers with switched telephony services with a bandwidth of 64kb/s and narrowband data services with a bandwidth up to 128 kb/s. These markets are:
- Wholesale analogue exchange line services;
  - Wholesale ISDN2 exchange line services; and
  - Wholesale ISDN30 exchange line services.
- 5.2 There are two separate geographical areas to which these market definitions apply:
- The UK excluding the Hull Area; and
  - The Hull Area.
- 5.3 Following consultation, BT has provided significant further information relating to our consideration of the ISDN30 market. We believe this warrants further consideration and we also consider that other stakeholders should be able to comment on this additional information. Therefore, we are not concluding on the ISDN30 exchange lines market at this time. Instead, we will consider the ISDN30 market separately.
- 5.4 With regard to SMP assessments, we conclude that:
- BT has SMP in the wholesale analogue exchange lines and wholesale ISDN2 exchange lines markets in the UK excluding the Hull Area; and
  - KCOM has SMP in the wholesale analogue exchange lines and wholesale ISDN2 exchange lines markets in the Hull Area.
- 5.5 We are imposing the remedies shown in Table 5.1:

**Table 5.1: Summary of remedies in the analogue and ISDN2 exchange lines markets**

	BT obligations	KCOM obligations
Wholesale analogue exchange lines	Requirement to provide network access on reasonable request Requests for new network access Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges, terms and conditions Requirement to notify technical information Cost accounting Accounting separation Transparency as to quality of service Obligation to provide WLR Charge control	Requirement to provide network access on reasonable request Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges, terms and conditions Requirement to notify technical information Cost accounting Accounting separation
Wholesale ISDN2 exchange lines	Requirement to provide network access on reasonable request Requests for new network access Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges, terms and conditions Requirement to notify technical information Cost accounting Accounting separation Transparency as to quality of service Obligation to provide WLR	Requirement to provide network access on reasonable request Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges, terms and conditions Requirement to notify technical information Cost accounting Accounting separation

5.6 We discuss these remedies in Section 11 to Section 17 of this document.

5.7 As set out above, we are not concluding on ISDN30 exchange lines at this time. Therefore, the existing remedies in these markets imposed on BT and KCOM will continue to apply until our further analysis is concluded.

## Market Definition

5.8 In the consultation we proposed the following wholesale fixed narrowband exchange line markets in the UK excluding the Hull Area:

- Wholesale analogue exchange line services on a fixed narrowband network;
- Wholesale ISDN2 exchange line services on a fixed narrowband network; and
- Wholesale ISDN30 exchange line services on a fixed narrowband network.

5.9 We proposed the following wholesale fixed narrowband exchange line markets in the Hull Area:

- Wholesale analogue exchange line services on a fixed narrowband network;
- Wholesale ISDN2 exchange line services on a fixed narrowband network; and
- Wholesale ISDN30 exchange line services a fixed narrowband network.

5.10 We proposed these markets after considering a number of factors. We first of all considered the retail markets. It is important to do so since the wholesale markets are derived from the retail level. It is also important that we consider the level of competition that would exist at the retail level if there was no wholesale regulation in place. Our preliminary conclusions at the retail level, based on our market research, were that:

- Fixed access and calls are separate markets;
- Mobile and fixed access are separate markets;
- Residential and business access are separate markets; and
- There is a single geographic market for the UK excluding Hull, and a separate geographic market for Hull.

5.11 We considered the wholesale markets based on this retail definition. The wholesale market definition took account of both indirect constraints and direct constraints. Indirect constraints occur if an increase in the pricing of the wholesale product leads to a reduction in consumption of the retail products based upon the wholesale product. In the case of the narrowband exchange lines market we considered two options to which retail customers could switch: mobile access and alternate fixed access (such as LLU or cable). Since we had found that at the retail level, mobile access was not in the same market as fixed access, it follows that switching from fixed to mobile at the retail level in the event of a price increase at the wholesale level will not act as a constraint. We proposed that alternate fixed networks may not provide sufficient indirect constraint. Our market research indicated that there may be sufficient switching although it was not conclusive.

5.12 We also considered whether direct constraints from CPs that provided their own exchange lines (or exchange lines products at the wholesale level) were sufficient to suggest these alternate networks were in the market. Again we excluded mobile access as it is not able to provide the features required by customers of fixed access. We considered that direct substitution opportunities had been relatively weak due to the high cost of deployment and that LLU may not provide an effective alternative for narrowband only access. However, we considered that the strength of this constraint is increasing as more full LLU deployment occurs.

5.13 Market definition is not an end in itself but a means to assessing effective competition for the purposes of ex-ante regulation. Given that BT's market shares would still be substantial whether the market is defined to include or exclude cable and LLU, and given that BT's product prices constrain LLU and cable such that suppliers using these options cannot profitably raise prices, we considered that further analysis of the market definition would not provide further clarity. We therefore proposed that the markets included alternate fixed narrowband networks such as direct access and

LLU but also explained in our SMP analysis that a narrower market definition would not result in a change to our proposals of SMP.

- 5.14 At the retail level we defined separate business and residential markets. However, we proposed at the wholesale level that there was a single market because the underlying products had converged to the extent that the difference between the basic products supplied to the business and residential markets were minimal.
- 5.15 We further proposed that analogue, ISDN2 and ISDN30 formed separate wholesale markets because the different functionality and pricing of these products meant they were not substitutes for each other.
- 5.16 We also set out our view of developments over the forward look period of this review. These concerned mainly the possibility of increased fixed/mobile convergence, the deployment of NGN and NGA, VoIP, and the likely development of existing technologies.
- 5.17 We said that we expected, for access lines, fixed and mobile to remain complements rather than substitutes. We also highlighted potential fixed-mobile convergence (FMC) solutions, but said that as these tended to rely on the presence of a fixed line to provide a broadband connection over which the FMC service ran, these types of convergence drive use of fixed broadband access which in turn requires fixed narrowband access. We also said it was also unclear the extent to which these technologies could meet other needs identified by consumers for retaining fixed services. Therefore, we said that whilst these services may develop over the next three to four years, we do not expect this development to drive significant reduction in the demand for fixed narrowband access.
- 5.18 We then discussed NGN deployment. In the context of exchange lines, NGN deployment across the industry may have three main effects:
- The NGN access device, the MSAN, allows both narrowband and broadband services to be provided. This may lead to a greater use of LLU for the provision of narrowband services than is currently experienced today. We have discussed this above;
  - The deployment of MSANs, along with backhaul with higher bandwidth, may lead to increased broadband speeds over fixed networks reinforcing consumer demand for fixed access; and
  - The deployment of new technology in mobile networks may lead to increased broadband speeds being available over mobile networks, reducing the demand for fixed access.
- 5.19 Taking the above points together, we considered that an increase in mobile broadband access speeds during the period considered in this review were unlikely to significantly reduce the requirements that consumers have for fixed access (either due to broadband requirements or other reasons).
- 5.20 We also note that, since publishing our consultation, BT has commenced a review of its 21CN deployment strategy. As such, it is likely that BT's deployment of 21CN has less impact on exchange lines in the forward look period than we previously expected.

- 5.21 Next Generation Access deployments may also impact narrowband access requirements, since this may affect the way consumers access fixed broadband services. NGA deployments have been announced by Virgin Media and BT. Whilst a narrowband access contract is not a pre-requisite of Virgin Media's super-fast broadband offer, other reasons identified by market research indicate to Ofcom that customers taking this offer may keep their narrowband access for other purposes. The Virgin Media service has been launched recently and will be available in the cable network areas. BT is trialling its NGA FTTP offer in Ebbsfleet. At the time of our consultation, we said that the percentage of the market covered by BT's proposed FTTP deployment is relatively small compared to its FTTC deployment and the total market. However, we also note that BT's plans are developing in this area and, at the time of this statement, BT has indicated that FTTP deployments may be significantly larger.
- 5.22 Since our consultation, there has been further clarification of BT's NGA plans although absolute rollout details are not available beyond trial deployments. Ofcom notes, for example, that Openreach has recently consulted on a Voice over NGA product. This product assumes that the copper infrastructure is replaced. However, no dates for removal of the copper access network have been discussed at this time. Therefore, our view remains that there will be a very high proportion of end users served via copper delivery in the forward look period of this review.
- 5.23 We also flagged that use of voice over Internet Protocol (VoIP) technology requires broadband and this will, in turn, drive the demand for narrowband access.
- 5.24 Regarding existing technologies, Ofcom considers that these will be subject to the following developments:
- ISDN – we said the ISDN2 market is likely to slightly decline. We also said we expected ISDN30 to remain relatively flat. As noted above, we have recently received additional information from BT related to the ISDN30 market.
  - Analogue access will continue to be provided. There may be an increase in the number of wholesale offers available if the number of CPs deploying narrowband service over LLU was to increase.
  - Leased lines such as PPCs will continue to be used to provide ISDN30 lines.
- 5.25 We therefore conclude that these developments will not affect our market definitions for analogue and ISDN2 exchange lines during the period covered by the review. We will, however, continue to monitor each of these potential market developments. We will consider future impacts on ISDN30 separately when we consider the ISDN30 market.
- 5.26 Finally, we set out our views on geographic markets. We recognised that there are some variations in the competitive conditions due to the presence of cable and/or LLU in some parts of the UK but that we did not see this as sufficient to define separate geographic markets. We therefore defined a single national market within the UK excluding Hull and a separate market for Hull.

## Market power assessment

### Assessment of SMP in the UK excluding the Hull area

- 5.27 In our consultation document we proposed that BT had SMP in the wholesale analogue, ISDN2 and ISDN30 exchange lines markets in the UK excluding the Hull Area based on the following factors.
- 5.28 BT's market share of analogue lines was shown to be over 80%, its share of ISDN2 lines was almost 100% and its share of ISDN30 lines was around 67%.
- 5.29 We considered that the considerable investment required to set up an access network presented a substantial barrier to entry for the wholesale supply of analogue exchange lines. Whilst the existence of LLU reduces the cost of deploying access network products (as it allows a CP to use BT's existing infrastructure) the investment required to deploy narrowband and broadband services over LLU remains substantial.
- 5.30 We also considered that the significant economies of scale and scope that BT has in the wholesale exchange line markets, due mainly to its nationwide network deployment of duct infrastructure that supports a range of other communication services, further strengthened entry barriers.
- 5.31 We did not consider that other CPs were likely to possess sufficient countervailing buyer power to undermine BT's market power given the limited availability of alternative suppliers.
- 5.32 Finally, we noted that BT's prices had been charge controlled for analogue lines and been subject to cost orientation for ISDN2.
- 5.33 We also discussed ISDN30 but since we are separating this out into its own document, we do not discuss it further.

### Assessment of SMP in the Hull Area

- 5.34 In our consultation document we proposed that KCOM had SMP in the wholesale analogue, ISDN2 and ISDN30 exchange lines markets in the Hull Area.
- 5.35 KCOM is the only supplier of retail analogue lines. It therefore has 100% market share of exchange analogue lines at the wholesale level, which creates a presumption of dominance. For business customers in the Hull Area, there has been some entry into the ISDN2 and ISDN30 access markets, because of direct connection from other CPs via, in particular, PPCs and radio links. This, however, does not appear to be at the level that would prevent KCOM from setting prices above the competitive level.
- 5.36 The barriers to entry in the exchange line markets in the Hull Area are similar to those in the exchange line markets in the rest of the UK. We argued that in addition to the barriers discussed above, the size of the Hull Area represented a further barrier, since the relatively small market size meant the high initial fixed costs of establishing a network (via either a direct access network or LLU) would need to be recovered over a significantly smaller customer base.
- 5.37 Whilst the relevant narrowband access markets in the Hull Area are much smaller than in the rest of the UK, the assessment of the other SMP criteria as applied above



to BT in the rest of the UK equally relate to KCOM and the Hull Area. This suggests that KCOM would not be constrained in its pricing of these services.

- 5.38 Again, since we are considering ISDN30 separately we do not plan to discuss it further.

## Forward look

- 5.39 We discussed whether the developments considered in the forward look associated with the market definitions may impact our SMP assessment. We considered that the assessments of market power and the findings of SMP in the relevant markets was unlikely to change in the period covered by the review given BT's and KCOM's high market share and the rate of deployment of alternative infrastructure solutions.

## Relationship between the wholesale market definition and the Commission's Recommendation on product and service markets

- 5.40 In our consultation we proposed to define markets based upon exchange lines. The Commission does not define exchange lines markets. Its definition makes reference to unbundled access. We explained that we considered it necessary to define narrowband wholesale exchange line markets in order to examine the competitive conditions present and consider appropriate regulatory remedies. This approach remains consistent with our current definition of these markets. In doing so, we set out in the consultation that we had given careful consideration to the three criteria set out in the EM. We proposed that, in relation to all three identified exchange line markets, the three criteria test was met, and the imposition of appropriate ex ante regulation was necessary.

## Consultation questions

- 5.41 We asked the following questions related to the market definitions and SMP proposals summarised above:

**Question 5.1:** Do you agree with Ofcom's assessment that there are separate markets for analogue, ISDN2 and ISDN30 wholesale exchange lines and that there are separate geographic markets for the UK excluding the Hull Area and the Hull Area? If not, please explain why.

**Question 5.2:** Do you agree with Ofcom's assessment that BT has SMP in analogue, ISDN2 and ISDN30 wholesale exchange lines in the UK excluding the Hull Area? If not, please explain why.

**Question 5.3:** Do you agree with Ofcom's assessment that KCOM has SMP in analogue, ISDN2 and ISDN30 wholesale exchange lines in the Hull Area? If not, please explain why.

**Question 5.4:** Do you agree with Ofcom's analysis of future developments that may affect these assessments? If not, please explain why.

## Consultation responses

- 5.42 We first of all discuss the analogue and ISDN2 markets.

## Market definition

- 5.43 One respondent argued that Ofcom had over-stated the ability for full LLU to act as a constraint on the price of wholesale analogue exchange lines. This is because full LLU provides both narrowband and broadband service only, so in order to substitute MPF for WLR effectively, the purchaser of WLR would need to also supply the end-user with broadband service. In addition, the pricing of MPF is such that, even if the price of WLR is increased by 10%, it is unlikely that purchasing a wholesale MPF solution from an MPF provider would be cost effective as an alternative to WLR. The respondent argued that LLU could only be considered a substitute if a narrowband only product was made available and the margin between LLU and WLR was increased.
- 5.44 Zen Internet, C&W and four confidential respondents agreed with Ofcom's proposals.
- 5.45 All respondents that specifically discussed the geographic scope of the markets agreed with the geographic market definition.

## Residential and business analogue markets

- 5.46 BT argued that we had not fully explained our rationale for considering that wholesale analogue residential and business lines were in the same market. Whilst BT does not necessarily object to a simplification of the market definition as long as it does not impact on its ability to offer differentiated products within the market to residential and business users, it believes the conditions identified by Ofcom in the market review in 2003 that led to separate residential and wholesale markets still exist, and that there has not been a fundamental change in the way in which BT delivers wholesale analogue exchange lines products.
- 5.47 KCOM argued that in defining a single analogue exchange lines market in the Hull Area, Ofcom had not taken account of the constraint placed on business analogue exchange lines by alternate access solutions such as leased lines. KCOM referenced Ofcom's finding that KCOM does not hold SMP in low bandwidth traditional interface (TI) leased lines (although KCOM continues to hold SMP in Traditional Interface Symmetric Bandwidth Origination (TISBO) circuits up to and including 8Mb/s) as evidence that, along with decreases in the number of circuits provided, alternate access methods are imposing a stronger constraint.

## ISDN2

- 5.48 In relation to ISDN2, BT argued that Ofcom had started by assuming the BT product was the market definition and had not taken sufficient account of substitute products including: "broadband or xDSL services, PSTN, IP-based solutions and mobile or VoIP where ISDN2 is used to only provide voice."
- 5.49 BT raised two concerns. First, the SSNIP test carried out by Ofcom "appears to relate either to wholesale analogue exchange lines or wholesale exchange lines more generally without a specific SSNIP test for ISDN2". Second, BT argues that Ofcom fails to consider indirect competitive constraints at the retail level. BT states that it considers broadband to be the primary alternative to ISDN2 and that this provides an indirect constraint on ISDN2 at the wholesale level.

## Market power analysis

- 5.50 FCS, Zen Internet, C&W and four confidential respondents agreed with Ofcom's proposal that BT has SMP in the UK excluding the Hull Area.
- 5.51 FCS, Zen Internet, C&W and one confidential respondent agreed with Ofcom's proposal that KCOM has SMP in the Hull Area.
- 5.52 BT agreed with our assessment of its SMP in analogue exchange lines.
- 5.53 BT said that Ofcom's assessment over-stated BT's market power in the supply of ISDN2. In particular, the substitution of ISDN2 by broadband and other services had not been taken sufficiently into account. KCOM said that as the volumes of ISDN2 were falling, remedies were no longer proportionate.

## Forward Look

- 5.54 Zen Internet and two confidential respondents agreed that likely developments in NGN and NGA during the period were unlikely to affect either the market definition or the finding of SMP.
- 5.55 BT said that the three areas identified by Ofcom in our forward view would "create potential uncertainty in relation to its SMP designation (albeit over an extended period)". BT made the following points:
- The relationship between mobile and fixed services is maturing. In an NGN environment, mobile and fixed networks are "practically indistinguishable" in functionality. Mobile networks cannot, therefore, be considered irrelevant in considering fixed line markets in the future;
  - The use of IP transport in an NGN environment will drive increased demand for IP-based solutions which is likely to be at the expense of legacy ISDN products; and
  - NGA networks will require a fundamentally different approach from those taken in the wholesale narrowband review. BT states that Ofcom has recognised that existing regulation may be impractical or unnecessary. In particular, copper-based remedies would not be appropriate. As such, BT seeks "absolute clarity from Ofcom that the remedies proposed in the Ofcom Consultation are not intended to be applied in an NGA environment".
- 5.56 KCOM raised the potential for NGA deployments by alternate providers to act as a much greater constraint in the Hull Area than "Ofcom's limited analysis suggests".

## Ofcom's response

- 5.57 We address these concerns in the following order:
- Substitutability between narrowband exchange lines and LLU;
  - Residential and business markets;
  - Substitutability of ISDN2 with broadband; and
  - Next Generation Access

### Substitutability between narrowband exchange lines and LLU

- 5.58 In our consultation we set out that narrowband exchange lines may be provided by LLU, but that LLU may not be suitable for customers with only narrowband lines or who wish to take narrowband and broadband services from different CPs. Therefore, whilst an analogue exchange line provided via LLU is largely the same in the narrowband functionality it can support, the inability to use LLU to compete for narrowband only customers, along with the geographic limitation of LLU will limit the constraints it places on the hypothetical monopolist provider. As such, we stated that: “direct substitution possibilities have been, to date, unlikely to be either sufficiently strong or sufficiently timely to impose anything other than a weak competitive constraint”.<sup>17</sup> However, we also argued that this did not necessarily mean an unregulated monopolist would necessarily be able to profitably implement a SSNIP everywhere. We did not definitively conclude on whether narrowband lines provided over LLU were in the same market, since, as pointed out in paragraph 5.131 of our consultation, this would not impact our SMP analysis.
- 5.59 In relation to the provision of a narrowband-only LLU product (discussed by industry as xMPF), we note this may make LLU capable of providing narrowband only lines and, potentially, allow different CPs to provide the narrowband and broadband service. Ofcom provided its views on xMPF in its recent NGN consultation<sup>18</sup>.
- 5.60 We said that, at present, the most appropriate method for resolving the issue of xMPF will be through the BT Statement of Requirements (SoR) process. If there is demand for such a product, then CPs have the option of submitting an SoR to BT, and provided the request is reasonable and xMPF is judged to sit in the WLA market, BT would be obliged to meet it.

### Residential and business analogue markets

- 5.61 In proposing a single wholesale market for analogue exchange lines we considered that, on the demand side, the wholesale products for residential and business analogue lines were sufficiently similar to be regarded as belonging to the same product market, through a chain of substitution argument. In the previous market review, these markets were found to be separate. Since then, the products supplied have become less differentiated, with service levels now the key difference between residential and business users, although residential users can choose to pay to receive higher service levels.
- 5.62 Openreach offers two rental products at the wholesale level: WLR Basic and WLR Premium. Their prices were set in 2005 based on the differentiation between the products that existed at the time and that were the basis for defining separate residential and business markets in the market review of 2003. However, the majority of these differences have diminished over time with the key remaining differences being based on service levels and phonebook entries. The basic product includes an entry in the residential phonebook only, whereas premium allows the choice between residential and business. We, therefore, consider these to be insignificant differences, and there is evidence that some businesses (generally small companies) buy the residential product.

<sup>17</sup> Para 5.113 *Review of the wholesale fixed narrowband markets consultation*, 19 March 2009, [http://www.ofcom.org.uk/consult/condocs/review\\_wholesale/](http://www.ofcom.org.uk/consult/condocs/review_wholesale/)

<sup>18</sup> *Next Generation Networks*, 31 July 2009, <http://www.ofcom.org.uk/consult/condocs/ngndevelopments/main.pdf>

- 5.63 Given that, since 2003, both products have been subject to a charge control which reflected greater product differentiation at the time the controls were set, the current prices are not necessarily good proxies for those that would prevail in a competitive market. In such a market, we would expect the price differential between services that have limited differentiation of value to users to reflect more closely the relatively low difference in costs of the services. In other words, if a hypothetical monopolist provider of WLR Premium lines increased its prices by 5-10% above the competitive level, it is likely that, given the minimal difference in service levels, a relatively substantial number of customers (the small firms in particular) would find it more attractive to switch to the WLR Basic product. A relatively substantial substitution from the (more highly priced) premium lines to basic lines is likely to render the SSNIP unprofitable even in the case where the hypothetical monopolist of premium lines would also be the main supplier of basic lines.
- 5.64 In relation to KCOM's argument that PPCs may be used as substitutes and therefore provide greater constraint in the business markets than in the residential markets, our view is that substitution by PPCs will mainly be focused on the ISDN30 market. It is much less likely that a PPC will be used to substitute for analogue or ISDN2 lines.

## ISDN2

- 5.65 In relation to broadband substitution, Ofcom acknowledged substitution by broadband in paragraph 5.53 of our wholesale consultation: "the use of ISDN2 to provide access to the Internet has largely been replaced by broadband." In addition, Ofcom's consultation proposed that the effect of this substitution was that the market for residential ISDN2 was no longer relevant.
- 5.66 We also agree with comments from several respondents that ISDN2 use may be gradually declining. Its use is becoming more relevant as a backup or resilience connection.
- 5.67 However, and as BT states, ISDN2 is used for a number of other purposes including point of sale machines, Automated Teller Machines (ATMs) and resilient back-up for other services. Table 5.2 below shows BT's wholesale ISDN2 volumes for the past three years, from BT's regulatory accounts:

**Table 5.2: Wholesale ISDN2 channels supplied by BT (in millions)**

	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>
Total channels	1.515	1.459	1.428	1.299
Internally supplied channels	1.344	1.201	1.081	0.898
Externally supplied channels	0.171	0.258	0.347	0.401

*Source: BT Regulatory Accounts*

- 5.68 Table 5.2 shows a slight decline in the total number of ISDN2 lines supplied. We also note that in our previous market review in 2003, we estimated the wholesale business ISDN2 market size as 1.5 million lines<sup>19</sup>.

<sup>19</sup> Para 4.162 *Review of the fixed narrowband wholesale exchange lines, call origination, conveyance and transit markets*, Consultation, 17 March 2003, [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/eu\\_narrow/index.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/eu_narrow/index.htm)

- 5.69 In the period shown above, the functional differences between broadband and ISDN2 have widened (in terms of speeds available via broadband compared to the maximum 128kb/s available via ISDN2). At the same time, the retail price of broadband has fallen.
- 5.70 Where customers have previously used ISDN2 to provide internet access, those customers are likely to have migrated to a broadband based solution. However, this does not necessarily mean that broadband provides a constraint on the pricing of ISDN2 for all services for which ISDN2 has been used. Taking one of BT's examples, the advantages of broadband over ISDN2 are likely to be irrelevant for ATMs. Indeed, the key advantage of ISDN is that it provides a resilient, secure, high-quality level of service. Users of ISDN for this purpose may consider that broadband does not provide these features, and as such broadband cannot be considered to be a substitute product. As less ISDN2 is used for internet access, the remaining base will not, therefore, view broadband as a relevant substitute, and as such the pricing of ISDN2 will not be constrained by broadband pricing. This is confirmed by a review of Openreach's internal documents.
- 5.71 Therefore, Ofcom is of the opinion that there is a separate market for business ISDN2 and that BT has significant market power in the UK excluding Hull.
- 5.72 In response to KCOM, whilst we recognise that ISDN2 volumes provided in the Hull area are small, we have found that there are no alternative supply options and KCOM has SMP in the provision of these lines. It is therefore appropriate for Ofcom to impose remedies.

### Next Generation Access

- 5.73 Whilst the copper access network remains in place to provide narrowband services, it is appropriate for all the obligations imposed in this review to apply. This is irrespective of whether broadband is provided over the copper network, via FTTC or via an FTTP overlay.
- 5.74 Where BT proposes to deploy a FTTP solution where no copper access network is in place, or plans to remove the connection back to the RCU in an FTTC or FTTP environment, these deployments may provide the opportunity for products upstream of the narrowband markets to be deployed that are effective in addressing the competition issues we have identified in the narrowband markets in this review. This would lead to the opportunity for de-regulation in the future. However, if the most upstream product that is effective in addressing our concerns is a specific narrowband product, we would expect that there would be a need to continue to impose regulatory obligations in the narrowband markets. Therefore, we believe it is prudent to consider the specific regulation required once these products are better understood.
- 5.75 Whilst specific product obligations may need to be reviewed or removed, or new obligations imposed to take account of new technology, we have taken a technology neutral approach throughout this review to allow for new and/or replacement products to be developed using these new network technologies and for a consistent regulatory approach to be applied as the need arises.
- 5.76 In response to BT's specific comments regarding WLR, we set out Ofcom's position in Section 13 of this statement. In summary, the WLR condition may continue to be relevant in order to ensure a wholesale narrowband service can be provided by CPs once the copper access network is no longer available. However, the specific product

that delivers this may be different. The condition being imposed is neither product nor technology specific. As discussions around NGA products evolve, a better understanding of the capabilities available in respect of voice will develop and it may be appropriate to review this condition. However we consider that the condition should be interpreted, in the NGA environment where no copper remains as:

- A CP should be able to provide a wholesale narrowband service via the NGA network, such that it can support a Publicly Available Telephony Service (PATs) and can own the retail relationship with the end customer.
- However, this does not necessarily mean the existing WLR product needs to be replicated over NGA. Technology options that allow greater flexibility and innovation potential to CPs should be fully considered before the final product design is confirmed.

## Conclusion on analogue and ISDN2 markets

### Conclusion on market definition

5.77 We remain of the view for the reasons set out above and in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to that consultation that the relevant markets are:

- Wholesale analogue exchange line services; and
- Wholesale ISDN2 exchange line services.

5.78 There are two separate geographical areas to which these market definitions apply:

- The UK excluding the Hull Area; and
- The Hull Area.

### Conclusion on market power assessment

5.79 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to that consultation, we conclude that BT has SMP in the wholesale analogue exchange lines and wholesale ISDN2 exchange lines markets in the UK excluding the Hull Area, and that KCOM has SMP in the wholesale analogue exchange lines and wholesale ISDN2 exchange lines markets in the Hull Area.

5.80 Specifically in relation to BT's supply of wholesale analogue exchange lines, having regard to BT's high market share, barriers to entry and lack of CBP we find that there is a risk of BT having the ability and the incentive to price excessively. We therefore consider the imposition of a charge control is an appropriate remedy in this market. We set this out in Section 16. We do not consider this to be the case for KCOM due to the very small size of the market.

## Remedies

5.81 Based on the above conclusion, we are imposing a number of remedies in the markets where BT and, separately, KCOM have SMP. These are discussed in the following sections of this consultation as outlined below.



5.82 We are imposing the following general remedies on BT and KCOM:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Basis of charges;
- Requirement to publish a reference offer;
- Requirement to notify charges, terms and conditions;
- Requirement to notify technical information;
- Cost accounting; and
- Accounting separation.

5.83 These remedies are discussed in Section 11.

5.84 In addition, we are imposing the following remedies on BT:

- Transparency as to quality of service (discussed in Section 11);
- Requests for new network access (discussed in Section 11);
- Obligation to provide Wholesale Line Rental (WLR). This is discussed in Section 13; and
- Charge control: we discuss the charge control to be imposed on BT for analogue exchange lines in Section 16.

## ISDN30

### Consultation responses

5.85 Whilst most respondents agreed with Ofcom's analysis on market definition and SMP analysis for ISDN30, BT argued that Ofcom had started by assuming the BT product was the market definition and had not taken sufficient account of substitute products and had not looked at indirect constraints at the retail level.

5.86 BT said that ISDN30 will eventually be replaced by newer, alternate technologies. BT provided a forecast for UK business voice services. This showed growth in hosted VoIP and SIP Trunking between 2008 and 2013, with a slight decline in ISDN30 over the same period. BT pointed out that the forecast was provided by IDC, which also considered that the economic recession was slowing take-up of business VoIP services.

5.87 Finally, BT pointed to NGA developments, arguing that CPs could use NGA products to provide alternative access to PBXs.

5.88 Based on this, BT argued that, Ofcom's assessment over-stated BT's market power. In particular, the substitution opportunities and constraints that existed due to other providers in the market had not been taken sufficiently into account.



## **Developments since the consultation and next steps**

- 5.89 Since the consultation closed, BT has provided Ofcom with further information related to the ISDN30 market and possible developments within the forward look period. BT has presented that ISDN30 is a mature product close to the end of its life. BT stated that substitute products are becoming available at a much quicker rate than considered in our consultation. These products deliver voice over IP using wholesale broadband connections (such as Wholesale Broadband Connect) or Ethernet (in particular, Ethernet in the First Mile (EFM) which is provided using multiple MPF lines to provide an Ethernet access connection). In addition, BT said that its proposed deployments of NGA will provide further substitution possibilities. Taken together, the impact of these, in BT's view, will lead to a significant decline in ISDN30 volumes in the next four years.
- 5.90 Based on this recently received information, we have decided further work is required to conclude our analysis of the ISDN30 market and the remedies required in this particular market. We also think that we should give other stakeholders the opportunity to comment on these arguments.
- 5.91 The imminent expiry of the current network charge controls means we have had to conclude our market analysis in those markets currently subject to the NCC in order to avoid an uncertain period between the end of one charge control and the commencement of the next. Therefore, we have decided to issue this statement now, and to conclude our analysis of the ISDN30 market as a separate follow-on project.
- 5.92 We have not reached a conclusion on our market definition, SMP analysis or a final decision on any remedies that may be required in this market. We will progress this via a further publication shortly.
- 5.93 As we have not concluded our analysis, the current market definition and regulation of the ISDN30 wholesale market will remain in place, and we do not intend to withdraw any of the current SMP remedies applied to that market until such time as we complete our review.

## Section 6

# Call origination

## Summary

- 6.1 In this section we discuss call origination. Call origination relates to the conveyance of all signals (including relevant control signals) originating on a customer's exchange line to the first point in the network where those signals can be accessed by another communications provider. We conclude that the relevant product market is:
- Wholesale call origination on a fixed narrowband network
- 6.2 There are two separate geographical markets:
- The UK excluding the Hull Area; and
  - The Hull Area.
- 6.3 With regard to SMP assessments, we conclude that:
- BT has SMP in the market for call origination on a fixed network in the UK excluding the Hull Area; and
  - KCOM has SMP in the market for call origination on a fixed network in the Hull Area.
- 6.4 Based on these conclusions of SMP, we are imposing a number of remedies. We discuss remedies in Sections 11 to 17 of this statement. In summary, the remedies we are imposing in the call origination market are shown in Table 6.1:

**Table 6.1: Summary of remedies for call origination**

BT obligations	KCOM obligations
Requirement to provide network access on reasonable request	Requirement to provide network access on reasonable request
Requests for new network access	Requirement not to unduly discriminate
Requirement not to unduly discriminate	Basis of charges
Basis of charges	Requirement to publish a reference offer
Requirement to publish a reference offer	Requirement to notify charges, terms and conditions
Requirement to notify charges, terms and conditions	Requirement to notify technical information
Requirement to notify technical information	Cost accounting
Cost accounting	Accounting separation
Accounting separation	Obligation to provide CPS
Obligation to provide CPS	Obligation to provide IA
Obligation to provide IA	
NTS call origination, Retail Uplift and Bad Debt Surcharge	
Charge control	

## Market definition

- 6.5 In the consultation we proposed that the relevant market was for wholesale call origination on a fixed narrowband network and that there were two separate geographic areas: the UK excluding the Hull Area and the Hull Area.
- 6.6 We first considered the retail market where our market research indicated that:
- fixed access and calls are separate markets;
  - mobile calls are outside the market for fixed calls;
  - managed voice over broadband (VoB) is in the market for calls;
  - there is a single residential market for all call types (calls to geographic, non-geographic (for example, NTS calls), mobile and international numbers);
  - residential and business calls are in separate markets; and
  - there is a single UK geographic market excluding Hull and a separate Hull geographic market.
- 6.7 At the wholesale level, the channels of indirect substitution are similar to those described in the market for exchange lines. However, the proportion of any wholesale price increase that is passed on to retail consumers is also a key factor in considering whether any such constraint would be effective. Calculating accurately the percentage of the retail price that is made up by wholesale call origination is not straightforward given the extent of bundling at the retail level. However, we proposed that a 5-10% increase in wholesale call origination would imply at most an increase in the range of 1.5-3% at the retail level in the event that retailers would entirely pass the increase on to consumers. We considered that it was not certain that such a price increase would be passed on.
- 6.8 Since, at the retail level, we have established that mobile calls are just outside the market for fixed calls, we also proposed that it is clear that a 5-10% increase in wholesale call origination would be profitable to the extent that customers would not substitute mobile calls at the retail level so that, on the demand side, at the retail level mobile calls do not represent a sufficiently strong indirect constraint for call origination on a fixed narrowband network.
- 6.9 We said that, at the retail level, calls to geographic, non-geographic (including NTS), mobile and international numbers were in the same market. We therefore also proposed that there was a single call origination market at the wholesale level.
- 6.10 We said that other fixed networks may provide an indirect constraint as retail customers could move to these alternatives if an increase in the wholesale price led to an increase in the retail price. However, as set out above, the limited increase in retail prices even if a 10% increase at the wholesale level is fully passed through means this constraint may not be significant. As such, the increase in the retail price may not be substantial enough to lead to sufficient substitution to, e.g. cable and LLU-supported call products.
- 6.11 We also said that alternate fixed networks may provide sufficient direct constraint based on LLU or other alternate direct access networks, although similar limitations to those explained for exchange lines again existed.

- 6.12 Wholesale call origination costs and charges are the same whether the exchange line is provided to a residential or business customer and whether the service is PSTN or ISDN. Therefore we concluded that all these were in the same market.
- 6.13 Based on the above we proposed that the relevant product market was wholesale call origination on a fixed narrowband network. While call origination on alternative fixed networks may or may not impose a constraint on BT's pricing of wholesale call origination, we proposed for clarity to include them in the relevant product market. We explained in our consultation that a narrower market definition would not have affected our SMP findings.
- 6.14 Although some variations in competitive conditions exist due to the presence of cable and/or LLU in some parts of the UK, conditions are sufficiently homogenous to result in a single market for the UK outside Hull. This is due to the uniform national voice pricing and because CPs are reliant on BT's network for full national geographic and product competition.
- 6.15 We set out that we do not consider that there will be development in the market that will affect our market definition during the period covered by the review. In particular, we note that mobile convergence is unlikely to affect the definition due to the relatively small proportion of total retail call price that wholesale call origination represents, combined with current pricing strategies that consist in offering bundles of minutes. The market definition was technology neutral to the extent that expected migrations to next generation networks, in particular BT's 21CN, could be accommodated.

## Market power assessment

### Assessment of SMP in the UK excluding the Hull Area

- 6.16 We proposed that BT had SMP in wholesale call origination on fixed narrowband networks in the UK excluding Hull. As discussed above, alternate fixed networks may be considered in the same market. However, even if these are taken into account, we estimated BT's market share of call origination across all fixed narrowband networks to be 73%.
- 6.17 Additionally, for a CP to be able to offer call origination services rather than relying on those provided by BT, it would need to have an access network. Therefore, the barriers to entry and economies of scale in the market for call origination are similar to those in the market for exchange lines.
- 6.18 We also noted in the consultation that BT has priced at the maximum level allowed within the charge controls imposed in the call origination market. Any alternate network that provides a wholesale call origination product would have its prices constrained by the BT rates since BT provides this service on a national basis (excluding Hull). This means that all purchasers of call origination are likely to use BT for some parts of the country (either directly or indirectly) and will therefore be in a position to substitute onto the BT network if prices of other CPs are not competitive.

### SMP Assessment in the Hull Area

- 6.19 As said in the review of exchange lines (see Section 5), KCOM has a 100% market share of wholesale residential exchange lines and does not face strong constraints in the pricing of its wholesale business lines. Furthermore, there are little alternative

networks as neither cable nor LLU are present in Hull. Alternatives are mainly in the ISDN30 market and are provided mainly via PPCs.

- 6.20 Barriers to entry are at least as strong, or possibly stronger, in the market for wholesale call origination in the Hull Area as in the rest of the UK (see Section 5 on exchange lines).

## Forward look

- 6.21 Increasing competition in the retail market for calls arising from other providers of fixed calls (Virgin Media, CPW and CPs using WLR) and mobile providers currently act as an effective constraint to BT's pricing for retail calls. However, for the same reasons as those mentioned in the forward look on market definition, these constraints are unlikely to pose a threat to BT's or KCOM's market power in the wholesale market for call origination during the period of this review.

## Relationship between the wholesale market definition and market power assessment and the Commission's recommendation on product and service markets

- 6.22 In our consultation we proposed to define separately the call origination market and the local-tandem conveyance ("LTC") and local-tandem transit ("LTT") market. Ofcom's proposed market definition therefore differs from the market 2 in the Commission's recommendation. This approach remains consistent with our current definition of these markets. In doing so, we set out in the consultation that we had given careful consideration to the three criteria set out in the EM. We proposed that, in relation to the call origination market, the three criteria test was met, and the imposition of appropriate ex ante regulation was necessary.

## Consultation questions

**Question 6.1:** Do you agree with Ofcom's assessment that the relevant call origination market is wholesale call origination on fixed narrowband networks and that there are separate geographic markets for the UK excluding the Hull Area and the Hull Area? If not, please explain why.

**Question 6.2:** Do you agree with Ofcom's assessment that BT has SMP in wholesale call origination on fixed narrowband networks in the UK excluding the Hull Area? If not, please explain why.

**Question 6.3:** Do you agree with Ofcom's assessment that KCOM has SMP in wholesale call origination on fixed narrowband networks in the Hull Area? If not, please explain why.

**Question 6.4:** Do you agree with Ofcom's analysis of future developments that may affect these assessments? If not, please explain why.

## Consultation responses

- 6.23 There was general agreement about our market definition and market power assessment for call origination.
- 6.24 BT did not disagree with our findings but expressed some concern about a possible change in these findings during the period of the review. In particular, BT commented

that they “are disappointed that Ofcom has not recognised the significant impact that mobile call substitution is having on call origination and the fact that a single market, particularly at the retail level, may become a reality prior to the next market review”. BT’s concern is that Ofcom’s market definition and SMP assessment becomes out-of-touch with market reality and BT is left facing all the burdens of SMP regulation while its major competitors (both fixed and mobile) would be free to act on the basis of commercial self-interest.”

- 6.25 The Number commented that voice over broadband (VoB) call origination should be included in the wholesale market for call origination and be subject to remedies. The Number “considers that Ofcom must clarify the treatment of managed VoB services in relation to the wholesale market for call origination on the public telephone network”.
- 6.26 The Number commented that, while at the retail level Ofcom included managed VoB services in the fixed narrowband calls markets this finding is not reflected in relation to the relevant wholesale market for call origination. The Number further commented that “having included call origination over alternative network architectures, such as cable, PPCs/fibre and LLU, no explanation is provided by Ofcom as to why wholesale call origination on “broadband” public telephone networks should also not also be included in the product market.”

### Ofcom’s response

- 6.27 In response to BT’s comment, we note that we specifically considered possibilities for fixed-mobile substitution in our market definition. Our starting point for defining the fixed wholesale call origination market was to consider whether a hypothetical monopolist of fixed wholesale call origination could profitably implement a SSNIP, typically 5-10%. It is on the basis of this test and the analysis of competitive constraints that mobile or alternatives fixed networks are or are not included in the same market as the focal product.
- 6.28 In our consultation, we set out that mobile call origination is, currently, unlikely to impose a direct constraint on BT’s pricing of wholesale fixed call origination because of the high dilution that any price increase at the wholesale level would be subject to at the retail level. Currently, this level of retail price increase is unlikely to prompt consumers switching from calling from their landlines to calling from their mobile phones in such a scale that BT would find it unprofitable to implement a 10% price increase in wholesale call origination. We also considered that mobile did not provide a direct alternative to wholesale call origination as mobile networks cannot provide fixed call origination to fixed lines operators selling narrowband calls at the retail level without undertaking significant investments. On this basis, we concluded that mobile was outside the wholesale market for call origination on a narrowband network.
- 6.29 While we recognise that, at the retail level, mobile calls are increasingly imposing a constraint on fixed calls, this is not necessarily the case for call origination at the wholesale level. If a material change occurs in competitive conditions in relation to substitution by mobile at the retail level which affects the competitive conditions in the wholesale market, it would be appropriate to consider whether Ofcom should review the market. However, we do not consider that there will be developments in the markets over the next four years that will affect our finding.
- 6.30 In relation to The Number’s comment on call origination on VoB, we concluded in the consultation that it is less clear than for exchange lines that the constraint imposed by call origination on alternate networks is sufficient to include them in the same

market as call origination on BT's network. We also said that call origination from alternate fixed networks may be in the same market as wholesale call origination on the BT network. Given that our SMP findings were unlikely to be affected by the inclusion or exclusion of alternate networks, we proposed for clarity to include them in the relevant market.

- 6.31 We did not explicitly discuss wholesale VoB call origination in the March consultation document as we believe that if a hypothetical monopolist of wholesale call origination increased prices by 5-10%, it is unlikely that the resulting price increase at the retail level (1.5-3% if the wholesale price increase is passed on completely which is unlikely) would cause consumers to switch from narrowband calls to VoB calls in such scale so as to make the SSNIP unprofitable.
- 6.32 It is also important to note that the specific concern raised by The Number relates to services provided by BT over a broadband connection. Currently, BT provides these broadband connections over the wholesale IPStream and Wholesale Broadband Connect (WBC) products, which in turn use the Shared Metal Path Facility (SMPF) product. BT is required to provide SMPF by conditions placed upon it by Ofcom due to its SMP in the Wholesale Local Access (WLA) market. Where the WLA market remedies have not proved effective, BT is also required to provide IPStream and WBC under its obligations in the Wholesale Broadband Access (WBA) market. Based on these remedies, we have found competition in the retail broadband market to be effective and BT does not have SMP in the provision of retail broadband services.
- 6.33 SMPF is provided in addition to a narrowband exchange line. In order to provide its own retail broadband services using SMPF, BT must also provide a narrowband exchange line. This narrowband exchange line and the calls made over it are regulated by this wholesale narrowband market review. BT has obligations to provide network access, to provide specific products (WLR and CPS) and pricing obligations in these markets.
- 6.34 All CPs that provide broadband services via SMPF, MPF or using the IPStream or WBC products provided by BT Wholesale have access to the same upstream inputs as BT in order to provide a VoB service. This is not the same as services such as Skype and Vonage, where the VoB service is provided by a different CP to the broadband provider. In our consultations we separated these out as "Un-managed VoB" services. We defined the VoB service provided by BT Broadband Talk as being a "Managed VoB" service.
- 6.35 We are also of the opinion that these services are different to scenarios discussed in relation to both Next Generation Networks (NGNs) and Next Generation Access (NGA) where the change of technology may lead to BT providing a single connection to the end customer. In this case a separate narrowband network may not be replicated and as such call origination on a narrowband network would move onto the broadband (IP) network. This remains a possibility with the forthcoming Next Generation Access (NGA) deployment, in particular the deployment of Fibre To The Premise (FTTP). BT's approach to deploying NGN and NGA networks is still the subject of some uncertainty. As BT's plans become clearer we will need to consider whether the current market definitions remain appropriate.
- 6.36 In general, for managed VoB services to be attractive they need to provide similar service at the same prices as the existing voice over narrowband services. As BT is required to provide a narrowband line wherever it provides a broadband service, if



the VoB service does not provide certain features, or is priced more expensively than the narrowband service, the customers will not use the VoB service.

- 6.37 The specific issue raised by The Number relates to BT's approach to providing certain call types over its broadband service. In particular, the terms offered to The Number at a wholesale level are not attractive to The Number, compared to those that exist on the narrowband network.
- 6.38 Ofcom has imposed an end-to-end connectivity obligation on BT<sup>20</sup>. This obligation requires BT to purchase fixed and mobile voice and narrowband data call termination services from any PECN. However, this obligation, when imposed, specifically excluded Voice Over IP and VoB services. In our statement imposing the end-to-end connectivity obligation, Ofcom stated<sup>21</sup>:

"Ofcom will keep the need for an extension of the end-to-end connectivity obligation under review and would examine the case for proposing ex ante conditions on other services, such as VoIP and VoB, should end-to-end connectivity not be provided in respect of them."

- 6.39 Ofcom is concerned that, notwithstanding our view that call origination for VoB calls is not in the same market as wholesale call origination on a narrowband network, end-to-end connectivity is not being provided on VoB services. In general, BT is likely to have commercial reasons to make its VoB products attractive compared to other products available via both VoB and traditional narrowband networks and this is likely to mean services provided by other suppliers need to be supported. However, there may be specific call types where this is not the case. For directory enquiries services, BT provides its own directory enquiries service which is accessible via its VoB product. The incentives that arise from this vertical integration are likely to lead to BT not providing the same commercial agreements on VoB since the end-to-end connectivity obligation does not take effect.
- 6.40 As the use of VoB services develops, it may therefore be appropriate for Ofcom to review its approach to these services which may include considering whether the end-to-end connectivity obligation should be updated to include VoIP and VoB services.

## Conclusion

- 6.41 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to that consultation, we conclude that the market is for wholesale call origination on a fixed narrowband network. Call origination relates to the conveyance of all signals (including relevant control signals) originating on a customer's exchange line to the first point in the network where those signals can be accessed by another communications provider. We conclude that there are two separate geographical markets:
- The UK excluding the Hull Area; and
  - The Hull Area.

<sup>20</sup> *End to end connectivity*, 13 Sep 2006, [http://www.ofcom.org.uk/consult/condocs/end\\_to\\_end/statement/](http://www.ofcom.org.uk/consult/condocs/end_to_end/statement/)

<sup>21</sup> Paragraph 3.37, *End to end connectivity*, 13 Sep 2006, [http://www.ofcom.org.uk/consult/condocs/end\\_to\\_end/statement/](http://www.ofcom.org.uk/consult/condocs/end_to_end/statement/)



6.42 With regard to SMP assessments, we conclude that:

- BT has SMP in the market for call origination on a fixed narrowband network in the UK excluding the Hull Area; and
- KCOM has SMP in the market for call origination on a fixed narrowband network in the Hull Area.

6.43 Having regard to BT's high market share, barriers to entry (which are the same as those for analogue exchange lines) and the fact that we do not consider that BT's price is constrained by competition, we find that there is a risk of BT having the ability and the incentive to price excessively. We therefore consider the imposition of a charge control is an appropriate remedy in this market. We set this out in Section 16. We do not consider this to be the case for KCOM due to the very small size of the market.

6.44 In addition, based on the above conclusion, Ofcom is imposing a number of remedies in the wholesale call origination on fixed narrowband networks markets where BT and, separately, KCOM have SMP. These are as follows.

6.45 We are imposing the following general remedies on BT and KCOM:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Basis of charges;
- Requirement to publish a reference offer;
- Requirement to notify charges, terms and conditions;
- Requirement to notify technical information;
- Cost accounting; and
- Accounting separation.

6.46 These remedies are discussed in Section 11.

6.47 We are also imposing the following remedies on BT and KCOM:

- Obligation to provide Carrier Pre Selection; and
- Obligation to provide carrier selection (Indirect Access).

6.48 These are discussed in Section 13.

6.49 We are imposing a NTS call origination obligation on BT, including a regulated return on the NTS Retail Uplift and an allowance for bad debt on PRS calls (the PRS bad debt surcharge). This is discussed in Section 15.

6.50 In addition, we are imposing the following remedies on BT:

- Transparency as to quality of service (discussed in Section 11); and

- Charge control: we discuss why we are imposing a charge control on BT for wholesale call origination in Section 16. This includes the charge control for the Retail Uplift.

## Section 7

# Call termination

## Summary

- 7.1 In this section we discuss fixed geographic call termination, i.e. the final service needed to deliver a call to a called party on a fixed network.
- 7.2 We define the market as:
- Wholesale fixed geographic call termination on each individual network.
- 7.3 Similar to call origination, call termination includes the conveyance of all signals (including relevant control signals) required to terminate calls on a customer's exchange line from the first point in the network where those signals can be accessed by another communications provider.
- 7.4 With regard to SMP assessments, we conclude that each individual network has SMP in the market for fixed geographic call termination on its own network.
- 7.5 Based on this SMP conclusion, we are imposing the remedies shown in table 7.1.

**Table 7.1: Remedies to be applied in the call termination market**

CP	Obligations
BT	Requirement to provide network access on reasonable request Requirement not to unduly discriminate Basis of charges Charge control Requirement to publish a reference offer Requirement to notify charges
KCOM	Requirement to provide network access on reasonable request Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges
All other CPs that provide call termination	Requirement to provide network access on fair and reasonable terms

- 7.6 We are also consulting on one further remedy in this document. We propose to impose an obligation on all other CPs that provide call termination requiring them to notify charges. This is discussed in Section 19.

## Market definition

- 7.7 Given that the market definition should consider all network architectures and technologies that can supply the call termination service, Ofcom proposed that call termination should be taken to include the conveyance of all signals (including relevant control signals) required to terminate calls on a customer's exchange line from the first point in the network where those signals can be accessed by another communications provider.
- 7.8 Call termination considered in this document is a wholesale product. An originating network demanding call termination services has no alternative than to demand it from the network of the subscriber to whom the call has to be delivered. This implies that, once a call has been made, the network of the subscriber to whom the call has to be delivered has a monopoly on terminating that call, and hence faces no direct constraint at the wholesale level on the price it charges for terminating the call.
- 7.9 At the retail level, calls are sold on an end-to-end basis. In this consultation we are considering only termination to fixed geographic numbers (the call types identified as local and national geographic calls). The analysis of the retail markets in Section 6 for call origination also applies to call termination.
- 7.10 As for call origination, call termination on a fixed network is a wholesale product and is not sold as a standalone product at retail level. However, it is a component of the retail end-to-end call.
- 7.11 To define the relevant economic wholesale market we considered whether it would be profitable for a hypothetical monopolist supplier of the service to impose a 5-10% increase in price. The result of this standard SSNIP test depends on the extent of substitution possibilities for both immediate customers (direct competitive constraints) and final customers (indirect competitive constraints).
- 7.12 Regarding indirect constraints, we concluded that the call termination market was not constrained by fixed/mobile substitution as we reasoned it is unlikely that the hypothetical SSNIP for geographical call termination would change the relative price between fixed to fixed calls and fixed to mobile calls, nor change the price of mobile to fixed calls. Due to the relatively high percentage of households without access to broadband (40%) and possible service quality factors we concluded that the wholesale market for fixed geographic call termination is not constrained by broadband voice services.
- 7.13 There were no direct constraints on the call termination market. This is because the demand for wholesale fixed geographic call termination is derived from the demand of retail customers to make end-to-end calls and there are no effective substitutes at the retail level for the fixed line end-to-end call desired. Likewise, there is no possibility for supply-side substitution. Competitors are physically unable to offer an equivalent wholesale fixed geographic call termination service as by definition the called party customer is connected to the terminating network.
- 7.14 We also discussed BT's plan for its next generation network (21CN). We said that our definition of the market was technologically neutral such that a change-out of the underlying network in the provision of wholesale narrowband call termination does not necessarily require a review of the market definition. However, since our consultation, BT has announced it is reviewing again its approach to deployment of 21CN. This review is ongoing. Ofcom's understanding is that the likely outcome of this review is that migration to 21CN of narrowband services will be slower than previously expected. There may also be a review of the way that narrowband

services are supported. If this was to be the case, it may require Ofcom to consider whether the market definition for call termination remains valid.

### Regulatory Framework

- 7.15 The European Commission has developed its 'Recommendation on the regulatory treatment of fixed and mobile termination rates in the EU'. The Recommendation seeks to create a uniform approach to the regulation of voice call termination rates across the EU. In particular it recommends the adoption of a uniform cost accounting methodology and the use of a cost model which assumes the core network for fixed networks to be NGN based.
- 7.16 In addition, Ofcom will review regulation regarding mobile call termination rates during the forward look period, since the current controls expire in March 2011.
- 7.17 We have considered whether the gap between the rates for fixed geographic termination compared to mobile will, as a result of either of the above developments, narrow to the extent that mobile call termination would provide an effective substitute for fixed geographic termination during the period of this review.
- 7.18 Ofcom is mindful of its duty under s84 of the Act to carry out further market analyses at such intervals that we determine to be appropriate. Should changes occur that significantly affect matters that have been taken into account in this review, a further review of the market may be appropriate.
- 7.19 In the consultation we asked:

**Question 7.1:** *Do you agree with Ofcom's assessment that there is a separate market for wholesale fixed geographic call termination for each provider of fixed geographic call termination? If not, please explain why.*

### Consultation responses

- 7.20 All respondents to this question agreed with Ofcom's market definition for geographic call termination. Several respondents noted that as new network deployments advance, the market definition may need to be reviewed. Similarly, substitution between fixed and mobile services may lead to a need to review this definition.
- 7.21 Some respondents said Ofcom should have included a review of non-geographic call termination within this review.

### Ofcom's response

- 7.22 In regards to non-geographic call termination, whilst we consider fixed geographic and NTS termination to be sufficiently different so that they do not necessarily need to be considered in the same review, Ofcom understands that there are concerns with the current NTS regime. In Section 8 of this document we address the specific concerns related to the impact of de-regulation of LTC on NTS. In Section 9 we address comments related to the role of transit in the NTS termination regime. We are re-consulting on the transit markets in Section 19 of this document.
- 7.23 In addition, in our consultation on the NTS Retail Uplift we noted that, if we were to conclude that BT no longer has SMP in the retail market for calls, it would be appropriate to consider the implications of that finding for the pricing rules set out in

the National Telephone Number Plan (NTNP). As we are concluding in our retail narrowband market review that BT does not have SMP in the calls market, we believe that it is appropriate to carry out this review. We are considering the exact scope of the review but, in addition to the pricing rules in the NTNP and NTS Retail Uplift, it will need to take account of the relevant aspects of the wholesale regime for NTS. This would include NTS termination and transit of NTS traffic. We intend to consult on the review next year.

## Conclusion on market definition

- 7.24 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to the consultation, we conclude that the market is:
- Wholesale fixed geographic call termination on each individual network.
- 7.25 Call termination in this context includes the conveyance of all signals (including relevant control signals) required to terminate calls on a customer's exchange line from the first point in the network where those signals can be accessed by another communications provider.
- 7.26 Ofcom also notes that some CPs terminate traffic via broadband connectivity to their end-users in the standard geographic number ranges (01 and 02) and interconnection is provided via TDM. Therefore, in these cases, it is not practical or even technically possible for the originating CP (or a transit CP if applicable) to differentiate whether the call is to a voice over broadband connection. In this instance, it is Ofcom's view that this traffic should be treated as a call to a fixed geographic narrowband network.

## Market power assessment

- 7.27 Ofcom proposed that all fixed network CPs have SMP in the provision of their fixed geographic call termination services to all other CPs. All these providers are identified at Annex A of Schedule 3 in the notification in Annex 7 of this consultation.
- 7.28 We have explained above that for the purpose of this review the relevant market definition is wholesale fixed geographic call termination on individual networks, as it is only the terminating network provider that can terminate calls over its network (this is an absolute technical entry barrier). Each network provider therefore has 100% of the market for calls terminating on their networks, leading to a strong presumption that each provider has SMP in geographic call termination on its own network. However, criteria other than market share need to be considered to assess whether this strong presumption may be offset by other factors. In particular, a purchaser of geographic call termination may be able to exert sufficient countervailing buying power (CBP) such that a particular CP does not have SMP.
- 7.29 The test to assess whether CBP is sufficient to prevent the exercise of SMP is that set out in Article 14 (2) of the Framework Directive, namely: whether CBP can constrain a call termination provider from having the "power to behave to an appreciable extent independently of competitors, customers and ultimately consumers". As regards the termination price, in the context of this review, Ofcom considers that an application of the test is that providers of fixed call termination will have SMP if they are able to sustain charges to an appreciable extent above the competitive level.

7.30 In carrying out this analysis and consistent with the analysis adopted by the European Commission (the so-called modified Greenfield test), the assessment of whether a given provider has SMP is conducted on the basis that no regulation that affects the assessment of whether that operator has SMP should be taken into account. This includes any SMP related regulation as well as any ex post regulation such as potential action under competition law or dispute resolution. However, regulation in other markets or on other parties, which will continue to exist throughout the period of the forward looking assessment independently of an SMP finding on the market concerned, should be taken into account. We identified in our consultation the following regulatory factors that need to be reviewed in an assessment of CBP:

- The extent to which, absent regulation, CPs buyer power could be influenced by the extent to which they can take into account the prices of their own services in negotiations. In the case of BT, as we argue below, BT has SMP in the provision of geographic call termination on its own network and we conclude a charge control should be imposed on BT. Therefore, BT's termination charges cannot be considered to be a source of bargaining strength in negotiating termination charges on other CPs' networks.
- BT's obligation to provide CPS and IA services have a specific impact on the retail market for calls to other fixed networks. The ability of consumers to switch to alternative CPS or IA based providers of such calls weakens BT's ability to threaten to cease purchasing fixed network termination services.
- End-to-end connectivity obligations may impose obligations on a CP that impacts its CBP. Ofcom has imposed such a condition on BT<sup>22</sup>. This requires BT to purchase call termination from any CP that reasonably requests BT to do so, and requires BT to purchase services as soon as reasonably practicable and on reasonable terms and conditions (including charges). To the extent that this obligation may impact the SMP assessment it should not be taken into account according to the Modified Greenfield approach. We do not consider that General Condition 1.1 is relevant existing regulation as this imposes an obligation on providers to negotiate interconnection rather than to interconnect, it is Ofcom's view that it would not have material impact on the level of CBP held by purchasers of fixed call termination.

### **Geographic Call Termination on BT's network**

7.31 In our consultation we set out that we considered that the size of BT's access network means all other CPs, including MNOs, have to purchase call termination from BT in order for their service to be viable. The size of BT's access network is such that it cannot be easily duplicated by competitors and thus the ability to compete with BT in relevant retail calls markets depends upon the ability to acquire termination from BT. This implies that, in the absence of regulation of any fixed geographic call termination services, Ofcom would not expect other fixed network providers to have sufficient CBP to negate BT's SMP.

7.32 We further proposed that whilst mobile operators have, each and in theory, the potential to exert CBP with BT, it is unlikely that in the absence of wholesale regulation mobile network operators would possess sufficient CBP to prevent BT setting charges above the competitive level.

---

<sup>22</sup> *End-to-end connectivity*, 13 September 2006  
([http://www.ofcom.org.uk/consult/condocs/end\\_to\\_end/statement](http://www.ofcom.org.uk/consult/condocs/end_to_end/statement))

- 7.33 We therefore proposed that BT had SMP in the provision of fixed geographic call termination services to all CPs.

### **Geographic Call Termination on other fixed networks**

- 7.34 We then considered BT's ability to exercise CBP against other providers of fixed call termination. Whilst BT has a substantial market share in the market for calls and, considered individually, its competitors have much lower market shares, the CBP that may result from this is greatly weakened by regulation of BT outside of the markets for termination on other CPs' networks. For instance, the charge control on BT's own termination service removes BT's ability to react to price increases by other networks by raising its own prices. Its obligation to provide CPS and IA also means that, were BT not to provide interconnection to another network, its customers may use alternative suppliers to access those numbers. Together, these may be sufficient to weaken BT's position sufficiently that terminating providers are able to exercise their market power to set prices above the competitive level.
- 7.35 In addition, BT may have commercial incentive to interconnect to other networks. In assessing BT's incentives to interconnect, the relative merits of BT providing its own retail customers with the most comprehensive service compared to its incentive to weaken competitors' offerings would need to be considered. For smaller providers of geographic call termination it is less clear that the absence of termination to these networks would significantly impact the retail offers of BT. However, in order to find that a CP does not have SMP, compelling evidence that BT's incentives not to interconnect clearly outweigh its incentives to provide its retail customers with the widest possible degree of interconnection would be needed to refute the strong presumption of the terminating networks' SMP.
- 7.36 Finally, we argued that for bilateral negotiations between fixed CPs, it is not clear whether the level of CBP in any case would be sufficient to restrict the termination monopolist's pricing freedom or would be strong enough to drive the terminating CPs' prices down. It is also unclear whether this would be the case for fixed CPs when terminating calls from mobile CPs. To understand fully when or if call termination would be constrained by the possession of CBP, Ofcom would need to compare the market power of each fixed CP against the CBP of all other CPs. To conduct this analysis for each and every CP providing termination on its network would be very extensive and, Ofcom believes, not very informative. Ofcom is of the view that it would be the exception rather than the rule that the level of CBP in these negotiations would be of the precise magnitude to ensure that call termination charges were constrained to the competitive level. Furthermore, because non-BT fixed providers are, in general, interconnected to BT, the BT price may act as a floor and a ceiling on the possible charges for termination that they can levy.
- 7.37 We therefore proposed each non-BT fixed CP possesses SMP in the provision of fixed geographic call termination services to all other CPs.

### **Court of Appeal Judgement H3G v Ofcom**

- 7.38 In our consultation we referred to the CAT judgement in the case of H3G v Ofcom (Mobile Call Termination). This judgement was appealed to the Court of Appeal. Following the publication of the consultation document the appeal was concluded with the Court of Appeal delivering its judgement on 16 July 2009<sup>23</sup>.

---

<sup>23</sup> [2009] EWCA Civ 683



- 7.39 We have considered the judgement of the Court of Appeal and consider that it supports the arguments that we made in our consultation document. In particular the Court placed emphasis on the strong presumption of SMP for terminating operators, with the onus being upon the CP should they wish to rebut the presumption by providing clear and convincing evidence, and provided support in relation to our interpretation of how End to End connectivity obligations should be treated.
- 7.40 We note that in our consultation we provisionally assessed 79 CPs (in addition to BT and KCOM) as having SMP in call termination. None of those CPs have responded to us in relation to our proposed finding with evidence to demonstrate that they do not have SMP, and therefore we have no additional evidence to suggest that the presumption of SMP, as we fully set out in our consultation document, should not be maintained.

### Summary of conclusions on significant market power in wholesale call termination markets

- 7.41 The analysis set out in this chapter led Ofcom to propose that all fixed network CPs have SMP in the provision of their fixed geographic call termination services to all other CPs. All these providers are identified at Annex A of Schedule 3 in the notification in Annex 7 of the consultation.

### Consultation questions

- 7.42 In the consultation we asked:

**Question 7.2:** Do you agree with Ofcom's assessment that each provider of wholesale fixed geographic call termination has SMP? If not, please explain why.

**Question 7.3:** Do you agree with Ofcom's analysis of future developments that may affect these assessments? If not, please explain why.

### Consultation responses

- 7.43 As we stated above we have not had any specific response back from a CP to dispute our proposed finding of SMP in respect of call termination on their network. The majority of respondents agreed with Ofcom's SMP proposals. However, one respondent, who was not a terminating CP, argued that only BT had SMP in geographic call termination but did not provide evidence to support this position.
- 7.44 Most respondents also agreed with Ofcom's analysis of future developments. Two respondents noted, in particular, that market changes such as fixed-mobile substitution may drive the need for a review of the market before the four years covered by this review (including the network charge control). One respondent also said it was unclear where Ofcom had discussed future developments in the call termination market.

### Ofcom's response

- 7.45 We set out in our consultation, and have summarised above, why we consider that all providers of fixed geographic call termination have SMP. As set out in the consultation, we do not consider that there is sufficient evidence to support an argument that BT (or any other fixed or mobile provider) can exercise sufficient CBP on a provider of fixed call termination to offset the market power arising from a 100%

market share. Since each CP has a monopoly on the provision of fixed geographic call termination on its network, and other CPs are unable to constrain the price set by the terminating CP by exerting CBP, the terminating CP could set prices in excess of the competitive level. Whilst BT is the largest provider of fixed geographic call termination, this has been taken into account in assessing BT's ability to exert CBP on other providers. Therefore, all CPs have SMP in provision of call termination on their own network, which we define as a separate market for each CP, irrespective of the size of the CP in relation to BT.

- 7.46 In relation to the forward look, Ofcom set out its view in sections 7.35 to 7.41 of the consultation.

## Conclusion on SMP

- 7.47 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the decision of the Court of Appeal as set out above, we have concluded that all CPs have SMP in the provision of their fixed geographic call termination services to all other CPs. The providers of these services are BT, KCOM and the providers identified in Annex A of Schedule 3 in the notification in Annex 7 of this statement.
- 7.48 Specifically in relation to BT, given the much larger scale of BT than other CPs, and the lack of CBP that other CPs can exert on BT's pricing, we find that there is a risk of BT having the ability and the incentive to price excessively. We therefore consider the imposition of a charge control is an appropriate remedy in this market. We set this out in Section 16. We do not consider this to be the case for KCOM due to the very small size of the market.

## Relationship between the wholesale market definition and the Commission's Recommendation on product and service markets

- 7.49 In our consultation we proposed to define markets based upon call termination on individual public telephone networks provided at a fixed location. Our definition includes the conveyance of all signals (including relevant control signals) required to terminate calls on a customer's exchange line from the first point in the network where those signals can be accessed by another communications provider. Ofcom is therefore proposing to define separately the call termination market and the local-tandem conveyance ("LTC") and local-tandem transit market ("LTT") market. This approach remains consistent with our current market definitions.
- 7.50 Our proposed definition is drafted to be technology neutral, and takes into account likely changes to the network architecture on the implementation of 21CN. Within BT's 21CN architecture there is no LTC market, and, as the first point of interconnect would be at the POSI, the proposed call termination market definition would then include transit from that point.
- 7.51 The Commission defines call termination on individual public telephone networks provided at a fixed location as market 3. Our proposed market definition differs from the market 3 in the Commission's recommendation. We set out in the consultation that we had given careful consideration to the three criteria set out in the EM. We proposed that, in relation to the call termination market, the three criteria test was met, and the imposition of appropriate ex ante regulation was necessary.

## Remedies

- 7.52 Based on the above finding of SMP, we are imposing the remedies set out in Table 7.3 in the call termination market. We discuss Ofcom's justification for imposing these remedies in Section 12.

**Table 7.3: Remedies to be imposed in the call termination market**

CP	Obligations
BT	Requirement to provide network access on reasonable request Requirement not to unduly discriminate Basis of charges Charge control Requirement to publish a reference offer Requirement to notify charges
KCOM	Requirement to provide network access on reasonable request Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges
All other CPs that provide call termination	Requirement to provide network access on fair and reasonable terms

- 7.53 We are also consulting in Section 19 of this document on whether to impose a further obligation on CPs other than BT and KCOM, requiring them to notify charges.

## Section 8

# Local-tandem conveyance and transit

## Summary

- 8.1 This section focuses on Local-tandem conveyance (LTC) and Local-tandem transit (LTT). LTC is the service that an originating or terminating CP provides to carry traffic between the local and tandem layers in the network. LTT is the service that a transit CP provides to carry traffic to or from the local layer of one CP's network to the tandem layer of another CP. We define the following market:
- Local-tandem conveyance (LTC)/Local-tandem transit (LTT)
- 8.2 The geographic market is the UK excluding Hull.
- 8.3 We do not define an LTC/LTT market in the Hull Area as the KCOM network does not have separate local and tandem layers.
- 8.4 In analysing this market we conclude that no CP has SMP in this market. However we are maintaining some of the remedies in this market for a transitional period of 12 months at which point they will be withdrawn. This is in order to provide a reasonable period of notice to other CPs and stakeholders that will be affected by the move to deregulation. The remedies we propose to maintain for a twelve month period are:
- Requirement to provide network access on reasonable request;
  - Requirement not to unduly discriminate;
  - Basis of charges;
  - Requirement to publish a reference offer;
  - Requirement to notify charges;
  - Requirement to notify technical information; and
  - Accounting separation.

## Market definition

- 8.5 As for call origination and termination, LTC and LTT are wholesale services that constitute part of the end-to-end call path needed to meet the requirements for retail calls. In many networks other than BT, local and tandem functions are combined in the same physical exchange. This means that LTC/LTT may not be a relevant service on these networks. However, where CPs use the BT network to originate or terminate traffic, they may self-provide LTC by interconnecting to BT's DLEs. Further, the CP may then provide LTT by using this DLE interconnection to provide wholesale offers to other CPs.
- 8.6 LTC and LTT are concerned with the transport of traffic from the local exchange layer of the originating CP to the tandem exchange layer. LTC and LTT also includes the hand-off between the tandem and local layers at the terminating side of the call. In the consultation, we set out the different types of LTC and LTT in paragraphs 8.5 to

8.11. In summary, LTC occurs where the tandem exchange to which the local exchange routes the call is in the originating or terminating network. LTT occurs where this tandem exchange is in a transit provider's network.

- 8.7 In the consultation we proposed that provision of LTC by BT (e.g. where BT originates or terminates the call), LTC self-provided by another CP and provision of LTT by CPs other than BT are in the same relevant product market. This was based on the high degree of interconnection by CPs to DLEs in BT's network. As well as using these interconnects for their own traffic, some of these CPs also provided transit services to other CPs. This has resulted in alternatives to BT-provided LTC being effective substitutes in the event of BT increasing its prices.
- 8.8 We also set out the constraints we considered supported a single geographic market for LTC/LTT, even though, in the absence of regulation, BT may be in a position to set geographically differentiated prices:
- large customers of LTC are likely to demand a single geographic price for traffic. Since there is interconnection by CPs other than BT at all but one of BT's DLEs, increasing prices on the less connected DLEs may drive traffic off the BT network on at least these routes, but may also lead to traffic on other routes moving away from the BT network;
  - setting different rates on an originating CP basis to raise prices to those CPs with little or no DLE interconnection is unlikely to be profitable as these CPs could move to LTT supplied by other CPs; and
  - setting different rates on a DLE by DLE basis to take account of different levels of interconnection would be a complex task and, given the low number of DLEs for which this would be relevant, unlikely to be commercially advantageous to BT.
- 8.9 We set out that we considered that, under BT's 21CN plans at the time, LTC/LTT would no longer be a relevant market since 21CN does not include separate local and tandem layers to which CPs can interconnect for the routing of voice traffic. As BT has revised its approach to 21CN migration since the consultation was published, we have re-considered this. However, since it is less likely that large scale migration will occur in the forward look period, and any architectural changes to 21CN in support of voice products are currently unclear, we consider the above market definition to be appropriate.

## Market power assessment

- 8.10 In relation to market power assessments, we proposed that no CP had SMP. This was due to the extent to which the high degree of DLE interconnection constrains BT's ability to price above the competitive level. We did note that BT's recent approach to pricing its wholesale calls product has increased its market share
- 8.11 We also set out Ofcom's position on several other considerations where the LTC price is used as a component of another charge or service. Generally, Ofcom's view was that whilst there may be concerns over the method of calculation of the prices of these particular services, these do not influence the assessment of SMP. The particular services considered were: number portability, NTS call origination, 21CN pricing and reciprocity (in the context of setting of termination rates). These concerns were raised in response to our consultation so we address each of them in detail later in this section.

## Relationship between the wholesale market definition and market power assessment and the Commission's recommendation on product and service markets

- 8.12 In our consultation we proposed to define separately the call origination market and the LTC/LTT market. Ofcom's proposed market definition therefore differs from the market 2 in the Commission's recommendation. This approach remains consistent with our current definition of these markets. In doing so, we set out in the consultation that we had given careful consideration to the three criteria set out in the Explanatory Memorandum discussed at paragraph 4.25 above. We proposed that, in relation to the LTC/LTT market, the three criteria test was not met. In particular we considered that neither the first or second test was met. We also noted that as the first and second tests were not met, the third test may be considered to not be applicable but we stated that we believed that any concerns raised by CPs in relation to the LTC/LTT market could be dealt with appropriately via ex-post competition law.

### Consultation Questions

- 8.13 In the consultation we asked:

**Question 8.1:** *Do you agree with Ofcom's assessment that there is a single LTC/LTT market in the UK excluding the Hull Area? If not, please explain why.*

**Question 8.2:** *Do you agree with Ofcom's assessment that BT does not have SMP in the LTC/LTT market? If not, please explain why.*

### Market definition

#### Consultation Responses

- 8.14 The majority of respondents agreed with Ofcom's market definition, in particular that the market includes both LTC and LTT. One respondent said that whilst it agreed in general, there may also be a case for defining sub-national markets.
- 8.15 O2 argued this definition was too wide because even if faced with a 5-10% price increase for LTC by BT<sup>24</sup>, it is likely that it will need to continue to rely on BT provided LTC because it cannot easily switch to use LTT services from other CPs. Whilst the respondent has not been able to undertake a formal assessment of the costs of switching to a LTT provider, these costs, it argued, would be significant and the project would not be concluded within a timely fashion.
- 8.16 O2 also commented that, in reaching its conclusion, Ofcom has considered past migration from LTC to LTT and interconnection at DLEs. It is "firmly of the view" that should a SSNIP in LTC be conducted, going forwards, it would turn out to be profitable for BT. In its view, this would lead to a narrower market definition: "provision by BT of LTC, not including LTT or interconnection at DLEs."

#### Ofcom's response

- 8.17 Ofcom disagrees with the argument that LTT is not part of the same market as LTC. Ofcom has discussed market definition in detail in the consultation document and is

<sup>24</sup> This price increase could also be at 5-10% on average while theoretically being higher or lower in different geographies to take advantage of any lack of ability to react in individual areas.

of the view that there is substitutability between LTT and LTC both on the demand side and on the supply-side and that the correct market definition is therefore the wholesale market for the supply of LTC and LTT.

- 8.18 Our market definition is reinforced by updated data presented by BT and other CPs. This indicates that a number of CPs with significant traffic volumes have re-arranged traffic away from using LTC provided by BT. In general this has been onto LTT provided by a transit provider. In addition to the data showing this shift of traffic, Ofcom has collected information from several CPs with large traffic volumes showing the potential costs and timescales for carrying out such a substitution to LTT, and we remain of the opinion that LTT remains in the same market as LTC because it provides a substitute that is practically available to purchasers of LTC. This includes tenders where customers for BT to provide LTC and ask CPs to provide LTT.
- 8.19 Interconnection at the DLEs is not included in the market definition. However, this is required in order for LTC or LTT to be provided by a supplier other than BT. As discussed in the previous paragraph, we consider these are in the same market as LTC provided by BT. We discuss DLE interconnection in detail below in relation to how the ability of CPs to interconnect at the DLE and therefore provide LTC and LTT lead to a finding of no SMP for BT.

## **SMP assessment**

- 8.20 Stakeholders generally acknowledge the increased deployments of DLE interconnection since the last review. Many CPs are now able to self-supply LTC, therefore constraining BT's pricing of LTC in general. However, most stakeholders have disagreed with our assessment of SMP and our proposal that BT does not have SMP in the LTC/LTT market. As well as general comments around the scope of Ofcom's analysis, respondents raised the following reasons for disagreement:
- Ofcom's assessment of BT's market share does not take into account the LTC minutes included in BT's own retail use of the network and BT's provision of wholesale end-to-end call minutes.
  - Increased DLE interconnection may not be profitable going forward given:
    - BT's expected migration to 21CN;
    - The current economic climate; and
    - BT's aggressive pricing and growth in wholesale end-to-end calls.
  - There is little spare capacity available outside the BT network implying that other CPs may not be able to re-route traffic to avoid BT's LTC charge in reaction to a price increase, be it for self-supply or supply to third-parties without additional investment. Furthermore, such investment would not be profitable in the event of a 5-10% increase in BT's LTC price.
  - BT has the incentive and the ability to increase prices in some segments of the LTC/LTT market such as number portability, NTS traffic and some specific exchange types in the BT network where CPs are unable to avoid BT's LTC charges.
- 8.21 We present stakeholder comments in relation to these issues in more detail below and discuss them in turn.



## General Comments

### Consultation responses

- 8.22 A number of stakeholders indicated that they believed Ofcom's analysis was not complete in that it did not consider each of the criteria set out in the Commission's recommendation on the assessment of SMP.
- 8.23 One respondent argued that Ofcom had not considered CBP and its analysis of barriers to entry was limited and incorrect.

### Ofcom's response

- 8.24 Ofcom is of the view that in the LTC/LTT market, the ability of CPs to either interconnect directly at the DLEs or avoid paying BT for LTC by routing traffic via an alternate LTT provider is the key determinant of whether BT has SMP in this market. Not all of the Commission's identified criteria are necessarily relevant in all markets. For example, a consideration of BT's distribution and sales networks is unlikely to be informative of whether it has SMP in the LTC/LTT market.
- 8.25 Similarly the overall size of BT is relevant only to the extent to which it has so many DLEs that it is not commercially viable for other CPs to deploy sufficient interconnection to act to constrain BT's price setting ability. It is clear that BT will be interconnected at every DLE since it is its own network, but this is not informative in analysing its market power.
- 8.26 In analysing the market, Ofcom has therefore considered the extent to which other CPs have been able to replicate BT's interconnection to the DLEs. In this analysis we have taken into account that BT is required to provide interconnection services at regulated prices, since this is an obligation related to the call origination and call termination markets. These obligations act to restrict BT's ability to exploit any advantage in relation to control of infrastructure that is not easily duplicated and any technological advantages it may gain from this.
- 8.27 In relation to countervailing buyer power, we again consider the extent to which CPs have deployed, and continue to be able to deploy DLE interconnection to be the key aspect of whether they can exert CBP on BT. We discuss this again below. Finally, we set out again our discussion on DLE interconnection, including an updated view on the ability of CPs to continue to interconnect at the DLEs, and the impact this has on barriers to entry.

## BT supply of LTC for its own retail use and for wholesale calls

### Consultation Responses

- 8.28 A number of respondents commented that Ofcom failed to take into account self-supply used when supplying wholesale end-to-end calls to rival retailers, which is relevant in the assessment of BT's market power. For example, one respondent commented that it does not believe that BT's market share of LTC minutes is 40% in 2007/08 as set out in the consultation document, precisely because it does not take into account LTC used by wholesale end-to-end calls.
- 8.29 Since April 2007, BT has won several large contracts to supply competing CPs with wholesale end-to-end calls. Wholesale end-to-end calls currently appears to be an attractive product for many CPs, both in terms of prices and as a useful product in



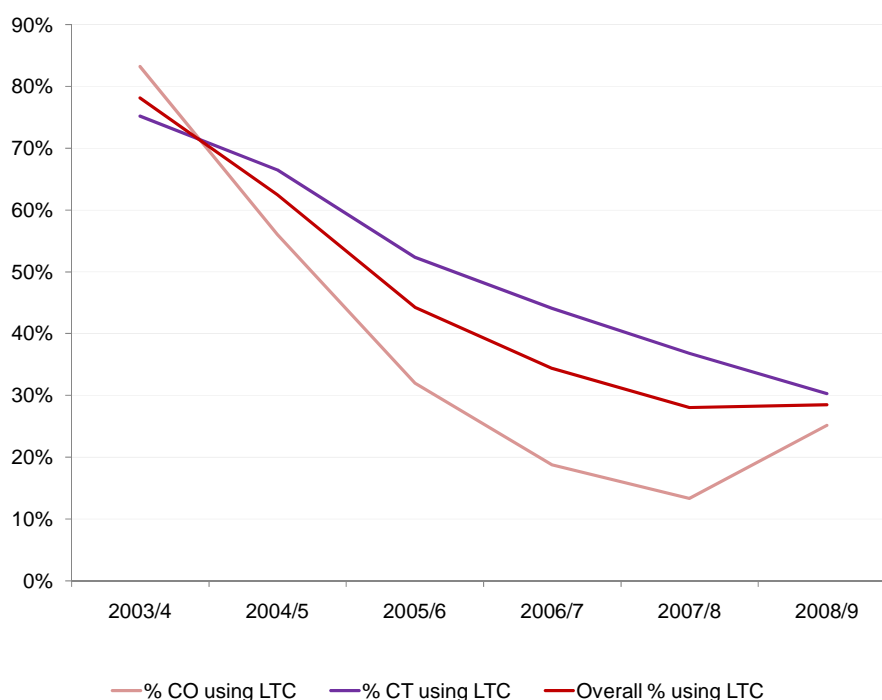
supporting CPs' customers whilst they migrate from TDM networks to their own NGNs.

- 8.30 It may be particularly attractive to CPs planning their own migration onto an NGN, if moving traffic onto wholesale calls allows them to retire TDM assets at a quicker rate than BT migrates to 21CN. The consequence of CPs interconnected at BT's DLEs moving large amount of traffic from CPS to wholesale calls is that they also purchase LTC as part of the wholesale call product wherever a call routes between the local and tandem layers in BT's network.

#### Ofcom's response

- 8.31 Including BT's self-supply for its own retail services can be misleading as it includes non-contestable traffic in the market. As long as BT's economies of scale are properly taken into account a high market share including BT's self-supply to its own retail divisions is not necessarily indicative of a SMP in the specific LTC market. However Ofcom's view is that the supply of LTC to support BT's wholesale calls product provided by BT to other CPs (which have the alternative to self-supply LTC through DLE interconnection) should be explicitly considered in the market share assessment.
- 8.32 In the consultation document, our analysis covered the period up to 2007/08. Since the consultation was published we have gathered further data and extended the analysis undertaken in the consultation document to the year 2008/2009. This analysis takes account of wholesale calls (WSC). Prior to 2008, wholesale calls volumes were not significant and therefore unlikely to affect Ofcom's analysis for these years.
- 8.33 Figure 8.1 below updates Figure 8.4 of our consultation document to take into account the period 2008/2009. This figure shows BT's "market share" in the contestable LTC/LTT segment of the market (i.e., including wholesale calls but excluding BT's self-supply to BT Retail).

**Figure 8.1: Percentage of LTC in BT's traffic carried for other CPs (including wholesale calls)**



*Source: Ofcom (from BT data)*

- 8.34 Figure 8.1 shows that, despite BT's growth in wholesale calls, BT's share of the contestable segment of wholesale LTC/LTT supply to third-parties has not increased but merely stabilised between 2007/2008 and 2008/2009. This is because the increase in BT's share of LTC due to wholesale calls has been offset almost entirely by the shift of significant traffic volumes from LTC to LTT provided by other CPs on wholesale call termination in 2008/2009.
- 8.35 Table 8.2 below shows the year on year change between 2007/2008 and 2008/2009 in BT's external supply of LTC. It includes wholesale calls and other external traffic.

**Table 8.2: Change in LTC volumes in wholesale calls and other external traffic between 2007/08 and 2008/09**

	LTC in Call origination	LTC in Call Termination	Total LTC
External traffic excluding WSC	-6%	-11%	-9%
WSC traffic	18%	5%	9.4%
Total external traffic (net effect)	12%	-6%	0.4%

- 8.36 Table 8.2 shows that further substitution by DLE interconnection or the use of LTT has led to a reduction in call origination traffic other than wholesale calls using LTC by 6%. However, the effect of wholesale calls is an increased use of LTC in delivering wholesale call origination traffic on the BT network supplied to third parties

of 18%. This results in an overall increase of 12% in BT's share of LTC supplied as part of its wholesale call origination.

- 8.37 For call termination, the declining trend in BT's percentage of LTC in traffic supplied to third parties (excluding wholesale calls) has continued, albeit at a lower rate (11% compared to 16% between 2006/2007 and 2007/2008). This decline could not be compensated by the impact of wholesale calls<sup>25</sup>, leading to an overall decline of 6% in BT's percentage share of LTC supplied as part of its wholesale call termination.

## **DLE interconnection**

### Consultation responses

- 8.38 Some stakeholders commented that Ofcom's finding of non-SMP is based on a backward-looking view, having considered only past migration from LTC to interconnection at DLEs. These CPs argued that the business case for further DLE interconnection going forward could not be made. BT's planned migration to 21CN, the current economic and financial climate and the overall fall in fixed network voice traffic may mean that CPs will reduce capital expenditure on investments related to fixed voice.
- 8.39 One confidential respondent commented that "Ofcom has not provided any evidence as to the costs, time or resource that are required to establish new interconnect capacity. Rather Ofcom has merely assumed that because a high degree of incremental interconnection to DLEs has occurred in the period between 2003 (when the last market review was carried out) and today, there does not appear to be significant barriers to entry into the LTC/LTT market." This respondent argued that it has a large volume of traffic terminating to BT ([<] mins per month) and that it is reliant on LTC for the termination of a portion of this traffic. Whilst it has spare capacity overall in its interconnection estate to BT, in its view, this does not necessarily mean it has spare capacity both at local (DLE) and transit (tandem) layer. The majority of spare capacity is at the tandem layer and so should not be considered in assessing the ability to re-route to avoid paying LTC charges.
- 8.40 O2 argued that it spends £[<] per annum on call termination to BT and all of this traffic is handed off at the tandem layer. O2 is therefore reliant on LTC and cannot easily avoid paying these charges. These CPs have submitted that they are likely to continue to rely on BT services which contain LTC because, going forward, there is not sufficient commercial motivation to establish further interconnection at BT's DLEs to avoid BT's LTC charges. Therefore, Ofcom should base its SMP assessment not only on the current levels of DLE interconnection but also an analysis of whether this will continue to grow in the future.
- 8.41 One confidential respondent also commented that it is necessary for Ofcom to explore the geographic breakdown of DLE interconnection because the level of interconnection may not be geographically uniform and there may be some areas with limited or no DLE connectivity. The respondent argued that most networks are BT-centric, so that the amount of spare capacity in practice available to by-pass the BT network through direct interconnection among CPs is limited.

---

<sup>25</sup> While all wholesale call traffic would necessarily make use of BT's LTC at origination, a large part of this traffic leaves the BT network (e.g., traffic to mobile) or is delivered to CPs that are interconnected at the DLE, hence would not contain LTC in its terminating part.

Ofcom's response

- 8.42 We acknowledged in paragraph 8.31 of our consultation document that “available evidence suggests that a CP without any DLE interconnection might not necessarily establish such interconnects in response to a 5% to 10% increase in the price of LTC by BT”. Our finding of no SMP in the LTC/LTT market was based on CPs that currently have very high levels of interconnection being able to offer LTT and the fact that it would not be as costly or time consuming for a CP with current interconnection to extend capacity – if it does not have sufficient spare capacity already deployed - to handle an increase in own traffic or further third party traffic or (in particular if they can secure a long-term contract for interconnect traffic).
- 8.43 Since Ofcom carried out the analysis presented in its consultation, we have gathered further information that relates to our assessment of the LTC/LTT market.
- 8.44 In paragraphs 8.44 to 8.54 of our consultation we explained the current status of interconnection at BT's DLEs. Table 8.6 of the consultation set out the level of interconnection at the DLEs from January 2007 to February 2009.
- 8.45 As of July 2009:
- There are 666 live DLEs and 2 standby units<sup>26</sup>;
  - There is physical interconnection at 643 DLEs;
  - There is interconnection realised by Virtual Interconnect Circuits (VICs) at a further 22 DLEs;
  - Lerwick is the only live DLE with no interconnection.
- 8.46 The 22 DLEs that support VIC interconnection only are the DLEs identified by BT in the first four tranches of migration in preparation for migration to 21CN (e.g. the Tranche 1–4 Pathfinder DLEs).
- 8.47 Of the 665 DLEs supporting interconnection, 659 are reached by three or more CPs. This figure accounts for various merger and acquisition activities by counting C&W, Energis and Thus as one CP. Similarly it counts Virgin Media, NTL and Telewest as one CP<sup>27</sup>. Interconnection to 495 DLEs is supported by In-Span Interconnection (ISI).
- 8.48 Based on this data, which shows DLE interconnection largely unchanged except due to the Pathfinder 21CN migrations, we consider that the migration to wholesale calls has not, as yet, resulted in any material removal of DLE interconnection.
- 8.49 We have also considered possible future changes in DLE interconnection that may result from falling traffic volumes (in particular due to a move to wholesale calls).
- 8.50 Interconnection to the DLE has been realised using one of three mechanisms: ISI, ISI plus IEC or VIC. Both IECs and VICs rely on capacity provided by BT for which the CP pays an annual rental charge. ISIs, on the other hand, require the CP to build out its own network to the BT network. The cost is therefore a sunk capital investment. The only annual charge paid to BT is the relatively small cost of connectivity within

<sup>26</sup> Note that in the consultation document we stated there were 655 DLEs. This excluded 11 DLEs where the Pathfinder related migration onto VICs had been completed for all CPs.

<sup>27</sup> BT records interconnection based on Standard Interconnect Agreements. Where two CPs merge, multiple SIAs may remain in place.

the BT building onto the DLE (£92.88 p.a.). In the event of a significant fall in traffic, a CP that uses predominantly IECs or VICs could reduce its levels of DLE interconnection relatively easily by cancelling these circuits. Re-providing these to react to a subsequent increase in the price of LTC by BT would be more costly, as installation charges would be incurred.

- 8.51 CPs that provide DLE interconnection via ISI are less likely to remove DLE interconnection, since the majority of the cost of provision is sunk. As stated previously, 495 out of 666 DLEs are reached by ISI. Of these, 127 are reached by one or two CPs (when Telewest and Virgin Media are counted as one CP and C&W, Energis and Thus are counted as one CP). Therefore, if the growth of wholesale calls is such that CPs remove all DLE interconnection not provided via ISI, a significant number of DLEs would have no, or limited, interconnection.
- 8.52 However, Ofcom does not consider this to be a likely scenario. Even where CPs are using IECs or VICs, removing all interconnection to a DLE is unlikely to be cost effective where it is already in place. Three main traffic types make use of DLE interconnection: call origination (CPS/IA), call termination, and NTS origination from BT DLEs. Table 8.3 below shows the approximate split between these:

**Table 8.3: Usage of DLE interconnection**

Traffic type	2008/9 minutes (billions)	Percentage of total
CPS/IA	19.9	27%
Geo call termination	43.7	59%
NTS origination	10.1	14%

*Source: BT data*

- 8.53 Ofcom interprets the above table to indicate that even if continued growth in wholesale calls drives a reduction in CPS/IA traffic and a smaller reduction in call termination (smaller because not every CPS/IA call that originates on BT terminates on BT), there would still be sufficient traffic volumes to justify of DLE interconnection. However, should a continued migration of traffic to WSC drive a significant reduction in DLE interconnection, Ofcom may need to reconsider the impact of this on its market analysis.
- 8.54 In relation to geographic distribution, we set out the level of DLE interconnection in paragraphs 8.45 to 8.47 above. There is one DLE in Lerwick that does not have any CPs interconnected to it. All other DLEs support interconnection except where existing interconnection has been migrated in relation to the Pathfinder trial within BT's 21CN programme. In the first four tranches of Pathfinder, 23 DLEs have been identified and some or all of the interconnection has been migrated off these. No further DLEs are currently planned for such migration. There are a further nine DLEs with less than three different CPs interconnected, taking into account the merger between Thus and C&W. These DLEs are spread throughout the UK, including DLEs in Scotland, Northern Ireland, the south west of England and London. Some of these may be reached by VICs, since the data available to Ofcom on a DLE by DLE basis does not include VICs. In each case, other DLEs in similar geographic locations support higher levels of interconnection.
- 8.55 Whilst there are some DLEs with lower levels of interconnection than others, we conclude that this is not sufficient to suggest separate geographic markets exist.

There is interconnection by multiple CPs at almost all DLEs which will provide some constraint on BT. The cost to BT of pricing traffic differently on routes where there is a lower level of interconnection is unlikely to be justifiable, because:

- There are interconnected CPs at most of these DLEs;
- Other CPs are able to implement interconnects at these locations if the cost of LTC to them increases;
- There would be an increase in the cost to BT of managing pricing to achieve this; and
- It is likely that the reduced level of interconnection at these locations is driven by low traffic volumes.

*Additional DLE interconnection in the event of a price increase by BT*

- 8.56 The above sets out the current levels of DLE interconnection. For traffic not carried by these DLE interconnects (for example a CP that has not deployed any interconnection to the DLEs, a CP that has interconnection only to some DLEs or a CP that has interconnection to most DLEs but is capacity constrained), a CP would either need to provide additional DLE interconnection itself or would need to route traffic via a transit provider. This provider in turn may need to add additional capacity. Therefore, we need to address two points. First, is it profitable to continue to add DLE interconnection if faced with a 5% to 10% price increase for BT's LTC and second, is there spare capacity available between CPs or could this be added cost effectively if faced with a similar price increase for BT's LTC?
- 8.57 CPs have provided estimates of the cost of providing a new E1 interconnect circuit<sup>28</sup>. These costs vary based on the particular business model employed by each CP.
- 8.58 One CP provided a detailed breakdown that indicated costs would be around £700 per annum which includes assumptions about the use of IECs and the length of these IECs. Another CP provided data similar to this for equipment costs, but did not include the additional assumptions. A third CP provided data that indicated a cost of around £800 - £900 per annum, depending on the percentage utilisation of interconnection transmission capacity. A fourth CP said that interconnection would cost a one-off connection/installation charge of £1250 and an annual cost of £350. This includes costs of interconnection paid to BT (Intra-Building Circuit and Interconnect Extension Circuit costs as relevant), and the costs of the CPs own equipment including an allocation of transmission and switch equipment. This CP did not indicate the timescales over which it would depreciate the one-off costs. Using the assumption of five years provided by other CPs, this gives an annual cost of £600.
- 8.59 Therefore, the data provided indicates that CPs estimate the costs are approximately £600 to £1000 per annum where the installation/one-off costs are recovered over a period of five years.
- 8.60 Ofcom's own estimate is that an interconnection circuit using IECs may cost more than the numbers set out above because a proportion of the rental is distance

<sup>28</sup> An E1 is a 2.048Mb/s circuit, typically comprising 30 or 31 voice channels and, possibly, a signalling link.

related. For an IEC of 30km<sup>29</sup>, the rental will be approximately £1000<sup>30</sup>. There would then be the additional costs of equipment and labour.

- 8.61 The number of minutes that can be carried on an E1 will vary depending on the traffic profile. In addition, in considering DLE interconnection, it should be considered that the routes are likely to be smaller and cannot be used for transit to other networks or other BT switches. Some CPs suggested an E1 can typically carry 250k to 400k minutes per month. This is likely to result in a utilisation towards the lower end of this range.
- 8.62 To assess whether it is economic to implement DLE interconnection, we compare the costs of these interconnection circuits with BT's LTC prices. The current LTC prices are shown in Table 8.4.

**Table 8.4: BT's Local-Tandem Conveyance Charge (LTC)**

Pence per minute	BT LTC	10% increase to LTC	Price after 10% SSNIP
Day	0.1155	0.0116	0.1271
Evening	0.0529	0.0053	0.0581
Weekend	0.0416	0.0042	0.0458
24 hour rate	0.0792	0.0079	0.0871

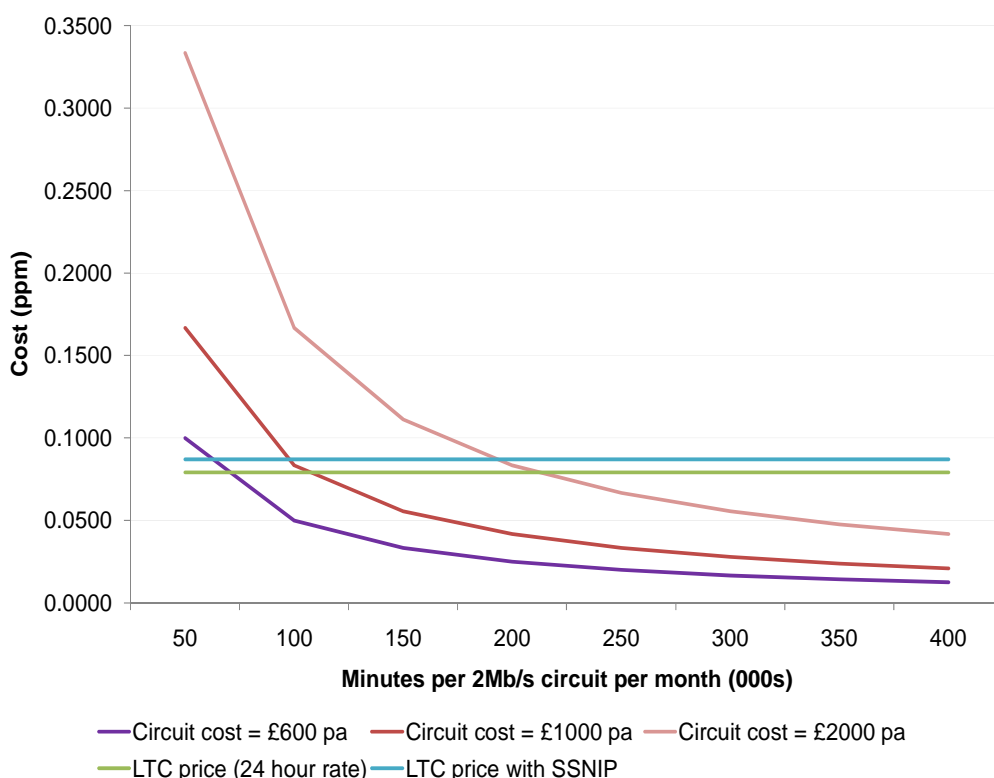
*Source: BT carrier price list*

- 8.63 Figure 8.5 below shows that, based on the costs provided by CPs of £700 to £1000 per annum, adding interconnection to the DLE is likely to be profitable provided there is sufficient traffic, even prior to any SSNIP by BT. We have also included the case where a circuit would need to carry in the region of 250,000 minutes per month in order to be worthwhile. This equates to a circuit cost of around £2000.

<sup>29</sup> Several CPs indicated that 30km was the typical IEC length

<sup>30</sup> This includes rental of £92.88 for the Intra Building Link, £492.96 for the IEC and £22.80 per km per IEC. Source: BT Carrier Price List.

[http://www.btwholesale.com/pages/static/service\\_and\\_support/service\\_support\\_hub/online\\_pricing\\_hub/cpl\\_hub/cpl\\_pricing\\_hub.html](http://www.btwholesale.com/pages/static/service_and_support/service_support_hub/online_pricing_hub/cpl_hub/cpl_pricing_hub.html)

**Figure 8.5: Interconnection circuit costs versus LTC price**

*Source: Ofcom, CP data, BT carrier price list*

- 8.64 Figure 8.5 shows that it is likely that direct interconnect is economic where, based on figures provided by CPs (annual cost of £600 - £1000 per annum), a utilisation of between 100,000 and 200,000 minutes per month per circuit can be sustained. This is well below the maximum utilisation of a 2Mb/s circuit. In addition, it shows that based on CPs' typical estimates of the traffic that an E1 can carry, a circuit with total annual costs of £2000 (rental plus recovery of one-off costs shared over five years) would be economic.
- 8.65 Figure 8.5 is provided for illustrative purposes. Each CP would need to consider the possibility of DLE interconnection on a case-by-case basis. In particular, where a very low volume of traffic is available to a particular DLE, it is very unlikely direct interconnection could be supported.
- 8.66 On the other hand, Ofcom has not taken into account the savings that could be made, since interconnecting at the DLE would allow a CP to reduce the level of interconnection at the tandem layer. This would reduce rental charges for IBCs, for example.
- 8.67 There are two further concerns to take into account:
- For a CP that has no DLE interconnection, it may be that the routing information on the CP's network would need considerable upgrading to route traffic via DLE



interconnection. Ofcom agrees this would be an additional task that would make implementing DLE interconnection a more complex project. For CPs that already have some DLE interconnection, this would be less of an issue as the level of routing data required to route traffic to DLEs would already be implemented to some extent.

- There would be a cost of managing the project to implement the new DLE routes.

8.68 Therefore, the above analysis is more likely to represent the ability of a CP that already has a high level of DLE interconnection than one which needs to start deploying a very large number of new routes.

### *Impact of the current reciprocity agreement on the level of DLE interconnection*

8.69 Depending on traffic volumes and the existing level of DLE interconnection, the reciprocity calculation may act to dis-incentivise CPs from adding new DLE interconnection. If the effect of adding DLE interconnection is to reduce the termination rate received by the CP to such an extent that the reduction in total revenues received from BT (due to lower rates flowing from the reciprocity calculation) outweighs the reduction in out-payments resulting from reduced LTC payments, the business case for additional DLE interconnection will not be made.

8.70 We do not take the reciprocity agreement into account in taking a forward view of the market since it is currently in the process of review. However, we note that for those CPs that have not increased the deployment of DLE interconnection due to the rates resulting from the reciprocity agreement, increasing the price of LTC to them may, in fact, cost BT more in termination payments than it would make in LTC revenues<sup>31</sup>.

8.71 On the other hand, if the incentives change as a result of the current reciprocity negotiations, we are of the opinion that alternatives to BT supplied LTC exist. In this case, if a CP has already deployed some DLE interconnection and has a high degree of tandem interconnection via ISI, the barriers to deploying sufficient DLE interconnection via IEC or ISI to render a SSNIP unprofitable are not likely to be substantial.

## **Existence of spare capacity on routes to other CPs to allow switching**

### Consultation responses

8.72 Two respondents said that in addition to the fact that implementing new or additional DLE interconnects to avoid LTC is not possible, large purchasers of LTC from BT may not be able to re-route traffic via a LTT provider because they do not have sufficient spare capacity. In addition, CPs that could provide LTT may be unwilling to do so, particularly if this meant re-arranging or augmenting network capacity either on the interconnects between the two CPs or on the LTT providers routes to BT.

8.73 One of these respondents said that the spare capacity it had to CPs other than BT was small ( $\gg$ ) compared to the capacity it needed to carry its BT terminating traffic. In addition, this capacity is not necessarily readily usable for re-routing BT traffic, depending on the specific structure of the interconnect between CPs. Therefore, it should be assumed that new capacity and/or re-arrangement of existing network would be required to move any significant traffic onto routing via an LTT provider.

---

<sup>31</sup> Assuming that the incentives deriving from the reciprocity agreement remain the same.

Ofcom's response

- 8.74 Some respondents argued that they believe the process of switching traffic away from LTC provided by BT to LTT provided by another CP would be neither cheap or easy to achieve. We have gathered data from CPs to analyse the costs involved.
- 8.75 A CP would need to be able to re-route enough of its traffic in order to render a SSNIP in LTC by BT unprofitable. It would not necessarily need to be able to re-route all its traffic. In order to do this, the CP would need to be able to either expand an existing route to other CPs or would need spare capacity. In addition, it would need to upgrade the routing plan in its network to do such routing.
- 8.76 Based on data provided to Ofcom, it is evident that there is a wide variability in the provision of interconnection between CPs other than BT. Some CPs have very heavily utilised routes between them. Also, some CPs have a limited number of large routes connecting their networks whilst others have quite a large number of thinner routes.
- 8.77 Where networks are connected by a large number of small routes, there may be spare capacity in place which, in total, can support the re-routing of sufficient traffic to render a SSNIP by BT unprofitable. However, the practicalities of utilising these routes may limit the ability of the CPs to do this. Ofcom has considered whether the CPs that currently purchase large volumes of LTC from BT could re-route sufficient traffic.
- 8.78 In table 8.2 above, we have shown that there has been an 11% decrease in BT's share of the LTC/LTT supplied directly (i.e. excluding wholesale calls) to third parties. This is because several CPs with large volumes of call termination traffic to BT have stopped sending traffic via BT's tandem switches and, instead, are routing traffic via an LTT provider. This directly contradicts the argument made by some respondents that it is not practical to re-route large volumes of traffic.
- 8.79 In order to clarify the above, we have analysed BT's call termination traffic. This is shown below in Table 8.6.

**Table 8.6: Changes in geographic call termination traffic to BT sent directly to BT and utilising LTC**

CP	2007/8 mins (millions)	2008/9 mins (millions)
CP1 (3<)	4,204	32
CP2 (3<)	1,319	369

*Source: BT data*

- 8.80 BT data also shows that neither CP1 nor CP2 in the above table have implemented interconnection at the DLEs. In further data provided to Ofcom, CP1 has indicated that this traffic is being routed via an LTT provider and that the process of re-routing the traffic took less than one year from when the decision to switch was being evaluated to the effective re-routing of the traffic. Another respondent provided evidence of a business case it had previously prepared analysing the costs and benefits of re-routing traffic. In this case, it chose to continue to route via an LTT provider rather than via LTC provided by BT.
- 8.81 In conclusion, the above evidence suggests that until last year it was profitable and feasible for CPs to substitute large amounts of BT's LTC to LTT provided by another CP. While Ofcom is aware that the specific circumstances of each CP will be different

in terms of their own traffic volumes and the status of spare capacity on their routes to different CPs, this evidence is strongly supportive of a conclusion that switching between LTC provided by BT and LTT provided by another CP is both practical and commercially attractive. One of the respondents argued that it had very little spare capacity on routes to other CPs that would be able to provide an LTT product to it. It argued, as set out above, that it should be assumed that it had very little available spare capacity. However, Ofcom has gathered further information from CPs and this shows that the respondent has sufficient capacity to re-route a significant percentage (3%) of the traffic it currently sends to BT via the BT tandems. Obviously, there may be practical difficulties with such a re-routing. However, Ofcom considers the availability of this capacity indicates that a substantial volume of traffic could be re-routed in the event of a SSNIP by BT.

- 8.82 Ofcom therefore does not believe there is compelling evidence in the data presented to it in respect of existing route sizes and available capacity to suggest that those CPs still purchasing large volumes of LTC from BT could not re-route some or all of their traffic in order to render a SSNIP unprofitable.

## **Number portability**

### Consultation responses

#### *Geographic Number Portability*

- 8.83 A potential concern relates to the Average Porting Conveyance Charge (APCC) that is applied by BT to calls it conveys across its network to geographic numbers ported from BT. The APCC is paid by the recipient operator (the operator to which the number has been ported). The recipient CP does not, however, control call routing and so cannot make routing decisions to avoid incurring elements of the APCC charge.
- 8.84 A high percentage of geographic call termination traffic is handed off to BT at its DLEs. As the originating CP cannot determine whether the call is to a number ported out of the BT network, a large proportion of non-BT originated ported traffic is handed to BT at the DLEs. BT currently routes this traffic to its tandem layer before handing it over to the recipient CP. Therefore, one of the elements included in the APCC is the regulated price of LTC. CPs have expressed concern that if LTC is de-regulated, the LTC component of the APCC (and therefore the APCC in total) may increase substantially.
- 8.85 Several respondents also argued that if LTC is deregulated, BT would no longer be obliged to publish its LTC rates and as such there would be no transparency as to the rate used in the calculation of the APCC.
- 8.86 An additional concern raised was that for traffic to numbers ported into the BT network, the cost of data management amendments to route this traffic from the donor CP via interconnects to BT's DLEs may force the donor to route traffic via the tandem exchanges, therefore incurring LTC charges. Deregulation of LTC may again allow BT to increase the charges for LTC which CPs could not avoid in routing traffic to numbers ported into BT.

#### *Non Geographic Number Portability (NGNP)*

- 8.87 Some stakeholders also raised concerns related to NGNP. These stem from the fact that whilst calls to a CP's NTS numbers may be handed over at the DLE if the CP

has a route to that DLE, NGNP calls are not. These calls must route to the tandem layer, as it is at this point that the BT network carries out the Intelligent Network (IN) query that ascertains that the number is ported. The DLEs do not support this function. This means that all calls to non-geographic numbers ported out of the BT network which originate on BT customers' lines must use LTC.

### Ofcom's response

- 8.88 Ofcom recognises that geographic number portability traffic will, in some scenarios incur LTC charges. This is because the majority of calls originating on other CPs networks to BT's geographic number ranges are handed off to BT at the DLEs, whilst the routes from BT to the terminating CP are hosted at the tandem switches. Therefore, the call will use LTC.
- 8.89 As we said in our consultation, the price of LTC for non-ported traffic is constrained by the competitive supply for LTC. For ported traffic, General Condition 18 ("GC18") requires that charges for ported traffic may not include, amongst others, "additional Conveyance Costs"<sup>32</sup>. This means that switching and transmission components used by ported traffic, including LTC, may not be charged at a higher rate than is charged for non-ported traffic. GC18 also places cost orientation and reasonableness obligations on the overall level of the APCC that may be levied.
- 8.90 As a result, we consider that GC18 sufficiently constrains the impact of the LTC element on APCC such that it should be no less competitively priced than it has been prior to the de-regulation of LTC. That is, we would expect that the LTC element in the calculation of the APCC reflects the competitive rates BT will charge for LTC more generally.
- 8.91 In order to ascertain the potential impact an increased LTC rate (as part of the APCCs) would have on BT's revenues from ported traffic, UKCTA indicated Ofcom should present data showing number portability volumes consuming LTC. Table 8.7 below shows the volume of geographic ported traffic into and out of the BT network.

**Table 8.7: Geographic number portability traffic using LTC**

Year	Traffic to numbers ported out of the BT network (billion mins per year)	Traffic to numbers ported into the BT network (billion mins per year)
2007/08	3	1.7
2008/09	4	1.7

*Source: BT*

- 8.92 This traffic corresponds to seven percent of the LTC traffic. Using the 24 hour rate for LTC, this traffic corresponds to revenues for BT of around £4m in 2008/9.
- 8.93 However, Ofcom considers that number portability volumes are not relevant to the question whether post de-regulation BT can raise the price of LTC included in number portability traffic substantially above the competitive level.

<sup>32</sup> Additional Conveyance Costs are costs related to the network resources used by the donor operator in providing switch-processing and switching and transmission capacity for the conveyance of the call to the ported-out number and which are additional to the costs of conveyance of non-ported calls from the donor operator's to the recipient operator's network.

- 8.94 In calculating the APCC, BT takes account of the traffic that uses LTC. Calls handed off by other CPs to the DLEs do incur LTC rates when they route up to the tandem layer for handover. Calls handed off at the tandem layer do not incur LTC charges. Similarly, BT's own originated traffic does not incur LTC charges. In addition, if the terminating network is not connected to all the relevant tandem exchanges, some inter-tandem conveyance may be consumed in routing the ported traffic to the recipient network. This would also be factored into the APCC. At the point of handover to the recipient network, the origin of the call cannot be ascertained. Therefore, the APCC is calculated to take account of the fact that some calls should not recover any porting charges from the recipient whilst allowing the same APCC to be recovered on all calls. As such, calculation of the APCC is dependent on not only the LTC rates but also the relative percentages of different traffic flows that incur different porting costs in the BT network and, potentially, inter-tandem conveyance charges which are already de-regulated.
- 8.95 Therefore, Ofcom believes that GC18 provides sufficient protection against BT setting unduly high LTC charges for the calculation of APCCs.
- 8.96 We recognise that transparency is important so that CPs that have ported traffic out of the BT network are able to assess whether BT is meeting their obligations under GC18. This transparency would be improved by BT publishing the rate it will use for LTC in the calculation of the APCC.
- 8.97 BT has committed to set the rate for LTC used in calculating the APCC as follows. The current LTC rate will be used, with increases in subsequent years being no greater than the increases in geographic call termination rates allowed for under the Network Charge Control. Ofcom is of the view that this provides the transparency as discussed above. We consider this provides a reasonable proxy to increases in costs incurred supporting similar services on the BT network and therefore will act as a first order check that prices comply with GC18.
- 8.98 However, in the event that a CP raises a complaint with or refers a dispute to Ofcom in relation to GC18, or Ofcom reviews BT's or other CPs' compliance with GC18, Ofcom does not take this commitment by BT as evidence that it is necessarily compliant with GC18. Any decision or determination would be made based on the facts of each case.
- 8.99 We are also of the view that this approach addresses the issues raised in relation to geographic traffic ported into BT as well as that ported out of BT, and that it addresses cases where LTC rates may be incurred in the routing of NGNP traffic.

## **Number Translation Service (NTS) calls**

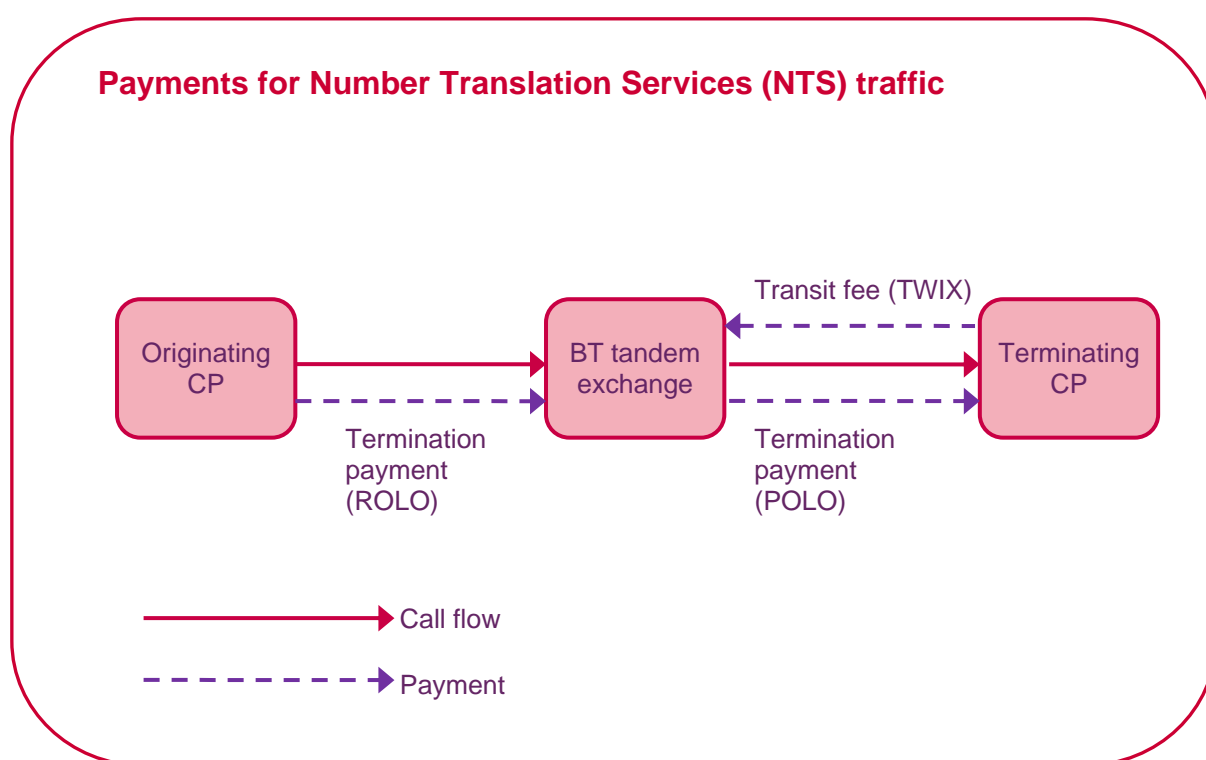
### Consultation responses

- 8.100 There is also concern among respondents about how BT's ability to set prices in an unregulated LTC/LTT market may impact NTS traffic. The NTS regime is such that CPs do not set their own termination rates. Rather, the rate is set by the BT retail price minus certain costs incurred by BT, including the cost of conveyance on the BT network. Hence, CPs with a higher degree of DLE interconnection incur lower conveyance and therefore receive a higher termination rate. This means that there is no fixed rate set by the terminating CP that can be used for transit traffic. The rate used for this traffic is the rate that would apply if the call was originated on the BT network and handed over at single tandem rates. Therefore, LTC is a component of this rate.

### Ofcom's response

- 8.101 Ofcom understands issues may arise from the current NTS regime. For traffic that originates on BT's network, the INCA/CLI direction<sup>33</sup> means that CPs can avoid LTC charges by interconnecting at the DLEs. The previous discussion on DLE interconnection is therefore relevant.
- 8.102 However, the LTC rate is currently used to calculate a termination rate for traffic which transits BT's network even though this traffic is not conveyed over the LTC portion of BT's network.
- 8.103 Figure 8.8 below shows how the NTS regime operates.

**Figure 8.8: The NTS regime for transit traffic**



8.104 The terms are defined as follows:

- ROLO: Revenue from Other Licensed Operator – payment to BT from the originating CP. It is equal to the POLO when the terminating CP pays the TWIX.
- TWIX: Transit with interconnect rate. This is the transit fee.
- POLO: Payment to Other Licensed Operator – payment from BT to the terminating CP. In the NTS regime, the terminating CP does not set this rate. It is calculated using the following formula:

<sup>33</sup> INCA/CLI for NTS interconnection charging, 24 October 2004, [http://www.ofcom.org.uk/consult/condocs/inca\\_cli\\_nts/final\\_dec/#content](http://www.ofcom.org.uk/consult/condocs/inca_cli_nts/final_dec/#content)

- $POLO = D - C$
  - where
    - D is the Deemed retail price – BT's retail price minus an allowance for discounts. The retention of the retail revenue (the difference between the retail price and the deemed retail price) includes the retail uplift.
    - C is Conveyance – cost of conveyance on the BT network. However, for transit traffic, this does not include the actual cost of transit (which is recovered through the TWIX). Instead, this is a proxy and includes call origination and LTC.
- 8.105 The charge to the originating CP (the ROLO) is a pass-through of the termination rate (the POLO).
- 8.106 Whilst LTC is used in calculation of the NTS rate, the CP is unable to avoid it in the above charging regime. BT could therefore increase the LTC rate used in this calculation to affect the revenue received by the terminating CP. Whilst this would reduce BT's revenue (increasing the LTC rate also reduces the charge to the originating CP), it would not adversely impact BT's own profitability. As well as impacting on the revenue and profits of other CPs (which are in competition with BT in the provision of NTS services), this could also impact the ability of these CPs to pay revenue shares on certain NTS number ranges to the service provider. Because revenue sharing is a key component of the business proposition of NTS, this could potentially impair their ability to compete with BT.
- 8.107 Whilst recognising this issue, Ofcom considers it would not be appropriate to maintain regulation in the LTC market based on the use of LTC in setting CPs' termination rates for NTS transit. This is not related to the consumption of LTC: the current LTC price is used as a cost proxy in calculating the price of NTS termination. In theory, even if the LTC market remained regulated, NTS termination rates could be set without reference to LTC pricing. The pricing of NTS does not, therefore, assist in determining the competitive conditions in the LTC market (which we define in relation to the carrying of traffic).
- 8.108 Therefore, under the current NTS termination regime, CPs are able to set their own termination rates outside of the above formula. Ofcom is, however, keen to avoid this due to the burden of such an approach on the resources of all the parties. Therefore, BT has committed that it will publish a headline rate to be used in calculation of the NTS rate to be used for transit traffic. This will mean the current regime can remain in place even without regulation of LTC. BT has suggested this rate will be the same as the rate used in any reciprocity agreement that replaces the current agreement. This may not be the same rate as used for calculating the APCC (as discussed above) due to the specific obligations that need to be met under GC18. Nevertheless, Ofcom would expect that these rates will be broadly in line with each other.
- 8.109 In addition, in our consultation on the NTS Retail Uplift we noted that, if we were to conclude that BT no longer has SMP in the retail market for calls, it would be appropriate to consider the implications of that finding for the pricing rules set out in the National Telephone Number Plan (NTNP). As we are concluding in our retail narrowband market review that BT does not have SMP in the calls market, we believe that it is appropriate to carry out this review. We are considering the exact

scope of the review but, in addition to the pricing rules in the NTNP and NTS Retail Uplift, it will need to take account of the relevant aspects of the wholesale regime for NTS. This would include NTS termination and transit of NTS traffic. We intend to consult on the review next year.

## **Migration to 21CN**

### Consultation responses

- 8.110 Respondents raised concerns that the architecture of 21CN was such that they would not be able to avoid paying increased charges. As there is a reduced set of points of interconnection (there is no equivalent of DLE interconnection), CPs would effectively have to purchase LTC from BT.

### Ofcom's response

- 8.111 We set out in paragraphs 8.67 to 8.69 of the consultation that concerns had been raised that the pricing of call origination and call termination services on BT's 21CN would be based on the current prices of these services plus LTC. The basis of this concern lies in the change to the network architecture between the current network and 21CN, in particular in that the reduced number of points of interconnection available in 21CN would mean conveyance to these points would be very similar to the current products that include LTC.
- 8.112 If the new 21CN products replicate the functionality of the existing products, and the two product sets run in parallel, then the price of the current services will act to constrain the price of the 21CN service. Otherwise, there will be no incentive for CPs to migrate onto the new platform. Even in the case where functionality is slightly different, BT will still have the incentive to price the 21CN products in such a way that CPs overall see a benefit in the new products or they will remain on the current network.
- 8.113 In the plans for 21CN discussed so far there will be no LTC market. The market definitions for call origination and termination will extend to the first point of interconnection. As such, BT would have to demonstrate that its 21CN prices meet its cost orientation obligations in the call origination and termination markets, irrespective of its pricing of LTC. Annex 14 sets out our approach to cost orientation.
- 8.114 Since our consultation, BT has announced that as a result of a strategic review of its 21CN plans, its approach to voice services has changed. BT's new approach is that there will not be a planned migration of all narrowband lines onto 21CN within a fixed timeframe. Instead, it will adopt a different approach. Wherever possible, the existing PSTN will remain in place. BT is currently working with its suppliers to assess the extent to which the PSTN can be maintained. Under this plan ("Project Sustain"), some voice lines will be migrated onto 21CN. This may be due to PSTN equipment failure, or to allow BT to free up equipment to provide spares for the rest of the network. It remains unclear how BT intends to progress and the extent to which CPs will have access to a detailed plan of future service migrations.
- 8.115 These changes, in addition to previous delays and changes to the 21CN plan have caused considerable uncertainty for CPs in assessing the business case for deploying interconnection. However, since BT is currently considering extending the life of its current assets, it is more likely that the vast majority of traffic remains on the current network during the forward look period.



## Other issues

### Consultation responses

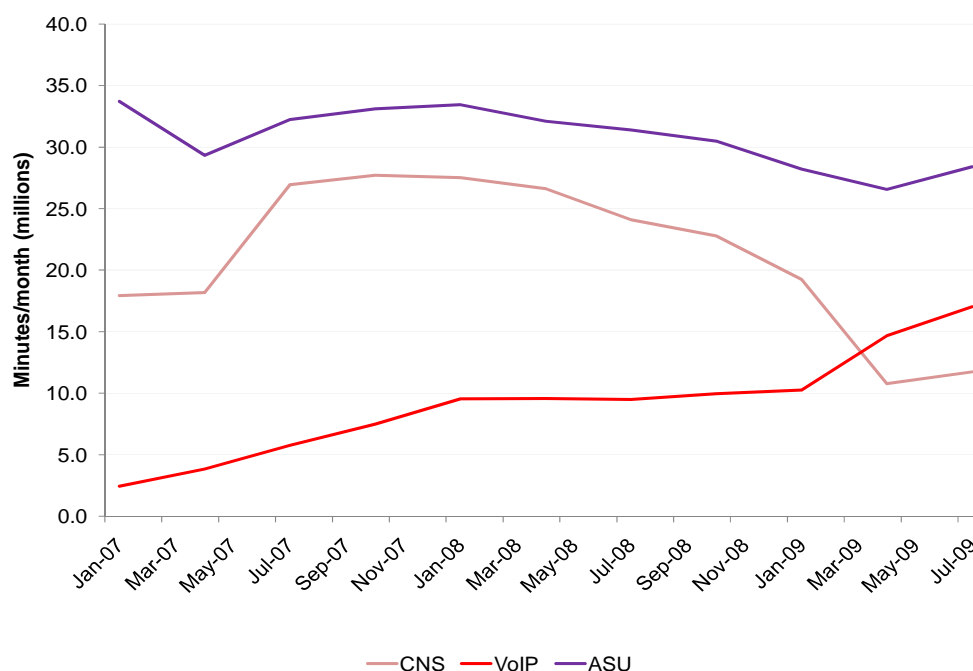
8.116 Several respondents including C&W raised the issue that BT has prevented CPs from connecting to specific BT switches (in particular the ASU platform which provides Featurenet and the metaswitch platform which provides various VoIP and broadband voice applications). C&W state that SoRs have been raised with BT to connect to these switches but that these requests have been declined. They argue that BT has attempted to charge large upfront development costs to C&W, or refused to proceed with a VIC based solution even though no physical product was available. C&W has requested BT to charge DLE prices for traffic affected by this issue, but BT has rejected it, instead charging a single tandem rate including both the call termination and LTC rates.

### Ofcom's response

8.117 BT has four networks to which interconnection is not currently supported. These are the Advanced Service Units (ASUs) which support Featurenet, metaswitches which provide business voice over IP services, a further voice over IP platform used to support BT Broadband Talk and the former Concert Network Services (CNS) network. BT has received SoRs to provide interconnection at some of these platforms. In assessing these requests, BT has said that the costs of providing this interconnection would be too expensive

8.118 The volume of traffic on these platforms is small. Figure 8.9 below shows the volumes.

**Figure 8.9: Traffic terminating on ASUs, VoIP and CNS platforms**



Source: BT

- 8.119 As can be seen from Figure 8.9 above, traffic volumes are small on each of these platforms. For example, less than 35 million minutes per month terminate on the largest of them – the ASUs. In total, BT terminates over 4.5 billion minutes per month of traffic on its network from other CPs. Less than 1% of traffic to BT geographic numbers terminates on the ASUs, VoIP platforms (metaswitches and Broadband Talk platform) and CNS networks combined.
- 8.120 We are proposing to continue regulation on BT in the call origination and call termination markets and, in addition, to impose interconnection obligations in order for the remedies in these markets to work effectively. On the ASUs, VoIP and the CNS platform BT could meet its obligation by developing interconnection capabilities. However, BT's previous analysis has shown that development costs of direct interconnection to these platforms would be too high based on the forecasted demand and based on the traffic volumes involved. In addition, BT has indicated to Ofcom that these platforms do not form part of BT's Project Sustain initiative to extend the life of current assets. The VoIP platforms do not form part of the 21CN plan and so are likely to be replaced.
- 8.121 Therefore, the ability of BT to potentially raise its prices in an uncompetitive manner in relation to these services, relates to the call origination and call termination markets and the related technical area of interconnection, rather than the LTC market.
- 8.122 If BT were to review this position and develop either physical interconnection or a VIC-type solution, it would be likely to meet its obligation. Such an obligation would flow from BT's SMP in the origination and termination market and we could consider whether additional regulation via SMP conditions in those markets would be appropriate, considering, for example, whether we should impose some form of interconnection obligation specific to these platforms. Any regulation would have to comply with the tests set out in the Act, including that any new condition was proportionate. Given the relatively low volume of traffic involved, if BT were to publish rates to these platforms based on the use of a determined LTC rate, it would be likely that additional regulation would not be appropriate as it could be considered disproportionate.
- 8.123 BT has again committed voluntarily to publish a rate for termination of traffic to these platforms. If CPs believe this rate is unreasonably high and commercial discussions with BT do not produce a satisfactory outcome, they can raise a complaint or dispute to Ofcom relating to BT's obligation to provide interconnection to these networks. We consider this is sufficient for us not to propose any further regulatory interconnection requirement upon BT at this stage.

## Conclusion

### Conclusion on market definition

- 8.124 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to our consultation, we conclude that the market definition is:
- Local-tandem conveyance (LTC)/Local-tandem transit (LTT)
- 8.125 The geographic market is the UK excluding Hull.

- 8.126 We do not define an LTC/LTT market in the Hull Area as the KCOM network does not have separate local and tandem layers.

### **Conclusion on market power assessment**

- 8.127 We have set out above the responses to our consultation in relation to our market power assessment for the LTC/LTT market. There are a number of specific traffic types where charges are currently based on the LTC rate. If LTC is deregulated, it is important that there is a relevant regulatory mechanism for ensuring BT does not set these charges unfairly, where they are not constrained by the wider competitive effects of the LTC market. We have set out Ofcom's approach in these cases. We do not believe these particular scenarios are necessarily related to the consumption of LTC except in the case of ported traffic, where Ofcom takes into account the constraints imposed by GC18. We therefore do not regard this as sufficient evidence to consider BT to have SMP in LTC.
- 8.128 We have also set out that we believe both small and large purchasers of LTC continue to have options to avoid purchasing LTC from BT in the event that BT increases its prices. Recently, a large volume of traffic has been moved off BT supplied LTC.
- 8.129 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the consultation responses, we conclude that BT does not have SMP in the LTC/LTT market.

### **Transitional arrangements**

- 8.130 In making a finding that BT no longer has SMP in this market, we are obliged by section 84(4) of the Act to revoke every SMP service condition applied to that person. If such revocation was made immediately then this could, in certain circumstances, adversely impact on the market. This is recognised in the Framework upon which section 84 is based, with Article 16(3) of the Framework Directive requiring NRAs to give affected parties a reasonable period of notice.
- 8.131 We recognise that BT has been subject to a number of SMP remedies, including a charge control. In deregulating the LTC market, we need to ensure that affected parties within the market can appropriately react to the changes in regulation and believe that the way to provide the appropriate period of notice is by imposing a 12 month transitional period.
- 8.132 In setting this period we will immediately revoke the following remedies:
- Cost accounting;
  - Requests for new network access; and
  - Charge control.
- 8.133 However, the following remedies will continue to apply for a further 12 months, at which point they will be revoked in order to discharge our obligations under section 84:
- Requirement to provide network access on reasonable request;

- Requirement not to unduly discriminate;
- Basis of charges;
- Requirement to publish a reference offer;
- Requirement to notify charges; and
- Requirement to notify technical information.

8.134 In addition, we will maintain the accounting separation obligation. This will allow BT to report for the financial year 2009/10 in which the current SMP finding we will be revoked. The regulatory financial accounts including this data will be published in or around July 2010. At this time, the accounting separation obligation will be removed. BT will not be required to provide separate accounting data for LTC/LTT for the period commencing April 2010 onwards.

## Section 9

# Wholesale Transit Services

## Summary

- 9.1 In our consultation we defined a single market as the wholesale transit services market to include:
- Inter-tandem conveyance and transit (ITC/ITT) and single transit (ST).
- 9.2 We proposed that BT did not have SMP in this market.
- 9.3 Based on responses to consultation we have reconsidered this approach. We now propose to define separate markets for ITC/ITT and ST. We also propose that BT retains SMP in the ST market.
- 9.4 We set out our arguments for this, and consultation questions seeking stakeholder responses, in Section 19 of this document. In the rest of this section we set out our initial proposal and feedback to consultation.

## Market definition

- 9.5 In previous market reviews, two separate markets have been defined: Inter-tandem conveyance and transit (ITC/ITT) and Single Transit (ST). ITC/ITT was de-regulated in 2005 whilst ST remained regulated.
- 9.6 In our March consultation we proposed ITC/ITT and ST belonged to a single market based largely on the high degree of interconnection between CPs other than BT and because CPs that offer wholesale services do not tend to offer separate ITC/ITT and ST products. BT is the only CP providing separately defined and separately priced single transit and inter-tandem transit products because of its current regulatory obligations.
- 9.7 We proposed a single geographic market in the UK excluding the Hull Area because transit services are focused on the tandem layer of exchanges, where there is less likely to be an argument for geographic differences in pricing. The high degree of interconnection at the BT tandem layer would make it impractical to manage different rates, since CPs could easily re-route traffic to take advantage of the lower transit rates.

## Market power assessment

- 9.8 We proposed that BT did not have SMP in this wider market because barriers to entry were low. A number of CPs have deployed a very high degree of interconnection at BT's tandem exchanges. In addition, there is a high degree of interconnection between CPs other than BT.
- 9.9 Large CPs have high traffic volumes between them. Whilst they may use the BT network as a transit network to carry some traffic, we proposed that the volumes were sufficient so that, in the event of an increase in price by BT, two CPs could implement a direct interconnection. We also set out why we considered that, even for smaller CPs, interconnection to a transit provider other than BT may be attractive, and this would act to constrain BT's ability to raise prices to smaller CPs.

## Relationship between the wholesale market definition and the Commission's Recommendation on product and service markets.

- 9.10 In our consultation we said that the Commission has not included a market for transit services in the products and services markets identified in its current Recommendation, having previously defined the following market in the 2003 Recommendation.
- Transit services in the fixed public telephone network (formerly market 10 in the 2003 Recommendation)
- 9.11 The removal of the market from the list published by the Commission indicated that the Commission no longer presumes that, in principle, *ex-ante* regulation is warranted for this market. However, we said that, given the current continued regulation in Single Transit, we are required, under the Act, to carry out a further analysis of the market to review the market power determination.
- 9.12 We proposed that the market dynamics are such that, for the wholesale transit services market, the three criteria test was not met.

## Consultation Questions

- 9.13 In the consultation we asked:

**Question 9.1:** Do you agree with Ofcom's assessment that there is a single market for conveyance and transit services at the tandem layer in the UK excluding the Hull Area? If not, please explain why.

**Question 9.2:** Do you agree with Ofcom's assessment that BT does not have SMP in the market for conveyance and transit services at the tandem layer? If not, please explain why.

## Consultation responses

### Market definition

- 9.14 There was a mixed response to our market definition.
- 9.15 C&W disagreed with it, commenting that "the approach of looking at the market in aggregate isn't sophisticated enough to provide the UK with the most appropriate market definition" and that "it would be far more appropriate for Ofcom to conclude that the transit routes to each particular carrier constitute separate markets ... A route based approach such as this is justified as it is quite clear that the competitive conditions on a route to a large carrier (such as an MNO interconnected with multiple other operators) will be very different to those on a route to a small operator, possibly only connected to BT. Absent the existing SMP conditions there is no common pricing constraint between these two very different situations."
- 9.16 C&W argued that the volume of small carriers co-existing with a few larger players makes the UK market different from most other EU member states and that with well over 100 active carriers, BT's nearest competitor has less than a third of the direct routes available to it than BT has in place. C&W further added that "smaller CPs also have a natural incentive to get their BT interconnect operational as soon as possible because it gives them access to all other networks from one place and allows other

providers to open up their number ranges, as other communication providers will only usually do this once a number is listed on the BT Carrier Price List.”

- 9.17 C&W argues that “it cannot put an accurate figure on the number of routes where [they] believe BT has a monopoly on the route (i.e. ignoring those providers who offer an A-Z transit service for convenience but are still dependent on BT) but [they] don’t believe that saying that over 70 such routes exist in the UK would be an exaggeration, accompanied by tens more that only have BT plus one or two others who don’t offer a productised transit offering (and who are unlikely to enter the market given the low return)”.
- 9.18 One confidential respondent made a similar comment: “there may be a national market for conveyance and transit services at the tandem layer in the UK excluding the Hull area” but added that “it may well be the case that the competitive conditions are sufficiently different such that it would be appropriate to define separate sub-markets.”
- 9.19 Another confidential respondent stated that they accept the fact that ITC and ITT are in the same market but “are less convinced by Ofcom’s argument that ST is also in the same market”. They said that they are “not convinced that just because two operators interconnect with 40 or more CPs that there could be sufficient entry in the event of a SSNIP by a hypothetical monopolist of ST.”

### Market power assessment

- 9.20 Respondents generally agree that some routes may be competitive and do not oppose the idea of deregulating these routes. However, many respondents disagreed with our finding that BT does not have SMP in the transit market on the basis that, they argue, BT has the ability to raise prices on some routes (i.e. where the market is so small that there is no room for a second interconnecting operator in addition to BT) and for some streams of traffic (e.g., NTS and Number portability) for which BT’s transit charges are unavoidable.

### Thin routes

- 9.21 Respondents expressed a concern about BT’s ability to raise prices for transit to routes to smaller CPs (“thin routes”) where competing suppliers would not find it profitable to directly interconnect.
- 9.22 A number of respondents including C&W and several confidential respondents provided analysis to show that direct interconnection in order to avoid BT’s single transit is not economic for some routes where traffic volumes are low. The CPs with the largest levels of interconnection are reliant on BT to reach more than 80 operators. It is not economically viable, either via deploying fibre or via PPCs to interconnect at a rate that would constrain BT’s prices for single transit. The cost of these routes, on a pence per minute basis, assuming the capacity is used efficiently, is likely to be several times the BT single transit prices (shown in Table 9.1 below). Therefore, a SSNIP would clearly be profitable to BT.

**Table 9.1: BT’s single transit prices (including PPP)**

Day (ppm)	Evening (ppm)	Weekend (ppm)
0.0238	0.0109	0.0086

- 9.23 Even where interconnection would become economic (e.g. following a price increase by BT), C&W argues that, in their experience, it takes nearly twelve months (sometime longer) to establish a new interconnection with other CPs (allowing for business case sign off, contractual agreement, planning, building and testing). UKCTA argues that our analysis ignores the scale of the task required to connect directly to the many small providers who terminate UK number ranges.
- 9.24 One other confidential respondent argued that interconnection capacity to CPs other than BT was limited, and that this may not be available for transit traffic. In particular, whilst CPs are relatively well interconnected for international traffic, it does not necessarily follow that they are also well interconnected to support national traffic. There may need to be interconnection to different switches, and scale may be different, between national and international traffic.
- 9.25 Many stakeholders have commented that BT has slashed ST prices in an attempt to discourage direct interconnection between other CPs. C&W stated that they are aware of at least one example where a business case for direct interconnection was abandoned because BT cut its ST charges undermining the economics of direct interconnection.
- 9.26 Many stakeholders have commented that, once deregulated, BT has incentives to and would raise prices on “thin” transit routes. These stakeholders also commented that BT has recently completed a significant upgrade of its billing platform and that BT's new 180 bespoke chargeband billing system will allow it to price discriminate by route with relative ease.

### Number Translation Services (NTS)

- 9.27 On calls to the majority of NTS numbers, the transit fee is paid by the terminating network. The terminating CP has no control over the routing of the call. It can attempt to reduce its costs by:
- interconnecting to as many tandem exchanges as possible to attract the single transit rate rather than a double tandem transit rate; or
  - offering an attractive rate for CPs to connect directly to it.
- 9.28 A number of respondents flagged the concern that the originating CP has no incentive under this regime to route traffic via a direct route. As such the terminating CP has no choice but to pay the transit rate. For example, one respondent said transit to non geographic numbers is an important issue that has not been dealt with by Ofcom. It argues that there are 140 operators who BT has a single transit rate for and that for the majority of these, BT offers the only point of interconnection.
- 9.29 Concern has been raised that number portability transit, in particular for non geographic numbers also relies on single transit.

### **Ofcom's response**

- 9.30 Ofcom based its proposed market definition in the transit market on several factors including but not limited to the high level of interconnection at BT's tandem switches and between other CPs. One implication of this is that, should BT increase its prices for ST, providers of ITT/ITC would find it profitable to supply ST services to other CPs or self-supply by building direct interconnection. Ofcom was also of the view that,



because transit services are focused on the tandem layer of exchanges, geographic differences in pricing were likely to be impractical as the high degree of interconnection at the BT tandem layer implies that CPs could easily re-route traffic to take advantage of lower transit rates.

- 9.31 In defining a wholesale transit market in this way, we considered that BT did not have SMP, since the constraints offered by other CPs' transit services or via direct interconnection were sufficient to ensure that effective competition occurred within the overall market. We noted in paragraph 9.55 of our consultation that there may be some routes or some traffic types where competition was weaker than in the wider market but that we did not consider that, overall, this should lead to regulating the single transit market as a whole.
- 9.32 Ofcom has given careful consideration to the analysis submitted by CPs in their responses to the consultation and subsequent information requests.
- 9.33 These show that the routing of traffic may be much more complicated than Ofcom took into account in assessing this market in the consultation. Whilst there is a relatively high degree of interconnection in place between CPs in addition to the interconnection they have to BT, and this allows the possibility of substitution between ST and ITC/ITT (and substitution of either of these with direct interconnection between the originating and terminating CPs), the complexity of establishing effective commercial offerings and managing the increased routing information in the different networks may act to impair this substitutability.
- 9.34 Ofcom has therefore re-considered its market definition, as set out in the consultation document which should be read in conjunction with this statement, and the effect of this on the assessment of SMP in the market. Since this leads us to a position that is different to that in our March consultation, we are re-consulting on our market definition, SMP analysis and remedies. This is set out in Section 19.

## Section 10

# Interconnection circuits and PPP

## Introduction

10.1 In this section we address two areas that we do not consider to be markets but are related to the provision of regulated products in the markets previously discussed. These are:

- Interconnection circuits; and
- BT's Product Management, Policy and Planning (PPP) activities related to regulated products. This includes administration overheads, marketing activities directly related to the regulated products, customer service management for these products and billing and finance activities.

10.2 We are imposing the following remedies in these areas:

**Figure 10.1: Remedies for interconnection circuits and PPP**

	BT obligations	KCOM obligations
Interconnection circuits	Requirement to provide network access on reasonable request Requests for new network access Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges, terms and conditions Requirement to notify technical information Cost accounting Accounting separation Transparency as to quality of service Charge control	Requirement to provide network access on reasonable request Requirement not to unduly discriminate Basis of charges Requirement to publish a reference offer Requirement to notify charges, terms and conditions Requirement to notify technical information Cost accounting Accounting separation
PPP	Charge control	

## Interconnection Circuits

10.3 In this section we address interconnection circuits. Interconnection circuits provide the facilities to allow calls to be routed between the networks of different CPs. Interconnection circuits are not identified within the Commission's recommendation on products and service markets as a market that should be considered for ex ante regulation<sup>34</sup>. However, in our consultation we proposed it was necessary to impose obligations on BT and KCOM requiring them to provide interconnection services in

<sup>34</sup> [http://ec.europa.eu/information\\_society/policy/ecomm/doc/library/proposals/rec\\_markets\\_en.pdf](http://ec.europa.eu/information_society/policy/ecomm/doc/library/proposals/rec_markets_en.pdf)

order to allow remedies aimed at addressing SMP in the wholesale call origination and wholesale call termination markets to be effective.

- 10.4 Without an obligation to provide interconnection circuits, the remedies required in the wholesale call origination and call termination markets imposed on BT are unlikely to be effective because without the obligations to provide interconnection circuits as set out in this section BT could restrict access to the proposed call origination and call termination remedies. For similar reasons, we consider it is appropriate to require KCOM to provide interconnection within the Hull Area.
- 10.5 We set out in our consultation that we did not consider it appropriate to require other CPs to provide interconnection circuits even though we proposed they had SMP in providing call termination because other CPs do not have the same scale of network as BT and KCOM meaning it would not be reasonable to expect them to provide interconnection circuits. We did, however, note that these CPs would still need to comply with General Condition 1 (GC1).
- 10.6 BT supports three types of interconnection circuit:
- In Span Interconnection (ISI): to provide ISI, a CP builds its own network up to a Point Of Connection (POC), generally located just outside the BT exchange. BT then connects its network to the POC;
  - Interconnect Extension Circuit (IEC): IECs build out from a POC provided via ISI as above, and allow CPs to extend their interconnection network beyond the building to which they have built their own network; and
  - Customer Site Interconnection (CSI): CSI does not require any infrastructure build by the CP. Instead, BT builds to the CP's site. Once the build is complete, the CP can use this BT-provided infrastructure to interconnect to other BT exchanges.
- 10.7 KCOM provides ISI and IECs. It does not provide CSI. Ofcom considers it would not be reasonable to require KCOM to provide CSI build-out to other CPs, given its limited network footprint outside of the Hull Area.
- 10.8 Ofcom considers that all three (or, in the case of KCOM, two) delivery methods are required because:
- not all CPs are of sufficient size to deploy ISI. To meet the requirements of these CPs, CSI is required;
  - if only CSI was available, larger CPs would not be able to take advantage of their own infrastructure deployments to provide interconnection. Therefore, ISI is required; and
  - IECs allow CPs to more efficiently use the ISIs they have deployed. They may help justify building ISIs which would not be economic if they were limited to providing interconnection only to the exchange to which they connect.
- 10.9 BT provides a fourth type of interconnection called Virtual Interconnection Circuits (VICs). VICs allow a CP to access the DLEs connected to a tandem switch through the tandem without paying LTC rates. VICs were introduced to assist the run up and migration to 21CN. However, this has been delayed on several occasions. During this period, VICs have been deployed both to assist in the early stages of migration

of DLEs to 21CN (migration VICs) and, more generally, in growing CPs' interconnection (business as usual VICs). In April 2009<sup>35</sup> BT announced a further change in approach. Within the scope of this discussion, BT has indicated the continued use of VICs may need to be reviewed because the ongoing support of VICs is creating capacity exhaustion at the NGS switches that host the VICs

- 10.10 VICs were agreed through commercial negotiations between BT and CPs without intervention from Ofcom. As the underlying components are based on the regulated interconnection circuits, Ofcom does not propose to regulate VICs at this time. Ofcom is currently of the view that the ongoing use of VICs should be agreed by BT with industry as part of the 21CN voice strategy discussions.

## Summary

- 10.11 Interconnection circuits are required to allow CPs to effectively use the products that BT and KCOM are obliged to provide. Different mechanisms for delivering interconnection circuits allow CPs to use their own infrastructure deployment efficiently to reduce costs whilst also allowing interconnection at remote sites where own-build would be prohibitively expensive.
- 10.12 Without an obligation to provide these circuits, BT and KCOM would be in a position to restrict the effectiveness of the remedies implemented in various markets where they have been found to hold SMP.

## Consultation Question

- 10.13 In the consultation we asked:

**Question 10.1:** *Do you agree with Ofcom's assessment that BT and KCOM should be required to provide interconnection circuits? If not, please explain why.*

## Consultation responses

- 10.14 All respondents to this question agreed BT should be required to provide interconnection circuits. The majority of these respondents also agreed that KCOM should be required to provide interconnection circuits, although some did not comment on the KCOM obligations.
- 10.15 BT agreed with the requirement that it should provide interconnection circuits. However, it argued that at sites where a sufficient number of CPs have deployed ISI, there should not be an obligation to provide IECs to that location. BT said it believed a sufficient number of CPs is three, and that this would mean 66 buildings that house DLEs would have the obligation to provide IECs removed.

## Ofcom's response

- 10.16 We do not agree with BT's argument regarding the removal of the obligation to provide IECs where there are three or more CPs interconnected via ISI. Whilst it is theoretically possible that CPs connecting via IEC to the DLEs in such locations could move onto an ISI based supply, it is clear this would not be a low cost or quick process. It would require the CPs with their own infrastructure to develop offers to

<sup>35</sup> BT raised this issue at the Consult21 interconnect workshop on 23 April 2009.

provide such services to other CPs. It is not clear they would be willing to do this, or have the available network to do so.

- 10.17 CPs that have used IECs do so based on having provided ISI to another BT building – ISI deployment is a pre-requisite to using IECs and requires limits are placed on the reach of IECs from the point where the ISI terminates on the BT network. If the ability to use this capacity also for IECs is removed, these CPs would have less efficient use of this network. They would also need to enter negotiations with other CPs to try to establish an agreement to purchase capacity from these other CPs. This may in turn drive a requirement for these two CPs to have to deploy new network interconnection between themselves to allow for the circuits to be provisioned.

## Conclusion

- 10.18 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the consultation responses, we conclude that BT and KCOM should be required to provide interconnection circuits. BT should provide ISI, IEC and CSI interconnection mechanisms. KCOM should provide ISI and IEC interconnection mechanisms.
- 10.19 We are imposing the obligation to provide interconnection in order to ensure the effective functioning of remedies in the call origination and call termination markets. Without this obligation BT would be able to restrict the effectiveness of this remedy. Similarly, since all CPs will be dependent on BT provided interconnection, there is a risk of BT having the ability and the incentive to price excessively. We therefore consider the imposition of a charge control is an appropriate remedy in this market. We set this out in Section 16. We do not consider this to be the case for KCOM due to the very small size of the market.

## Remedies

- 10.20 We conclude that it is appropriate to impose a number of obligations on BT and KCOM in relation to interconnection circuits. These are discussed in the following sections of this statement as outlined below.
- 10.21 We are imposing the following general remedies should be imposed on BT and KCOM:
- Requirement to provide network access on reasonable request;
  - Requirement not to unduly discriminate;
  - Requirement to publish a reference offer;
  - Requirement to notify charges, terms and conditions;
  - Requirement to notify technical information;
  - Cost accounting; and
  - Accounting separation.
- 10.22 These remedies are discussed in Section 11.

10.23 In addition, we are imposing the following remedies should be imposed on BT:

- Transparency as to quality of service: we discuss this in Section 11;
- Requests for new network access: we discuss this in Section 11;
- Charge control: we discuss the charge control to be imposed on BT for interconnection circuits in Section 16.

### Product Management, Policy and Planning (PPP)

10.24 BT makes a product management, policy and planning (PPP) surcharge to cover its administrative costs in dealing with interconnection relationships in narrowband markets. The charge covers BT's internal costs in managing such relationships over and above the charges that it incurs for actually conveying and switching calls across its network.

10.25 Any competing provider wishing to offer retail services to BT's customers via CPS or IA or needing BT to terminate calls on its network is required to pay PPP. Therefore, to the extent that BT maintains SMP in these markets, the competing providers have little alternative but to pay BT to either originate or terminate, and to pay BT PPP. In competitive markets, competing providers could choose to purchase conveyance services from alternative providers and a portion of the charge they would pay would directly or indirectly be attributable to a function of a similar nature to BT's PPP activity.

10.26 Therefore, we proposed to impose a charge control on the setting of the PPP charge that is currently levied on a once per call minute basis in the following markets:

- call origination on fixed public narrowband networks; and
- fixed geographic call termination.

### Consultation Question

10.27 In the consultation we asked:

**Question 10.2:** *Do you agree with Ofcom's assessment that BT's product management, policy and planning (PPP) charge incurred in markets where it has SMP and in the provision of interconnection circuits should be regulated? If not, please explain why.*

### Consultation responses

10.28 All respondents to this question agreed BT's PPP charge should be subject to a charge control. One respondent said that if we find SMP in LTC/LTT and/or transit markets, the PPP price should be regulated in these markets as well.

### Ofcom's response

10.29 As discussed in Section 8, we concluded that the LTC/LTT market is competitive. We discuss our approach to PPP for ST in Section 19.

## Conclusion

10.30 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the consultation responses, we conclude that BT's PPP charge for its call origination and call termination services should be subject to a charge control .

10.31 We discuss the charge control in Section 16.

## Section 11

# General Remedies

## Introduction

- 11.1 In our consultation we split our proposed remedies into eight sections. The first section considered general remedies whilst the other seven considered more specific remedies, or the application of remedies in specific markets (such as call termination). We considered whether it was appropriate to apply general remedies (requirement to provide network access on reasonable request, requirement not to unduly discriminate, transparency obligations including accounting separation and cost orientation obligations including cost accounting) to the exchange lines markets, call origination, interconnection circuits and PPP.
- 11.2 We discussed remedies proposed for the call termination market in a separate section. This is because call termination is the only market in which remedies are applied to operators other than BT and KCOM. We also included separate sections for product-specific remedies such as WLR, CPS and carrier selection (CS) and NTS call origination. We discussed charge controls and possible price regulations for ISDN30 in separate sections and, in Section 18, set out how we would revoke and re-impose remedies.
- 11.3 For the purpose of clarity, we take the same approach in this statement.
- 11.4 This section focuses on general remedies in the exchange lines, call origination markets and interconnection and PPP. For the remedies that apply to call origination, these remedies also apply to NTS call origination.
- 11.5 Based on our analysis set out in the consultation, responses to consultation and Ofcom's further consideration based on these responses, we are imposing the following remedies on BT in the UK excluding the Hull Area and on KCOM in the Hull Area in relation to wholesale analogue exchange lines, wholesale ISDN2 exchange lines, call origination and interconnection circuits:
- Requirement to provide network access on reasonable request;
  - Requirement not to unduly discriminate;
  - Basis of charges;
  - Charge control (BT only);
  - Requirement to publish a reference offer;
  - Requirement to notify charges, terms and conditions;
  - Requirement to notify technical information;
  - Transparency as to quality of service (BT only);
  - Requests for new network access (BT only);
  - Cost accounting; and



- Accounting separation.
- 11.6 KCOM said in its response that no remedies should be imposed on it in the ISDN2 market in the Hull Area due to the size of the market. Whilst Ofcom recognises that this market is small and the absolute number of customers is declining, we have concluded that KCOM continues to hold a position of SMP and, therefore, the imposition of remedies is appropriate. Since these remedies have been in place during the last review, we do not consider that it is disproportionate for them to continue to apply.
- 11.7 We explained in Section 5 that we have not concluded on the ISDN30 exchange lines market and that we will be publishing a separate document on that market shortly. Therefore, we do not include ISDN30 in the remedies discussed below and in the following Sections.
- 11.8 Whilst we continue to analyse the ISDN30 market the remedies currently imposed on BT in the UK excluding the Hull Area and KCOM in the Hull Area will remain effective. These are:
- Requirement to provide network access on reasonable request;
  - Requests for new network access (BT only);
  - Requirement not to unduly discriminate;
  - Requirement to publish a reference offer;
  - Requirement to notify charges, terms and conditions;
  - Requirement to notify technical information;
  - Accounting separation;
  - Transparency as to quality of service (BT only); and
  - Obligation to provide WLR (BT only).
- 11.9 The rest of this section sets out our consultation proposal, the responses we received to consultation and our conclusion for each remedy considered.

#### Note on setting of conditions

- 11.10 The 2003 and 2005 market reviews set various SMP conditions. These conditions were numbered using the following format; AAx (for BT), ABx (for KCOM) for markets other than the call termination market. We have in this document concluded our market reviews for certain markets, but we have not concluded our review of the following markets:
- Single Transit ; and
  - ISDN30
- 11.11 For these two markets, the current SMP remedies as set in 2003 will continue to be in force.

- 11.12 Further, although we have found the LTC/LTT market to be competitive we have set a transitional period that means that some current SMP conditions will not be withdrawn immediately. For this market, a number of the remedies set in 2005 will continue in force.
- 11.13 As we are setting new conditions for our newly defined markets which will run alongside the conditions in relation to the three markets described above, we need to ensure that there is no confusion as to what condition applies to what market. We have decided, therefore, to introduce a new numbering system for SMP conditions set under this review. We will number conditions in the form AAx (for BT), AABx (for KCOM). As all 2003 call termination remedies have been revoked in the accompanying Notification we have not renumbered call termination SMP conditions, and the new conditions to be imposed will retain the numbering of the conditions imposed under the 2003 review.
- 11.14 By way of illustration BT will continue be subject to SMP condition AA2, no undue discrimination, for the Single Transit, ISDN30 and LTC/LTT markets, and will also be subject to SMP condition AAA2, no undue discrimination, for the newly reviewed call origination, analogue exchange lines and ISDN2 markets.
- 11.15 We consider that the adoption of this numbering system will prevent any confusion between remedies imposed as a result of the 2009 review and previous remedies, whilst retaining a degree of symmetry in terms of the number of the condition ensuring that there is a consistent approach to numbering for similar types of condition.

### **Requirement to provide network access on reasonable request**

- 11.16 In the consultation we set out our proposal to retain the requirement to provide network access on reasonable request on BT and KCOM, where they have been found to have SMP in the following markets and technical area:
- Wholesale analogue exchange line services;
  - Wholesale ISDN2 exchange line services;
  - Call origination on fixed public narrowband networks; and
  - Interconnection circuits.
- 11.17 This remedy is designed to promote competition in downstream markets by requiring providers with SMP to provide wholesale access to their network facilities. The level of investment required by a third party to replicate BT and KCOM's networks in order to compete at this level is a significant barrier to entry. Ofcom considers that in the absence of such a requirement, the dominant provider would have an incentive not to provide access. The ability of competing CPs to gain wholesale access will facilitate the development of competition in retail markets.
- 11.18 Interconnection is not identified within the Commission's recommendation on product and services markets as a market that should be considered for ex ante regulation. However, we proposed to impose the obligation on interconnection as we considered that it is an area where it is necessary to impose adjacent or related regulation as part of the overall, effective obligation to address SMP on the analysed market.

- 11.19 Section 87(3) of the Act authorises Ofcom to set SMP services conditions requiring the dominant provider to provide network access as it may, from time to time, direct. These conditions may, pursuant to section 87(5), include provision for securing fairness and reasonableness in the way in which requests for network access are made and responded to, and that conditions are complied with within the periods and at the times required.
- 11.20 We have also taken into account the six factors set out in section 87(4) of the Act, including, inter alia, the technical and economic viability of installing other competing facilities and the feasibility of the proposed network access.

### Consultation question

- 11.21 In the consultation we asked:

**Question 11.1:** *Do you agree that Ofcom should impose a requirement to provide network access on reasonable request on BT and KCOM in the markets and technical area discussed? If not, please explain why.*

### Consultation responses

- 11.22 All respondents agreed with Ofcom's proposal to impose a requirement to provide network access on reasonable request on BT and KCOM in the markets and technical area discussed.
- 11.23 While BT was in agreement with our proposal, it stated that 'the form of network access may differ depending on developments in BT's core network topology and the roll out of fibre infrastructure, and that the network access should not be expected to be exactly replicable or in the same locations as has historically been the case'.
- 11.24 Zen Internet stated that it was insufficient to only require KCOM to publish tariff information once network access had been negotiated. It also stated that the absence of a requirement on KCOM to publish WLR pricing 'is a detrimental and limiting factor' in the Hull market.

### Ofcom's response

- 11.25 In response to BT's comments, the network access that is required to be provided under this condition is in response to a reasonable request. The obligation is technologically neutral in the sense that any technology used to provide services in the relevant markets are covered by this obligation. However, where technology changes, it may not be reasonable to exactly replicate a specific form of network access provided on a legacy technology when this is replaced.
- 11.26 In response to Zen Internet, while we address these comments later in Section 13 of this document in relation to WLR specifically, our argument remains that until demand is demonstrated through a request for new network access, it is not proportionate to require KCOM to prepare products in advance.

### Legal tests

- 11.27 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

- 11.28 Ofcom has considered the Community requirements as set out in section 4 of the Act. We consider the condition promotes competition in relation to the provision of electronic communications networks and encourage the provision of network access for the purpose of securing efficient and sustainable competition in markets for electronic communications networks and services.
- 11.29 We also detailed in paragraph 11.19 of our March consultation, why we considered the condition met the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## Conclusion

- 11.30 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing the obligation to provide network access on reasonable request on BT and KCOM in relation to the markets and technical area in which we have concluded that they have SMP, as listed in paragraph 11.16 above

## Requirement not to unduly discriminate

- 11.31 In the consultation we set out our proposal to retain the requirement on BT and KCOM not to unduly discriminate in relation to the provision of network access in the following markets and technical area:
- Wholesale analogue exchange line services;
  - Wholesale ISDN2 exchange line services;
  - Call origination on fixed public narrowband networks; and
  - Interconnection circuits.
- 11.32 The condition is necessary because otherwise BT and KCOM may have an incentive to provide wholesale services on terms and conditions that favour their own retail activities, in a way that would have a material adverse effect on competition. In the March consultation we considered this condition to meet Ofcom's objective to promote efficient and sustainable competition as it ensures that all parties are treated on an equitable basis.
- 11.33 Section 87(6)(a) of the Act authorises the setting of an SMP services condition requiring the dominant provider not to unduly discriminate against particular persons, or against a particular description of persons, in relation to matters connected with the provision of Network Access.

## Consultation question

- 11.34 In the consultation we asked:

**Question 11.2:** *Do you agree that Ofcom should impose a requirement not to unduly discriminate on BT and KCOM in the markets and technical area discussed? If not, please explain why.*

## Consultation responses

- 11.35 All stakeholders agreed with Ofcom's proposal to retain the condition on BT and KCOM not to unduly discriminate in relation to the provision of network access.
- 11.36 One respondent is concerned that the phrase "unduly discriminate" allows BT to 'discriminate where it can justify such discrimination' and that 'the ability of BT to behave in such a way was the key reason why Ofcom sought "real equality of access" and equivalence in the Telecoms Strategic Review'. It encourages Ofcom to 'strengthen the non-discrimination obligation imposed by this market review'.

## Ofcom's response

- 11.37 In relation to the phrase "unduly discriminate", we do not intend to alter the wording of the no undue discrimination condition further. The reference to not discriminating unduly comes directly from the wording of section 87(6)(a) of the Act and is consistent with Ofcom's approach where this obligation applies in other regulated markets. There may be instances where BT can legitimately justify differences between services or CPs when providing network access. The requirement to provide network access condition, as required by the Act (as set out above), specifically allows for BT to take into account whether a request is technically feasible or reasonable. This same approach to signalling in what instance BT can employ this discretion is applied in the no undue discrimination condition and is clarified in our explanation of why the condition is proportionate in response to the tests under section 49(2) of the Act: '...that is discrimination that would materially affect the ability of BT and KCOM's competitors to compete on equal terms'<sup>36</sup>.

## Legal tests

- 11.38 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 11.39 Ofcom has considered the Community requirements as set out in section 4 of the Act. We consider the condition encourages the provision of network access and service interoperability for the purpose of securing efficient and sustainable competition in the retail markets for access and calls, by ensuring BT and KCOM do not unfairly favour their own retail businesses and therefore distort competition.
- 11.40 We also detailed in paragraph 11.27 of our March consultation, why we considered the condition met the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## Conclusion

- 11.41 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing the obligation not to unduly discriminate on BT and KCOM in relation to the markets and technical area in which we have concluded that they have SMP, as listed in paragraph 11.31 above. We have made one minor change to the drafting of the Condition by inserting a second paragraph to provide guidance as to when the Dominant Provider may be deemed to have shown undue discrimination.

---

<sup>36</sup> See paragraph 11.27, bullet point 3, of the March consultation.

This paragraph is a standard construct used in our market reviews in order that we reflect the language of Article 10 of the Access Directive. This paragraph does not impose any additional burden on the Dominant Provider, but was omitted due to an oversight in our consultation document. We consider that it is appropriate to now include it within the Condition<sup>37</sup>.

## Basis of charges

11.42 In the consultation we set out our proposal to oblige BT and KCOM to comply with a basis of charges condition. Throughout this Statement we have discussed both basis of charges and cost orientation and we use these terms interchangeably. We proposed this obligation would continue in the following markets and technical area:

- Wholesale analogue exchange line services;
- Wholesale ISDN2 exchange line services;
- Call origination on fixed public narrowband networks; and
- Interconnection circuits.

11.43 BT and KCOM are currently subject to a basis of charges condition in each of these markets and technical area. We addressed wholesale ISDN30 exchange lines separately. We also separately asked which specific elements of the WLR product should be covered by this obligation.

11.44 We proposed this condition was necessary because otherwise, since these markets had not been found to be effectively competitive, competition cannot be expected to provide effective constraints. Therefore, without some intervention in pricing, BT and KCOM would have the ability to charge excessive prices in order to maximise profits.

11.45 In the consultation we set out the legal basis for imposing the obligation and why we believed each of these was objectively justifiable, not unduly discriminatory, proportionate and transparent.

11.46 In regard to the provision of WLR, we discuss the elements of the WLR product that should be subject to this condition in Section 13.

## Consultation questions

11.47 In the consultation we asked:

**Question 11.3:** *Do you agree that Ofcom should impose a requirement that BT's charges and KCOM's charges should be subject to a cost orientation obligation in the markets and technical area discussed? If not, please explain why.*

**Question 11.4:** *Do you agree with our approach on cost orientation? If not, please explain why, indicating in particular the mechanism you consider to be appropriate.*

## Consultation responses

11.48 BT accepted the imposition of the cost orientation obligation in all markets (except ISDN30, which we will consider separately). KCOM disagreed with the imposition of

<sup>37</sup> See SMP Conditions AAA2.2, AAB2.2, BA2.2 and BB2.2 at Annex 7.

cost orientation in ISDN2 (in line with its argument that no remedies should be imposed) and on ISDN30.

- 11.49 All other respondents agreed that Ofcom should impose cost orientation obligations on BT and KCOM in the markets listed in paragraph 11.42.
- 11.50 There were mixed responses in terms of Ofcom's approach to cost orientation. All respondents generally agreed that Ofcom's approach should be consistent across markets. However, some respondents indicated that it was not clear what this approach is. Several respondents referred to the PPC dispute which (at the time of consultation) was still progressing.
- 11.51 There were a range of views on what the appropriate cost orientation standard should be. One respondent said Ofcom should use the LRIC model, in line with the Commission recommendation on call termination. Other respondents supported a LRIC+EPMU model. BT said it could not comment on Ofcom's approach without further detail.

### **Ofcom's response**

- 11.52 In relation to BT's and KCOM's comments in relation to ISDN30, as we have set out previously, we will consider ISDN30 separately. Existing remedies will therefore continue to apply. We have addressed KCOM's comment regarding ISDN2 in paragraph 11.6.
- 11.53 In response to comments regarding the necessity for further detail on Ofcom's approach to cost orientation, we said in our consultation, at paragraph 11.33, that "LRIC plus an appropriate mark up for common costs and for recovery of cost of capital is the preferred method for this type of regulation in communications markets."
- 11.54 However, for the purposes of clarity, we include additional guidance on Ofcom's approach to cost orientation within the wholesale narrowband markets in Annex 14.

### **Legal tests**

- 11.55 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 11.56 Ofcom has considered the Community requirements as set out in section 4 of the Act. We consider the condition promotes competition and secures efficient and sustainable competition by ensuring that charges for wholesale services are at a level that enables operators to compete effectively.
- 11.57 We also detailed in paragraph 11.27 of our March consultation, why we considered the condition met the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

### **Conclusion**

- 11.58 Therefore for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing a basis of charges obligation on BT and KCOM in the markets and technical area set out in paragraph 11.42.

11.59 In relation to ISDN30 and as we explained in Section 5, we have not concluded our analysis in this market. We will consider whether a cost orientation obligation is required in conjunction with finalising our decision on market definition and SMP considerations.

## Transparency

11.60 In the consultation we said it was appropriate to ensure that there is transparency of charges, terms and conditions in a market in which one operator is dominant. As such, to provide transparency, we proposed to impose the following obligations on BT and KCOM in markets in which we proposed they hold SMP:

- requirement to publish a reference offer;
- requirement to notify charges;
- requirement to notify technical information; and
- transparency as to quality of service (BT only).

11.61 Each of these would apply in the following markets:

- Wholesale analogue exchange line services;
- Wholesale ISDN2 exchange line services;
- Call origination on fixed public narrowband networks; and
- Interconnection circuits.

11.62 Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish all such information, and in such manner as Ofcom may direct, for the purpose of securing transparency. Section 87(6)(c) of the Act authorises the setting of SMP services conditions requiring the dominant provider to publish, in such manner as Ofcom may direct, the terms and conditions on which it is willing to enter into an access contract. Section 87(6)(d) also permits the setting of SMP services conditions requiring the dominant provider to include specified terms and conditions in the reference offer. Finally, section 87(6)(e) permits the setting of SMP services conditions requiring the dominant provider to make such modifications to the reference offer as may be directed from time to time.

## Proposed changes to transparency obligations

11.63 We proposed the following changes to two of the transparency obligations that were put in place by the previous market review:

- Requirement to notify charges: Following a six month transition period, a reduction in notification of price changes from 90 days to 28 days, except in ISDN30 where the period is currently set at 28 days; and
- Requirement to provide transparency of quality of service: A change to the published performance indicators required under this obligation.

11.64 We set out our view on these proposed changes in the relevant section below.



## Requirement to publish a reference offer

- 11.65 In the consultation we set out our proposal to retain the requirement on BT and KCOM to publish a reference offer (RO) in relation to the markets and technical area for which we proposed that they hold SMP, as outlined in paragraph 11.61.
- 11.66 In the March consultation we stated that a RO assists with transparency and monitoring of potential anti-competitive behaviour by providing visibility of the terms and conditions on which other providers would be able to purchase wholesale access services. This ensures market stability and therefore does not undermine incentives to invest by existing market participants and potential new entrants.

### Consultation question

- 11.67 In the consultation we asked:

**Question 11.5:** *Do you agree that Ofcom should impose a requirement to publish a reference offer on BT and KCOM in the markets and technical area discussed? If not, please explain why.*

### Consultation responses

- 11.68 All stakeholders agreed with Ofcom's proposal to retain an obligation on BT and KCOM to publish a reference offer in relation to SMP markets.
- 11.69 BT agreed with Ofcom's proposal but requested that we remove from the condition the requirement for it to notify Ofcom separately when a RO is published or amended, as this information is available publicly via its website.

### Ofcom's response

- 11.70 In response to BT's request, we do not propose to remove the clause requiring BT to notify Ofcom directly of changes as it is an important step in monitoring compliance with the condition. The changes set out in the reference offer are made by BT (or KCOM). Notifying such a change to Ofcom is not a complex or resource intensive task. However, if such a notification is not provided to Ofcom, Ofcom would need to monitor the BT website to check for changes. This burden is unnecessary as it is much simpler for BT to continue to notify Ofcom when it makes a change. This is consistent with our approach to other regulated markets and is not an onerous requirement.

### Legal tests

- 11.71 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 11.72 Ofcom considers that the condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and encourages the provision of Network Access and service interoperability for the purpose of securing efficient and sustainable competition for the maximum benefit for consumers. The publication of a RO would mean that other CPs would have the necessary information readily available to allow them to make informed decisions about entry into the market.

- 11.73 We also detailed in paragraph 11.53 of our March consultation, why we considered the condition met the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

### Conclusion

- 11.74 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing the obligation to publish a reference offer on BT and KCOM in relation to the markets and technical area in which we have concluded that they have SMP, as listed in paragraph 11.61.

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

- 11.75 In the consultation we set out our proposal to retain the requirement on BT and KCOM to notify technical information in relation to the markets and technical area we proposed to find that they hold SMP, as outlined in paragraph 11.61.
- 11.76 This condition requires BT and KCOM to provide advance notification of technical characteristics to ensure that competing providers have sufficient time to respond to changes that may affect them. This is important as competing providers may need to introduce new equipment or modify existing equipment or systems to support a new or changed technical interface.
- 11.77 In the March consultation we outlined in paragraph 11.74 how changes in relation to BT's NGN should be treated.

### Consultation question

- 11.78 In the consultation we asked:

**Question 11.8:** *Do you agree that Ofcom should impose a requirement to notify technical information on BT and KCOM in the markets and technical area discussed? If not, please explain why.*

### Consultation responses

- 11.79 All stakeholders agreed with Ofcom's proposal to retain an obligation on BT and KCOM to notify technical information in relation to SMP markets.
- 11.80 BT agreed with Ofcom's proposal and again requested that we remove from the condition the requirement for it to notify Ofcom separately when technical information is updated, as this information is publicly available via its website.

### Ofcom's response

- 11.81 In line with our response to BT's request made in relation to the Reference Offer, we do not propose to remove the clause requiring BT to notify Ofcom directly of changes as it is an important step in monitoring compliance with the condition. This is consistent with our approach to other regulated markets and is not an onerous requirement.

## Legal tests

- 11.82 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 11.83 Ofcom considers that the condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have sufficient notification of technical changes to the dominant provider's network to enable them to compete effectively.
- 11.84 We also detailed in paragraph 11.76 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## Conclusion

- 11.85 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing the obligation to notify technical information on BT and KCOM in relation to the markets and technical area in which we have concluded that they have SMP, as listed in paragraph 11.61.

## **Requirement to notify charges**

- 11.86 In the consultation we set out our proposal to retain a requirement on BT and KCOM to publish any planned changes to charges in advance of those changes taking place.
- 11.87 The notification of charges at the wholesale level has the joint purpose to assist transparency for the monitoring of potential anti-competitive behaviour and to give advanced warning of charge changes to competing providers who purchase wholesale access services. The latter purpose ensures that competing providers have sufficient time to plan for such changes. Notification of changes therefore helps to ensure stability in markets, without which, incentives to invest might be undermined and market entry made less likely.
- 11.88 This remedy was imposed on BT and KCOM in the 2003 market review, with a 90 day notice period set for all markets except ISDN30 (which was 28 days) before any proposed changes would be effective<sup>38</sup>.

## Proposed changes to existing condition

- 11.89 In the consultation we proposed that it would be proportionate to set a notification period of 28 days for all markets, as long as this provided sufficient notice for CPs to meet obligations in the contracts with their customers. This would be the minimum notification necessary to allow other providers to adjust for any pricing increases. However, since CPs have contracts in place that may have notice periods of longer than 28 days, we believe any reduction in the period should only take effect after

---

<sup>38</sup> A 28 day notification period was also set for inter-tandem conveyance and transit. However, this market was found to be competitive by the 'Review of BT's network charge controls review' in 2005 and therefore, all regulation relating to this market was revoked.

[http://www.ofcom.org.uk/consult/condocs/charge/statement/statement\\_ncc.pdf](http://www.ofcom.org.uk/consult/condocs/charge/statement/statement_ncc.pdf)

sufficient time to renegotiate contractual terms. We proposed that a six month transition period would be appropriate and that this would commence from the date of our final statement.

- 11.90 BT had argued that a 90 day notice period was unduly restrictive. It stated that the 90 day period restricts, for example, its ability to provide trial pricing, since for a three month trial it is required to notify the end of the trial period before the impact of the trial can be assessed. A reduction in the notice period to 28 days would allow BT a greater degree of pricing flexibility, particularly around offers and promotions. It would also bring narrowband in line with other areas, such as LLU.
- 11.91 We stated in the consultation that the prices for many services in SMP markets are also subject to additional regulation such as cost orientation and in some cases, charge controls. This means that the market already has some visibility of price ceilings and floors outside of the notification period.
- 11.92 However, we did raise the concern that a reduction in the notice period may create a tension for CPs if notification periods in their contracts with their customers would not allow them to respond promptly to changes with their customer base.

#### Consultation questions

**Question 11.6:** *Do you agree that Ofcom should impose a requirement to notify charges, terms and conditions on BT and KCOM in the markets and technical area discussed? If not, please explain why.*

**Question 11.7:** *Do you agree that BT and KCOM should provide 28 days notice of price changes and changes of terms and conditions following a six month transition period? If not, please explain why.*

#### Consultation responses

- 11.93 While BT and Zen Internet agreed with our proposal to reduce the notification period to 28 days, the majority of respondents disagreed. BT, however, did disagree that a transition period was necessary.
- 11.94 BT again argued that the 90 day period undermines its 'ability to respond promptly to customers' requirements, ultimately to the detriment of end users'. It particularly focused on the impact on its ability to introduce and extend special offers. BT also felt that CPs 'have the ability to quickly amend prices in their contracts with their customers, particularly for price decreases'. Further, BT argued that the notice period for changes to mobile call termination rates is 28 days.
- 11.95 All other respondents strongly disagreed with Ofcom's proposal, arguing that the 90 day period was designed to give CPs sufficient notice to take action when input prices change, including time to make the necessary billing, traffic management and routing changes. They argued that Ofcom should retain 90 days and streamline the existing waiver process to deal with requests from BT for reduced periods. They also stated that it would take 'many years' to revise end user contracts to reflect a reduced price notification period.
- 11.96 One respondent commented that we should not consider reducing the notice period because the Network Charge Control consultation was proposing price increases. It stated that without sufficient notice CPs would not be able to recover these increased

input costs from their own customers all of whom will need contractual notice of a price change.

### Ofcom's response

- 11.97 The strongest reason for disagreement with our proposal was in relation to the time required for CPs to consider and implement a price change once notified by BT. Not only do CPs need to consider the impact of any changes, they may also need to go through their own internal governance processes if they are changing retail prices. They would also need to update billing systems, reproduce marketing material and notify existing customers. The feedback indicated this was unlikely to be possible within a 28 day period and would place them at a disadvantage, be it either to implement price reductions and therefore compete for customers or reflect price increases and therefore recover the costs of an increased wholesale input charge.
- 11.98 We believe this is a strong argument. Based on these responses we have considered further BT's arguments for a 28 day notification period. BT argues that a 90 period restricts its ability to immediately respond to CP requests for offers, particularly in relation to WLR. In the past, BT has had to request a waiver from Ofcom to change prices in less than 90 days. The only waivers that Ofcom has received have been in relation to WLR services other than the core line rental. We believe that it is unlikely that a request would be made to consult on a waiver to reduce the price of the core line rental. This is because the core line rental constitutes the largest single wholesale revenue for BT from CPs and retail revenue for CPs from end users. The recent waiver request by BT was to temporarily reduce the connection charge to stimulate take-up in the retail market. We consider an initiative such as this to be beneficial for the market and consumers<sup>39</sup>.
- 11.99 We have reconsidered the optimal notification period. We considered whether asymmetric periods (with a lower notice required for price reductions than for increases) would be suitable. However, we decided against this, because we consider that in some circumstances, reducing rates in short timeframes may lead to some concerns amongst stakeholders and potential competition issues.
- 11.100 In light of the discussion above, in both the analogue and ISDN2 exchange lines markets, we intend to retain the 90 day notification period for the core line rental, but move to 28 days for other services. This aims to provide CPs with the protection they were seeking for the ongoing monthly charge, while also providing BT with some pricing flexibility.
- 11.101 In relation to call origination, BT's main argument for reduced periods is consistency across call origination and call termination and that there should be consistency between the notification periods for changes to charges across fixed call origination, call termination and mobile call termination. Currently, fixed call origination and call termination have 90 day notification periods whilst mobile call termination has a 28 day period. BT has generally only changed its prices on an annual basis, even though the current obligations would allow more frequent changes.
- 11.102 Ofcom understands the point BT is making. However, given the competition conditions in call origination, BT has the incentive to price call origination at the maximum level set by the charge control. We do not see any significant reason for

---

<sup>39</sup> On 21 August 2009, Ofcom published a consultation regarding a further request from Openreach to waive the notice period in order to implement a reduced connection charge for WLR analogue exchange line connection charges, which is line with the proposals we set out in our consultation on the WLR charge control. The waiver consultation closes on 4 September. See [http://www.ofcom.org.uk/consult/condocs/waiver\\_bt\\_wholesale/](http://www.ofcom.org.uk/consult/condocs/waiver_bt_wholesale/)

BT to need to change the prices with short notice or on a frequent basis. This leads us to think that a 90 day period is appropriate.

11.103 In relation to the notification period for mobile call termination, a review of that market is currently in progress. Once the mobile call termination market review has completed, and has decided on the merits of that market what notification periods are required, it will be appropriate for Ofcom to consider whether, for consistency across markets, any changes should be made to fixed call origination and termination notification periods.

11.104 We are therefore of the opinion that the following charge notification periods are appropriate:

- Wholesale analogue exchange line services: 90 days for core line rental, 28 days for all other services;
- Wholesale ISDN2 exchange line services: 90 days for core line rental, 28 days for all other services;
- Call origination on a fixed narrowband network: 90 days; and
- Interconnection circuits: 90 days.

### Legal tests

11.105 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

11.106 Ofcom considers that the revised condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have the necessary information to allow them to make informed decisions about competing in the relevant market.

11.107 We consider that the condition meets the criteria set out in section 47(2) of the Act. It is:

- objectively justifiable, because general and reliable visibility of a dominant operator's prices is needed to enable competitors to set prices for their services that are based on purchasing the regulated inputs. It also allows Ofcom and other CPs to monitor BT and KCOM's prices for possible anti-competitive behaviour;
- not unduly discriminatory as it is only imposed on those providers who have SMP and all providers are subject to the same obligation;
- proportionate, in that only information that other network providers would need to know in order to adjust for any changes would have to be notified. Periods are proposed to be the minimum required to allow changes to be reflected in retail offers; and
- transparent as it is clear the intention is to ensure that BT and KCOM notify those who purchase wholesale access of changes to charges, terms and conditions.

## Conclusion

11.108 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing the obligation to notify charges on BT and KCOM in relation to the markets and technical area in which we have concluded that they have SMP, as follows:

- Wholesale analogue exchange line services: 90 days for core line rental, 28 days for all other services;
- Wholesale ISDN2 exchange line services: 90 days for core line rental, 28 days for all other services;
- Call origination on a fixed narrowband network: 90 days; and
- Interconnection circuits: 90 days.

## **Transparency as to quality of service**

11.109 In our consultation we set out our proposal to retain the requirement on BT to publish data (as described in a separate Direction) to monitor for discrimination in the delivery of services, in relation to the markets and technical area for which we proposed that they hold SMP, as outlined in paragraph 11.61.

11.110 Paragraph 11.79 of our March consultation outlined our rationale for seeking to retain this obligation and paragraphs 11.80 to 11.82 discussed the existing KPIs in place.

11.111 We proposed to retain the existing suite of non-discrimination KPIs in relation to the key areas of service provision and fault repair. We also proposed minor changes to the metrics, with the main change being the replacement of 'Top 10 CPs' with 'Best in Class'. We proposed that BT should publish an 'Industry Average' for each KPI, each CP should receive their own performance levels and that where appropriate, BT would report the performance of its own downstream businesses.

## Consultation questions

11.112 In the consultation we asked:

**Question 11.9:** *Do you agree that Ofcom should impose a requirement to provide transparency as to quality of service on BT in the markets and technical area discussed? If not, please explain why.*

**Question 11.10:** *Do you agree with Ofcom that service provision and fault repair remain critical areas for this remedy to monitor?*

**Question 11.11:** *Are the KPIs proposed above sufficient to provide industry with the necessary level of transparency? If not, what additional KPIs should be included?*

**Question 11.12:** *Is the reporting provided by the Openreach online KPI tool sufficient to provide the relevant KPI data?*

## Consultation responses

- 11.113 All respondents agreed that Ofcom should impose a requirement to provide transparency as to quality of service on BT and that service provision and fault repair remained critical areas for the condition to monitor.
- 11.114 A majority of respondents agreed that the existing KPIs were sufficient to provide industry with the necessary level of transparency to monitor for discrimination. No respondents provided feedback that the existing KPIs or that the measures proposed (see the revised condition in Annex 8 and 9 of the March consultation) were no longer appropriate. One respondent stated that the KPIs should be provided for BT Retail. Another respondent said that Ofcom should require BT to publish KPI data separately for residential and business customers so that providers to the business market can monitor the higher levels of performance needed.
- 11.115 BT does not believe that Ofcom should mandate KPIs, but rather it should be able to set these with industry agreement, therefore allowing for changes during the review period. BT also stated that it already provides a great number of measures to industry and regulators for transparency purposes and that the focus should be on streamlining the existing requirements. BT was also concerned that we were mandating the KPI Online as the delivery method.

## Ofcom's response

- 11.116 In response to the comment that BT should provide data for BT Retail, BT is already required by the existing direction to provide results against KPIs (ii) to (vi) in relation to its downstream businesses. We proposed to retain this key measure in our consultation.
- 11.117 In response to the comment that BT should publish separate residential and business information, we have found that there is a single analogue market and that ISDN2 and ISDN30 only relate to business consumers. We therefore do not expect BT to report separately on residential and business users, since there is no difference in the underlying products. In terms of the higher levels of performance that may be required particularly by business users, BT is required to report on the different care levels it offers.
- 11.118 We continue to believe that it is appropriate for Ofcom to set KPIs in relation to critical areas such as service provision and fault repair. No respondents suggested that the existing measures were no longer appropriate and we have recommended several amendments for the next review period. These KPIs are not just important for existing market participants but also new entrants.
- 11.119 We consider that the KPIs are unlikely to change frequently or drastically during the review period and in the event that a change to the KPIs was requested by BT and industry, Ofcom could address this through a short consultation, as allowed for under section 49 of the Act. We have also sought to streamline the existing KPIs by removing elements that no longer provide value and retaining or introducing just the key elements that we and industry are interested in monitoring: industry average, CP individual performance and BT's downstream performance.
- 11.120 With regards to the KPI Online tool, we did not propose to mandate this as the delivery method in the March consultation, but understand that wording in the condition could be interpreted narrowly to apply to the online tool. Therefore, we will amend the wording to remove this ambiguity.



- 11.121 In the condition on which we consulted in our March consultation, we specifically defined 'industry average' as excluding BT Retail. However, as we are requiring BT to supply information on services provided to BT Retail separately, we consider that it is more appropriate for this measure to include BT Retail. Therefore, the 'Industry Average' indicator will reflect total industry activity, including BT Retail. This is also reflective of how this data is currently provided by BT.
- 11.122 With regards to the indicator 'best in class', BT argues that we should remove this from the condition. It argues that it may not provide statistically meaningful results as those CPs who have a very low number of orders per month will achieve a very high percentage of completed orders or very low number of faults, which is not usefully comparable for a majority of the CPs who have much larger volumes. BT feels that the industry average and individual performance would be the best two measures for CPs to monitor for discrimination.
- 11.123 'Best in class' data is not currently provided by BT and therefore, it would need to develop the processes to capture and report this data. After re-considering the value of this indicator, especially in light of the other three indicators, we consider that this indicator may not be appropriate or necessary. When we impose regulation we need to ensure that it meets the proportionality test under section 47 of the Act. We consider that the level of transparency this data may provide would not out-weigh the costs of imposing this additional regulation on BT. Therefore, we have decided not to require this indicator.
- 11.124 With regards to the 'BT Retail' comparison, BT stated that industry has indicated this information is no longer useful. We disagree that this indicator should be removed. We believe that this continues to be an important indicator in fulfilling the intended purpose of this obligation. While we appreciate that as BT is likely to be the largest CP and therefore the 'industry average' will in large part already reflect BT's performance, it is worth revisiting the rationale for imposing this obligation, which is to monitor for discrimination between BT's downstream business and third party CPs. Without a BT Retail specific measure, this would not be possible.
- 11.125 BT questioned the validity of KPI (i) which reports the percentage of committed orders that were rejected during the reporting period in relation to its application for WLR3. It stated that when CPs have migrated to WLR3, the EMP will automatically reject invalid orders and therefore, this KPI will not be required. BT stated that it is the reason that orders are rejected that is of interest to CPs and this information is provided via KCI information on WLR3. BT also stated that in relation to KPI (ii), there is a difference between the 'customer confirmed date' in WLR2 and WLR3 because there is an additional step in WLR3 process.
- 11.126 We consider that at present, until such time as the majority of industry has migrated to WLR3, the existing KPI should remain in place.
- 11.127 BT reported that in relation to KPI (iv), industry feedback was that a fault rate measure is desirable, however, the current KPI requires this data to be reported on a rolling three month period. The feedback provided to BT from industry is that presenting the data this way removed seasonal trends and CP's would prefer a monthly statistic which calculates total faults as a percentage of the installed base. As BT and industry agree that a monthly statistic is a more appropriate measure, we will amend KPI (iv) to reflect this change.
- 11.128 With regards to KPI (v), BT did not recommend any changes, however it did indicate that it was likely to introduce additional repair options, which it did not believe would

fall under the existing definitions. We note that on the 24<sup>th</sup> of June<sup>40</sup>, Openreach announced the 'X-Hour Repair Trial', which is testing the operational viability of commercially launching accelerated repair requests, with a 5 hour repair time for the trial. We consider that it is important for the KPIs to monitor the standard care levels and therefore, we do not propose to make any changes to the definitions of care levels 1 to 3. BT can introduce expedited care levels for 'on demand' purchase and we do not consider that it is appropriate to include these care levels within the scope of this Direction. Should BT alter its existing care levels 1 to 3 to such an extent that they cannot be attributed to the relevant definitions as outlined in the Direction, then we may seek to update the Direction to reflect this change if necessary.

11.129 With regards to KPI (vi) which monitors access to the 'gateway' by third party CPs, BT indicated that industry feedback was that this measure is not particularly useful. However, industry uses the data to reinforce SLA/SLGs on which to obtain compensation from BT for the occasions when they are unable to access the ordering gateway. As BT always has access to the ordering system and the intention of the measure is to monitor how often third party CPs are without the ability to complete orders, we consider that this continues to be an important area to provide transparency in at present.

11.130 BT also sought clarity on paragraph 3 in Part 1 of the Annex to the WLR KPI direction which says 'In relation to KPIs (ii) to (vii), the Dominant Provider should publish separate KPI results where options exist for third parties to purchase differing levels of service'. BT felt that the reference to 'differing levels of service' might mean 'residential' and 'business'. However, the application of this direction to 'residential' and 'business' markets as reported by BT stems from the fact that the transparency as to quality of service condition and therefore this direction, is imposed in relation to the finding of SMP in the defined markets of residential and business by the previous market review. As discussed in our March consultation and confirmed in this statement, we have found that there is now only one WLR analogue market and the products delivered by BT to residential and business customers are essentially the same and are underpinned by a similar underlying cost base. In this statement we have also concluded that it is appropriate to apply a charge control to the supply of WLR. We are currently consulting in the *Charge controls for Wholesale Line Rental and related services* document ("WLR consultation") on the mechanics of any charge control given this change in the defined market for WLR analogue exchange line services. We have, in the WLR consultation proposed that a single "Core" WLR product should be charge controlled, but, of course, any final decision on this regulation remains to be taken.

11.131 Therefore, until such time as that consultation concludes on the detail of the charge control and how this might practically apply to a 'core' service and potentially a 'premium' service, we have amended the paragraph to provide clarity around the phrase 'differing levels of service' by replacing the previous text with 'WLR line rental package' and included a definition in the direction. We have defined 'WLR line rental package' to be a package which includes the 'line rental charge and any included levels of service sold as part of a single marketed product'. This means that BT will currently be required to report on its 'WLR Basic' (which currently refers to the 'residential' market) and 'WLR Premium' (which currently, primarily refers to the 'business' market). If the WLR consultation proposals are adopted, and BT continued to market a separate WLR Premium product, we would expect KPIs to be produced

<sup>40</sup> X-hour repair, 24 June 2009,

<http://www.openreach.co.uk/orpg/news/productbriefings/wlr/wlr04509.do#>

for “WLR Core” (the regulated product) and WLR Premium (as a package of line rental and service levels sold as a single marketed product).

- 11.132 We cannot, of course, prejudge the outcome of the WLR consultation, nor BTs own commercial decisions as to how they continue to market their WLR offerings. Depending on the outcome of the WLR analogue charge control consultation, we may need to revisit this description to ensure that the appropriate level of reporting as is intended by the direction remains in place.
- 11.133 With regards to the volume data that BT currently provides, BT informed Ofcom that there was a neutral response from industry as to the value of this data. However, we received no responses to the consultation discounting completely the need for this data. Due to the other amendments we are making to the KPIs, we consider that it is appropriate for this data to continue to be provided at least until the value of it can be assessed in light of the updated data provided by BT. As discussed previously, there is scope for the KPI direction to be reviewed during the life of the market review, and this may be appropriate if and when it becomes apparent that any changes to systems or processes affect the validity of the KPIs contained in this direction.

### *ISDN30*

- 11.134 As we have indicated previously, we are not concluding our analysis regarding market definition, market power and consideration of remedies for ISDN30 from this statement, and will publish a separate document covering ISDN30 in the near future. This means that we need to consider the implications of the interim period between when this statement is published and when we conclude on ISDN30, specifically in relation to the continuation of remedies and in this case regarding the KPI direction.
- 11.135 Our proposed direction on KPIs is made under the new transparency SMP condition and relates to markets that have been the subject of review. As we have not concluded on ISDN30, this direction would not apply to this market. Conversely, we do not consider it would be appropriate to maintain the current KPI obligations just for the ISDN30 market, since this would require two different sets of reporting. This would be time consuming for Openreach and potentially confusing for CPs.
- 11.136 In the interim period until we conclude on ISDN30, Openreach has agreed to continue publishing KPIs for ISDN30 in line with the new direction as discussed above. Should there be any significant issues with this approach during the interim period, Ofcom has the ability to impose a direction in ‘exceptional circumstances’ under the Act if necessary.

### Legal tests

- 11.137 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 11.138 We considered the Community requirements in section 4 of the Act and believe the condition promotes competition and secures efficient and sustainable competition by ensuring transparency through comparison of the service levels BT provides to itself versus third party CPs.
- 11.139 We also detailed in paragraph 11.89 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## Conclusion

11.140 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing an obligation on BT regarding transparency of quality of service. We are also imposing the direction regarding the specific KPIs, which will reflect the changes as discussed above in paragraphs 11.120 to 11.133.

11.141 The measures proposed by the direction are intended to be the minimum level of information provided by BT. There are instances where BT and industry have agreed that BT will provide a greater level of detail. We encourage this outcome and in line with our requirement to set only the minimum level of regulation required to achieve the desired outcome, we have not included the detail of these agreements within the direction.

## Requests for new network access

11.142 In our consultation we set out our proposal to retain the requirement on BT to publish guidelines regarding requests for new network access in the markets in which we proposed it had SMP, as outlined above in paragraph 11.61.

11.143 In paragraph 11.92 of our March consultation we outlined our rationale for seeking to retain this obligation and in paragraphs 11.94 to 11.98 we described our proposed amendments to the Statement of Requirements (SOR) condition.

## Consultation questions

11.144 In the consultation we asked:

**Question 11.13:** *Do you agree that Ofcom should impose an obligation on BT to follow a statement of requirements process to handle new requests for network access in the markets and technical area discussed? If not, please explain why.*

**Question 11.14:** *Do you agree that the condition should allow changes to be made to the current SOR process if agreed by BT with industry? If not, please explain why.*

## Consultation responses

11.145 All respondents agreed that Ofcom should retain a requirement on BT regarding requests for new network access. Several respondents indicated that the key word was 'agreed' and that BT should not be able to alter the process without industry agreement.

11.146 All respondents, except one confidential respondent, agreed with our recommendation to introduce the principles set out in paragraph 11.97 of our March consultation, specifically that changes to the SOR process should be agreed between BT and industry. The one respondent that disagreed stated that the condition should be reviewed but did not provide further information.

11.147 One respondent indicated that while it agrees that the condition should allow for changes to be made in agreement with industry, the current SOR process allows BT to apply too much discretion in determining which changes are 'business as usual' and which trigger the application of the formal SOR provisions. The respondent encouraged Ofcom to include a clause in the condition requiring BT to agree, in

consultation with industry, criteria as regards the application of the SOR and business as usual (BAU) processes.

## **Ofcom's response**

11.148 In response to the comment that Ofcom should review the condition, we did review the condition as part of our analysis for the March consultation. We consider that industry agreement on changes to the SOR process is a flexible way forward, which still constrains BT's ability to introduce changes that may be detrimental to CPs.

11.149 In response to the concern relating to the use of the SOR process (as opposed to BAU changes), while we do not intend to further amend the wording of the condition consulted on in March, we would point to condition AA1(b), specifically clause 2(c). This clause states that the guidelines should include 'the criteria by which requests will be assessed shall be clearly identified'. This clause is sufficient in setting out the criteria that should be used to assess whether a request falls under BAU or the SOR process. Therefore we believe that the direction we consulted on provides the appropriate guidelines to remedy any confusion regarding the clarity of the criteria by which requests will be assessed.

## **Legal tests**

11.150 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

11.151 Ofcom has considered the Community requirements set out in section 4 of the Act, and believes that the condition meets the requirements. Specifically, section 4(8), as the proposed condition has the purpose of securing efficient and sustainable competition in the markets reviewed.

11.152 We also detailed in paragraph 11.101 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## **Conclusion**

11.153 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing on BT an obligation regarding requests for new network access, in relation to the markets and technical area in which we have concluded that it has SMP, as listed in paragraph 11.61.

## **Cost accounting**

11.154 In our March consultation we set out our reasons for considering that it is appropriate to retain a cost accounting obligation on BT and KCOM in relation to the markets and technical area where they have been found to hold SMP. We said this obligation was needed to support the effective operation and monitoring of other obligations such as the basis of charges obligation and charge controls (where appropriate).

11.155 The cost accounting condition would apply to the following markets in which our conclusion is that BT and KCOM have SMP, and relevant technical area (and where we have decided to impose cost orientation and/or a charge control):

- Wholesale analogue exchange line services;
- Wholesale ISDN2 exchange line services;
- Call origination on fixed public narrowband networks; and
- Interconnection circuits.

11.156 Under sections 87(9) to 87(11) and 88 of the Act, appropriate cost accounting obligations may be imposed on dominant providers in respect of the provision of network access, the use of the relevant network and the availability of relevant facilities.

### Consultation question

11.157 In the consultation we asked:

**Question 11.15:** *Do you agree that Ofcom should impose an obligation on BT and KCOM to comply with obligations governing cost accounting systems and processes as set out by Ofcom in the markets and technical area discussed? If not, please explain why.*

### Consultation responses

11.158 All respondents agreed with Ofcom's proposal to impose cost accounting obligations on BT and KCOM in relation to the markets listed in paragraph 11.155 above.

11.159 The only market which BT did not agree with was in relation to ISDN30. This is because BT does not believe that Ofcom should impose either a basis of charges obligation or a charge control and therefore, a cost accounting obligation is not necessary in the absence of price regulation.

### Ofcom's response

11.160 As we have said previously, we are not concluding on ISDN30 in this statement. Excluding ISDN30, all respondents agreed with our proposal and therefore we do not offer further comment.

### Legal tests

11.161 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

11.162 Ofcom has considered the Community requirements set out in section 4 of the Act and believes that the condition meets the requirements. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant providers comply with cost orientation and charge control remedies implemented to promote competition.

11.163 We detailed in paragraph 11.109 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## Conclusion

11.164 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are imposing the cost accounting condition in the markets and technical area where we find BT and KCOM to hold SMP, as outlined above in paragraph 11.155.

## Accounting Separation

11.165 In our March consultation we set out our reasons for considering that it is appropriate to retain an accounting separation obligation on BT and KCOM in relation to the markets and technical area where they have been found to hold SMP. We said this obligation was needed to support the effective operation and monitoring of other obligations, in particular to ensure the dominant provider does not discriminate unduly and favour its own retail businesses to the detriment of third party CPs. We have set out above our arguments for imposing a non-discrimination remedy.

11.166 The accounting separation condition would apply to the markets in which our conclusion is that BT and KCOM have SMP, and the relevant technical area, as follows:

- Wholesale analogue exchange line services;
- Wholesale ISDN2 exchange line services;
- Call origination on fixed public narrowband networks; and
- Interconnection circuits.

## Consultation question

11.167 In the consultation we asked:

**Question 11.16:** *Do you agree that Ofcom should impose an obligation on BT and KCOM to comply with obligations governing accounting separation as set out by Ofcom in the markets and technical area discussed? If not, please explain why.*

## Consultation responses

11.168 All stakeholders agreed with Ofcom's proposal to impose an accounting separation obligation on BT and KCOM in relation to the markets we find them to hold SMP.

## Legal tests

11.169 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

11.170 Ofcom has considered the Community requirements set out in section 4 of the Act and believes that the proposed condition meets the requirements. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and

services, by ensuring dominant providers do not favour their own downstream businesses, thereby disadvantaging third party CPs.

11.171 We detailed in paragraph 11.117 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## **Conclusion**

11.172 Therefore, for the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and the relevant legal tests, we are therefore imposing on BT and KCOM an accounting separation obligation in relation to the markets and technical area in which we have concluded that it has SMP, as listed in paragraph 11.166.



## Section 12

# Call termination remedies

## Introduction

- 12.1 In Section 7, Ofcom concluded that all CPs who terminate fixed geographic calls have SMP in the provision of such services on their networks. This section outlines the remedies we are imposing in relation to this SMP.
- 12.2 In the March consultation we proposed the following remedies in relation to BT:
- Requirement to provide network access;
  - Requirement not to unduly discriminate;
  - Basis of charges;
  - Charge control;
  - Requirement to publish a reference offer;
  - Requirement to notify charges;
  - Cost accounting; and
  - Accounting separation.
- 12.3 In the March consultation we proposed the following remedies in relation to KCOM
- Requirement to provide network access;
  - Requirement not to unduly discriminate;
  - Basis of charges;
  - Requirement to publish a reference offer;
  - Requirement to notify charges;
  - Cost accounting; and
  - Accounting separation.
- 12.4 In the March consultation we proposed to impose a requirement to provide network access in relation to all other CPs. We also asked whether respondents agreed it would be disproportionate to impose an obligation on all CPs to notify charges.
- 12.5 Following consultation, we are imposing the remedies we proposed in the consultation. We discuss these below. We are also going to consult on an additional obligation on other CPs to publish their termination rates.
- 12.6 We first of all discuss the remedies to be imposed on BT, then those to be imposed on KCOM and finally on other CPs.

## Remedies in relation to BT

### Requirement to provide network access

- 12.7 In the March consultation we argued that in the absence of an obligation on BT to provide fixed geographic call termination services on fair and reasonable terms, BT could severely impede competition in downstream markets as it could refuse to supply call termination services or supply such services on unreasonable terms. As a result, retail customers could, for example, find that if they were connected to an alternative network they could not call customers connected to BT's network. As BT has the largest fixed access network, this would be likely to have a material effect on its competitors, and therefore consumer choice. In the long term, this would be likely to result in fewer competitors and reduced choice.
- 12.8 Therefore, Ofcom proposed that BT should be required to meet all reasonable requests to provide fixed geographic call termination services on its network and it should be required to do so on reasonable terms.

#### Legal tests

- 12.9 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.10 Ofcom considers the condition meets the Community requirements as set out in section 4 of the Act. The obligation would promote competition in relation to the provision of electronic communications networks and encourage the provision of network access for the purpose of securing efficient and sustainable competition in markets for electronic communications networks.
- 12.11 We detailed in paragraph 12.9 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

### Requirement not to unduly discriminate

- 12.12 In the March consultation we argued that in the absence of an obligation not to unduly discriminate, BT would have a strong incentive to discriminate in favour of its own retail businesses, by offering more favourable terms which would give them a competitive advantage over third party CPs. Therefore, we proposed to impose a condition on BT which disallows it from favouring its own businesses to a material extent so as to disadvantage competitors.

#### Legal tests

- 12.13 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.14 Ofcom considers the condition meets the Community requirements as set out in section 4 of the Act. The condition encourages the provision of network access and service interoperability for the purpose of securing efficient and sustainable competition in the retail markets for access and calls, by ensuring that BT does not unfairly favour its own retail businesses and therefore distort competition.

- 12.15 We detailed in paragraph 12.14 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

## **Basis of charges**

- 12.16 In the March consultation we argued that in the absence of this obligation, BT might set or maintain its prices for call termination at an excessively high level, which in turn would be passed on in the price of retail calls for end users. The requirement proposes that BT set cost-oriented charges. The condition is necessary to enable competing providers to buy call termination services at prices that would be expected in competitive markets.

### Legal tests

- 12.17 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.18 Ofcom considers the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition by ensuring that charges for wholesale services are at a level that enables operators to compete effectively.
- 12.19 We detailed in paragraph 12.19 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.
- 12.20 We also detailed in paragraph 12.20 of the March consultation why the condition met the tests set out in section 88 of the Act.

## **Charge control**

- 12.21 We discuss Ofcom's intended action regarding a charge control on BT's call termination service in Section 16.

## **Requirement to publish a reference offer**

- 12.22 In the March consultation we argued that requiring BT to publish a reference offer (RO) assists with transparency in monitoring for potential anti-competitive behaviour and provides visibility to the terms and conditions on which other providers would be able to purchase wholesale access services. We said that publication of a RO was particularly important in BT's case, as all CPs, either directly or indirectly, have to buy call termination services from BT.

### Legal tests

- 12.23 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.24 Ofcom considers the condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and

encourages the provision of network access and service interoperability for the purpose of securing efficient and sustainable competition for the maximum benefit for consumers.

- 12.25 We detailed in paragraph 12.25 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

## **Requirement to notify charges**

- 12.26 In the March consultation we argued that in the absence of an obligation to provide advance notification of charge changes, providers of retail services would have insufficient time to restructure their retail prices as a result of a change in costs at the wholesale level. This could result in retail prices being either too high if the wholesale costs decreased or too low if the wholesale costs increased. This would therefore lead to over-recovery or under-recovery of costs, and potentially cause competitive concerns.
- 12.27 We also consulted on whether to reduce the price notification period from the current 90 days to 28 days.

### Legal tests

- 12.28 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.29 Ofcom considers the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have the necessary information to allow them to make informed decisions about competing in the relevant market.
- 12.30 We detailed in paragraph 12.29 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

## **Cost accounting**

- 12.31 In the March consultation we argued that it is appropriate to retain a cost accounting obligation on BT, which will require it to demonstrate that its charges are cost orientated. It will also provide information necessary for Ofcom to set and review charge control obligations.

### Legal tests

- 12.32 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.33 Ofcom considers the condition meets the Community requirements set out in section 4 of the Act. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic

communications networks and services, by ensuring dominant providers comply with cost orientation and charge control remedies implemented to promote competition.

- 12.34 We detailed in paragraph 12.36 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

## **Accounting separation**

- 12.35 In the March consultation, we considered that it was appropriate to retain an accounting separation obligation on BT, which will require it to account separately for internal and external 'sales'. This will allow Ofcom and third party CPs to monitor the activities of BT to ensure that it does not discriminate in favour of its own downstream business.

### Legal tests

- 12.36 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.37 Ofcom considers the condition meets the Community requirements set out in section 4 of the Act. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant providers do not favour their own downstream businesses, thereby disadvantaging third party CPs.
- 12.38 We detailed in paragraph 12.43 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

## **Remedies in relation to KCOM**

### **Requirement to provide network access**

- 12.39 In the March consultation we argued that in the absence of an obligation to provide network access on fair and reasonable terms, KCOM would have an incentive to offer call termination on unreasonable terms which might lead to higher retail prices. For providers competing in the Hull Area, KCOM might refuse to offer call termination altogether. Competition would not therefore be sustainable, as the majority of customers in the Hull Area would be connected to KCOM's network.

### Legal tests

- 12.40 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.41 Ofcom considers the condition meets the Community requirements as set out in section 4 of the Act. The obligation would promote competition in relation to the provision of electronic communications networks and encourages the provision of network access for the purpose of securing efficient and sustainable competition in markets for electronic communications networks.

- 12.42 We detailed in paragraph 12.47 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

### **Requirement not to unduly discriminate**

- 12.43 In the March consultation we argued that in the absence of an obligation not to unduly discriminate, KCOM would have a strong incentive to discriminate in favour of its own retail businesses, by offering more favourable terms which would give them a competitive advantage over third party CPs.

#### Legal tests

- 12.44 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.45 Ofcom considers the condition meets the Community requirements as set out in section 4 of the Act. The condition encourages the provision of network access and service interoperability for the purpose of securing efficient and sustainable competition in the retail markets for access and calls, by ensuring that KCOM does not unfairly favour its own retail businesses and therefore distort competition.
- 12.46 We detailed in paragraph 12.52 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

### **Basis of charges**

- 12.47 In the March consultation we argued that in the absence of this obligation there is a risk that KCOM might set or maintain its prices for call termination at an excessively high level, which in turn would be passed on to the price of retail calls for end users. The requirement proposes that KCOM set cost-oriented charges. It is necessary to enable competing providers to buy call termination services at pricing levels that might be expected in competitive markets

#### Legal tests

- 12.48 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.49 Ofcom considers the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition by ensuring that charges for wholesale services are at a level that enables CPs to compete effectively.
- 12.50 We detailed in paragraph 12.56 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

- 12.51 We also detailed in paragraph 12.57 of the March consultation why the condition met the tests set out in section 88 of the Act.

### **Requirement to publish a reference offer**

- 12.52 In the March consultation we argued that a RO assists with transparency in monitoring for potential anti-competitive behaviour and to give visibility of the terms and conditions on which other providers would be able to purchase wholesale access services. The absence of a published RO might deter market entry to the detriment of long-term development of competition.

#### Legal tests

- 12.53 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.54 Ofcom considers that the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and encourages the provision of network access and service interoperability for the purpose of securing efficient and sustainable competition for the maximum benefit of consumers.
- 12.55 We detailed in paragraph 12.61 of the March consultation, why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

### **Requirement to notify charges**

- 12.56 In the March consultation we argued that in the absence of an obligation to provide advance notification of charge changes, providers of retail services would have insufficient time to restructure their retail prices as a result of a change in costs at the wholesale level. This could result in retail prices being either too high if the wholesale costs decreased or too low if the wholesale costs increased. This would therefore lead to the over-recovery or under-recovery of costs and potentially cause competitive concerns.
- 12.57 We consulted on whether to reduce the price notification period from the current 90 days to 28 days.

#### Legal tests

- 12.58 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.59 Ofcom considers that the condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have the necessary information to allow them to make informed decisions about competing in the relevant market.
- 12.60 We detailed in paragraph 12.65 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be

read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

## **Cost accounting**

- 12.61 In the March consultation we argued that it was appropriate to retain a cost accounting obligation on KCOM as it will require it to demonstrate that its charges are cost orientated.

### Legal tests

- 12.62 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.63 Ofcom considers the condition meets the Community requirements in section 4 of the Act. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant providers comply with cost orientation and charge control remedies implemented to promote competition.
- 12.64 We detailed in paragraph 12.72 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.

## **Accounting separation**

- 12.65 In the March consultation we argued that it is appropriate to retain an accounting separation obligation on KCOM which will require it to account separately for internal and external 'sales'. This allows Ofcom and third party CPs to monitor the activities of KCOM to ensure that they do not discriminate in favour of its own downstream business.

### Legal tests

- 12.66 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.67 Ofcom considers the condition meets the Community requirements in section 4 of the Act. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant providers do not favour their own downstream businesses, thereby disadvantaging third party CPs.
- 12.68 We detailed in paragraph 12.79 of the March consultation why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.



## Remedies in relation to all other CPs

### Requirement to provide network access

- 12.69 In the March consultation we proposed to retain an obligation which requires fixed CPs (other than BT and KCOM) to provide network access and to do so on fair and reasonable terms. It also requires relevant fixed CPs to provide such network access as Ofcom may from time to time direct, and allows Ofcom to make a direction under the condition.

### Reciprocity

- 12.70 In a statement issued by Oftel in July 1997, *Network Charges from 1997* (“the 1997 Statement”), the Director General supported the principle of reciprocal charging for Operators’ call termination charges. This principle required that Operators’ charges were calculated on a reciprocal basis to BT’s own call termination charges, taking into account the different network topologies. BT’s own charges were regulated under the Network Charge Controls from 1997. The aim of reciprocity was to ensure competitive neutrality between BT and OCPs and to remove the distortive effects of the call termination externality.
- 12.71 In the 2003 Market Review, whilst not mandating reciprocity, Oftel’s view was that charges that were not based on BT’s were unlikely to be ‘fair and reasonable’, as BT’s network costs are taken as a proxy for an efficient network. Nevertheless, the Director considered any dispute would need to be reviewed on its relative merits. In any case, Oftel was of the view that charges would have to be competitively neutral.
- 12.72 Ofcom continues to be of the view that this interpretation of “fair and reasonable”, taking into account network topology and technology differences remains relevant as BT’s costs are likely to be close to those of an efficient network. As BT and other terminating CPs progress in their migration from legacy networks to NGNs, the question of what constitutes an efficient cost base and how differences in networks should be taken into account under various migration scenarios will need to be addressed.
- 12.73 In the past, Industry has used the Reciprocity Agreement as the mechanism for setting termination charges. The existing Reciprocity Agreement is currently being re-negotiated. We would expect that this negotiation will address the migration between legacy networks and NGNs in such a way that CPs who migrate at different speeds are not unduly penalised. We continue to be of the view that it is appropriate for industry to establish this agreement rather than Ofcom imposing it as a regulatory requirement.

### Legal tests

- 12.74 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition. We also consider that the approach to setting rates for CPs other than BT and KCOM promotes and facilitates self-regulation.
- 12.75 Ofcom considers the condition meets the Community requirements as set out in section 4 of the Act. The obligation would promote competition in relation to the provision of electronic communications networks and encourage the provision of

network access for the purpose of securing efficient and sustainable competition in markets for electronic communications networks.

- 12.76 We detailed in paragraph 12.87 of the March consultation, why we considered the condition met the criteria set out in section 47(2) of the Act. This statement should be read in conjunction with the March consultation and we believe that our arguments made against each criterion continue to remain valid.
- 12.77 In terms of section 87(4), Ofcom believes this condition would help secure effective competition in the long term and that it is technically and economically viable to provide such network access.

## Requirement to notify charges

- 12.78 In the March consultation we stated that several CPs had indicated to Ofcom that deregulation of BT in certain markets (in particular LTC/LTT and ST) may have a knock-on effect in the call termination market. This arises since, in order to meet certain obligations previously imposed in these markets, BT published the call termination rates it had agreed with other CPs. This could then be used as a basis for commercial negotiations by other CPs looking to establish a direct interconnection.
- 12.79 Removal of regulation on BT may result in these rates no longer being published and we considered whether new regulation was required to provide notification of each CPs' rates. In particular, we considered whether to impose an obligation to publish prices on all providers. We said that without such an obligation providers of call termination may attempt to set different prices for some CPs. Therefore, without an obligation to publish prices, CPs would not know what rates were being charged to other CPs for the same service. However, we did not propose to impose a similar obligation on other CPs because we considered, overall, that in relation to the criteria set out in section 47(2) of the Act, it would not be proportionate to impose additional regulation on all other CPs requiring notification of charges. We also considered that the obligations under General Condition 1 relating to interconnection, together with the obligation to provide call termination on fair and reasonable terms were sufficient to ensure prices set for fixed geographic call termination were not excessive.

## Consultation questions

- 12.80 In the consultation we asked:

**Question 12.1:** *Do you agree with the obligations Ofcom proposes to impose on BT in the wholesale fixed geographic call termination markets? If not, please explain why.*

**Question 12.2:** *Do you agree with the obligations Ofcom proposes to impose on KCOM in the wholesale fixed geographic call termination markets? If not, please explain why.*

**Question 12.3:** *Do you agree that BT and KCOM should provide 28 days notice of price changes following a six month transition period? If not, please explain why.*

**Question 12.4:** *Do you agree that all other providers of fixed geographic call termination should be required to provide this on fair and reasonable terms? If not, please explain why.*

**Question 12.5:** *Do you agree that it would be disproportionate to require all other providers of fixed geographic call termination to notify charges? If not, please explain why.*

## Consultation responses

### Remedies imposed on BT and KCOM

- 12.81 The majority of respondents agreed with most of the remedies we proposed to impose on BT and KCOM in relation to the call termination market. One respondent commented that due to BT's position in Northern Ireland the conditions needed to be reviewed to stimulate competition.
- 12.82 BT again said that more guidance on cost orientation was required.
- 12.83 BT and Zen Internet agreed with our proposal to reduce the notification period to 28 days but all other respondents disagreed. Those who disagreed referred to their arguments made in relation to our same proposal for other markets where we had found BT and KCOM to hold SMP.
- 12.84 The main theme of the response disagreeing with the proposal is that a CP needs time to consider the price change notified by BT and KCOM and then implement that price change with their own retail customers. Stakeholders highlighted that they needed time to pass through their own internal governance processes, plus time to effect changes in systems and processes.

### Remedies imposed on other CPs

- 12.85 All respondents agreed that all providers of fixed geographic call termination should be required to provide this on fair and reasonable terms.
- 12.86 Stakeholder responses were mixed in relation to the question of whether it was proportionate to impose an obligation to notify charges on all CPs. Some respondents agreed that it would be disproportionate to require all other providers of fixed geographic call termination to notify charges, while some other respondents disagreed. One respondent stated that it anticipated that the SMP finding for all other CPs would lead to some formal requirement to notify geographic call termination charges.
- 12.87 One respondent argued that it would be disproportionate to impose this regulation and it is likely that call termination charges are expected to be dealt with under an updated reciprocity agreement. Another stated that the 'fair and reasonable' terms obligation has been effective to date and there is no need for more intrusive regulation. Further, it argued that the 'theoretic market power of other CPs has not increased since the last review and so there is no need for an increase in regulation'.
- 12.88 In its disagreement with our proposal, BT argued that the requirement to publish in itself is not onerous. For example, it is easy to publish rates on a website, and this would aid in transparency. C&W stated that BT's Carrier Price List (CPL) 'carries out an important function ensuring transparency and hence constraint to other operators' termination rates. If Ofcom proceeds to deregulate single transit then it is essential that an alternative is put in place and an obligation to publish charges would be an effective way to achieve that'.

## Ofcom's response

- 12.89 In relation to the comment about having to review the remedies in relation to BT's position in Northern Ireland, Ofcom does not agree with the comment. The market definition and analysis is such that all providers have a 100% market share on their own networks and, as set out in Section 7, this is the basis for our finding of SMP. As such, remedies are imposed. BT is subject to more remedies than other CPs that are found to have SMP in fixed geographic call termination on their own networks because of the scale of its network. This approach is the same across the whole market in the UK excluding the Hull Area.
- 12.90 We address the three areas where CPs did not agree with Ofcom below. These are: providing clarity in relation to the basis of charges obligation on BT and KCOM, notification periods that apply to BT and KCOM and whether it is proportionate to impose an obligation on all CPs (in addition to BT and KCOM) to publish their termination rates.

## Basis of charges

- 12.91 In relation to the basis of charges obligation, it was again flagged that guidance on the interpretation of the obligation should be provided. We provide this guidance in Annex 14.

## Notification of charges by BT and KCOM

- 12.92 Having carefully considered all consultation responses, and in particular the strong feedback from respondents in relation to our proposal to reduce the notification period applicable to BT and KCOM, we have re-considered our proposal.
- 12.93 In relation to call termination, as for call origination, BT's main argument for reduced periods is consistency across call origination and call termination and that there should be consistency between the notification periods for changes to charges across fixed call origination, call termination and mobile call termination. Currently, fixed call origination and call termination have 90 day notification periods whilst mobile call termination has a 28 day period. BT has generally only changed its prices on an annual basis, even though the current obligations would allow more frequent changes.
- 12.94 Ofcom understands the point BT is making. However, given the competition conditions in call termination, BT has the incentive to price at the maximum level set by the charge control. We do not see any significant reason for BT to need to change the prices with short notice or on a frequent basis. This leads us to conclude that a 90 day period is appropriate.
- 12.95 In relation to the notification period for mobile call termination, a review of that market is currently in progress. Once the mobile call termination market review has completed, and has decided on the merits of that market what notification periods are required, it will be appropriate for Ofcom to consider whether, for consistency across markets, any changes should be made to fixed call origination and termination notification periods.
- 12.96 We are therefore of the opinion that a notification period of 90 days should be imposed.

## Legal tests

- 12.97 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 12.98 Ofcom considers that the revised condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have the necessary information to allow them to make informed decisions about competing in the relevant market.
- 12.99 We consider that the condition meets the criteria set out in section 47(2) of the Act. It is:
- objectively justifiable, because general and reliable visibility of a dominant operator's prices is needed to enable competitors to set prices for their services that are based on purchasing the regulated inputs. It also allows Ofcom and other CPs to monitor BT and KCOM's prices for possible anti-competitive behaviour;
  - not unduly discriminatory as it is only imposed on those providers who have SMP and all providers are subject to the same obligation;
  - proportionate, in that only information that other network providers would need to know in order to adjust for any changes would have to be notified. Periods are proposed to be the minimum required to allow changes to be reflected in retail offers; and
  - transparent as it is clear the intention is to ensure that BT and KCOM notify those who purchase wholesale access of changes to charges, terms and conditions.

## **Notification of charges by other CPs**

- 12.100 In response to comments in relation to the reciprocity agreement, whilst this provides a framework for setting termination rates based on BT's charges, there is scope within this agreement for charges to vary based on different network topologies. Therefore, while all CPs will know what BT and KCOM's termination rates are, there will inevitably be differences between what different CPs charge for termination on their networks, which would not be visible absent publication by BT. As this agreement is currently in the process of renegotiation, we do not consider it would be correct for Ofcom to assume that the reciprocity agreement will provide sufficient transparency throughout the forward look period of this review.
- 12.101 With regards to comments that the obligation to set fair and reasonable rates has been sufficient in the past, the BT Carrier Price List (CPL) has listed the termination charges that BT pays other CPs, thereby providing the entire market with published prices. One respondent commented that CPs' market power in the termination of calls on their own networks has not necessarily increased. In markets where there are no supply-side substitutes and therefore limited competitive constraint on a provider, we believe it is necessary to consider whether regulation could play an effective role to ensure that interactions in that market better reflect those we would expect in a competitive one.
- 12.102 We consulted in March on a proposal not to impose regulation on other CPs in relation to notification of charges. After further consideration of the issue, we now

consider, based on feedback to the consultation, that such an obligation is required. We therefore propose to consult on imposing this obligation.

12.103 We have not previously had to consider regulation in fixed geographic call termination on CPs (other than BT and KCOM) beyond the requirement to provide network access on a fair and reasonable basis. However, our proposed regulatory approach in other markets has potential implication on transparency in the market for fixed call termination. In particular, it may lead to reduced transparency of rates via the BT CPL.

12.104 We agree with the argument that the CPL provides transparency, thereby acting as a constraint on termination charges. Without this transparency, it is possible that interconnection negotiations between CPs may become more difficult. This is because the lack of price transparency may make it difficult for CPs to assess whether the charges they are negotiating with another CP are fair and reasonable. While BT's charges will continue to be a proxy for those of an efficient network, charges will differ between CPs due to the different network topologies.

12.105 Given these concerns and the potential for disputes to be raised in the absence of price information resulting from changes in market conditions elsewhere, we are now proposing to impose this obligation on all CPs other than BT and KCOM. We set out our proposal and seek responses from stakeholders in Section 19.

## Conclusion

12.106 Having carefully considered all of the responses to consultation and taking into account the relevant legal tests, we are imposing the following remedies on BT in the fixed geographic call termination market:

- Requirement to provide network access;
- Requirement not to unduly discriminate;
- Basis of charges;
- Charge control;
- Requirement to publish a reference offer;
- Requirement to notify charges (with a 90 day notification period);
- Cost accounting; and
- Accounting separation.

12.107 We are imposing the following remedies on KCOM:

- Requirement to provide network access;
- Requirement not to unduly discriminate;
- Basis of charges;
- Requirement to publish a reference offer;

- Requirement to notify charges (with a 90 day notification period);
- Cost accounting; and
- Accounting separation.

12.108 We are imposing the obligation to provide network access and to do so on fair and reasonable terms on all CPs other than BT and KCOM, in the fixed geographic call termination market.

12.109 In Section 19 we are also consulting on our proposal to impose a requirement regarding the publication of charges on all CPs other than BT and KCOM.

## Section 13

# Wholesale Line Rental

## Introduction

- 13.1 In addition to the general remedies set out in Section 11, we are also imposing an obligation on BT to provide Wholesale Line Rental (WLR) in the following markets:
- Wholesale analogue exchange line services; and
  - Wholesale ISDN2 exchange line services.
- 13.2 The WLR condition we are imposing is different from the existing condition to take account of the developments of the WLR product, and the impact of BT's Undertakings, since the last review. The changes are:
- Removal of the detailed cost allocation and recovery elements outlined in the WLR condition; and
  - Removal of the obligation for BT to comply with the Functional Specification for WLR in the ISDN2 market.
- 13.3 In our consultation we also proposed to impose an obligation on BT to provide WLR in the ISDN30 market. As we have set out previously, we have not concluded our analysis in this market. Therefore, the existing obligations on BT will continue to be in place. This requires BT to provide WLR on ISDN30 in accordance with a functional specification.
- 13.4 The WLR remedy directly addresses BT's SMP in exchange lines markets by requiring it to make available a product which allows third party CPs to compete with BT's downstream businesses on an equivalent basis. This remedy also has the ability to enhance the CPS and CS/IA remedies, by exposing a greater part of the value chain to competition.
- 13.5 We also set out that during the next four years (the forward look period of this review), BT may deploy services via its NGN (21CN) or via next generation access (NGA) deployments. We said our view was:
- WLR in 21CN: during discussions on 21CN deployment, a WLR over 21CN product was discussed. In addition, the Wholesale Voice Connect (WVC) product was also discussed. BT has announced that it is reviewing deployment of 21CN and that it is not taking forward development of WVC at this time. Ofcom's view is that as BT provides voice services over 21CN, the obligation to provide WLR will continue to be in place. A product similar to the WVC product previously discussed by industry is likely to meet the obligation as it allows CPs other than BT to purchase wholesale access connectivity and to retail this to end users.
  - WLR in an NGA environment: a number of different deployment strategies exist in BT's NGA rollout proposals. In the initial phases, Fibre To The Cabinet (FTTC) deployments leave in place the current connection to the narrowband network. As such, in this configuration, the current obligation to provide WLR would continue to apply. Similarly, initial deployments of Fibre To The Premise (FTTP) are likely to be brownfield deployments – overlays of the existing network. As such, again,



the narrowband connection is likely to remain in place and the WLR condition will apply. Possible future developments of FTTC and FTTP may remove this separate narrowband connection. However, we said the likely scale of such deployment would be small.

- 13.6 We are not imposing an obligation to provide WLR on KCOM in the Hull Area as we continue to consider that it would not be reasonable to require KCOM to supply WLR without reasonable demand first having been demonstrated. We also consider that the requirement to provide network access condition imposed on KCOM covers requests for a WLR product upon request from third party CPs in the exchange lines market.

### Basis of charges obligation in regard to WLR

- 13.7 We proposed to oblige BT to provide products in the wholesale analogue and ISDN2 markets on the basis of long run incremental costs plus an appropriate return. We said we considered that this obligation should apply to all the elements required to provide the basic level of service required by consumers:

- Rental charges;
- Connection, rearrangement and termination charges; and
- Network features that comprise the basic service. Ofcom is of the view that these features are largely those agreed by industry as the parity feature set for the deployment of WLR3.

- 13.8 For other, additional features, the price may be constrained to some extent by the market, since if they are priced higher than the perceived value of the service, demand will fall. This does not, necessarily, drive down demand for the basic WLR service. However, where such a service is required, a CP has no choice but to purchase this from Openreach. We said we were concerned that if these value-add features were included in the basis of charges obligation it may act to inhibit Openreach from providing additional services in the future but that demand for new features may be inhibited if Openreach is able to set prices freely. We therefore invited views from CPs on the most appropriate way to treat value-added features on the WLR product.

### Consultation questions

- 13.9 In the consultation we asked:

**Question 13.1:** Do you agree that Ofcom should impose an obligation on BT to provide WLR products in the wholesale analogue, ISDN2 and ISDN30 exchange lines markets? If not, please explain why.

**Question 13.2:** Do you agree that the maturity of the WLR products plus BT's obligations under its Undertakings means that Ofcom does not need to impose an obligation on BT to comply with a functional specification for ISDN2 and ISDN30 WLR products? If not, please explain why.

**Question 13.3:** Is it appropriate for the pricing of value-added features to be subject to a basis of charges obligation? Do you think Openreach would have the correct incentives to develop new features in a regime where these may become subject to basis of charges obligations?

## Consultation responses

### WLR condition

- 13.10 All respondents agreed that Ofcom should impose an obligation on BT to provide WLR products in the wholesale analogue and ISDN2 exchange line markets. BT said that Ofcom should, however, explicitly dis-apply the obligation for NGA deployments.
- 13.11 Zen Internet stated that this obligation should also be placed on KCOM.

### WLR functional specification

- 13.12 Respondents were split in their response to our proposal to remove the functional specification for ISDN2. While Zen Internet, BT, FCS and one confidential respondent agreed with Ofcom, three respondents disagreed.
- 13.13 One of the confidential respondents that disagreed argued that the elements of the specification that are not covered by the Undertakings should be retained. It believes that to 'ensure certainty and stability for purchasers of these products, BT must continue to be required to comply with the functional specification, albeit in an amended form'. Further, the 'informal obligation' on BT to agree improvements with industry will not act as a sufficient constraint on BT not to amend the product specification for its own benefit.
- 13.14 Another confidential respondent argued that the removal of the functional specification could leave the opportunity for BT to 'behave in a manner which would set back CPs ability to compete in the retail market' and that BT would be free to make changes which could raise the costs for CPs. It also felt that a particular aspect of the existing functional specification in relation to an electronic gateway was not currently being delivered.
- 13.15 One respondent argued that the functional specification should stay in place until WLR3 is fully implemented.

### Basis of charges obligation

- 13.16 All respondents except BT agreed that value-add services for WLR should be subject to cost orientation while BT did not agree. Respondents generally argued that these services must be purchased from BT and therefore there is a risk of BT pricing above a competitive level. They did not believe this would impact BT's incentives to innovate and SSE pointed out that the SOR process 'provides a significant pool of desirable services from which BT can draw from'. One respondent stated specifically that the costs involved in developing new features should be allocated to those features and not shared across the product. This is because there may be features which are developed with different end-users in mind (i.e. residential, business). Business customers should not need to support the development of residential-focused products, and vice-versa.
- 13.17 BT stated that cost orientation should only apply to all the elements required to provide the basic level of service required by consumers (as described by Ofcom in paragraph 13.23 of the March consultation). BT commented that the condition should explicitly state which services are covered by the condition, thereby excluding anything which is not part of this feature set.
- 13.18 BT made further detailed arguments which included:

- that there was no obvious basis for proposing the imposition of charge obligation;
- cost orientation is not proportionate;
- cost orientation obligations may reduce efficiency, reduce competition in the downstream market, reduce end user choice and reduce incentives for Openreach to innovate;
- the Undertakings (section 5.11) specifically reference the treatment of unregulated services; and
- it is inconsistent with Ofcom's position in relation to the development of new NGA products.

## Ofcom's response

### WLR condition

13.19 In response to Zen Internet's comment that the WLR condition should be applied to KCOM, we continue to believe that our arguments, as discussed in paragraphs 13.9 to 13.11 of the March consultation, not to impose this condition, still stand. Specifically, we believe the requirement to provide network access covers requests for WLR or similar requests and that in the case of KCOM, it is not proportionate to impose this regulation. In KCOM's response to the March consultation it states that it is 'close to concluding negotiations with a major reseller for such an alternative means of access'.

### WLR functional specification

13.20 We have examined the concerns raised by respondents in relation to our proposal to remove this obligation.

13.21 Ofcom's obligation to impose regulation extends only to where it considers there is a specific competition problem that requires a remedy. The functional specification was originally implemented to ensure CPs could access a product that would allow them to compete with BT in the retail market. While we have concluded that BT continues to have SMP in the wholesale ISDN2 exchange line services market, these services have been provided in line with the functional specification since the last review. The features for WLR3 have been agreed through industry working groups and the OTA framework. We consider that this progress makes the need for a functional specification less compelling.

13.22 We note that if BT began removing features from the WLR products, this would have an impact on its own retail business. BT Retail is the largest user of WLR3 analogue and also consumes EOI ISDN2 products (although a large proportion of its user base remains on the legacy ISDN2 product). It is unlikely that BT would remove features from the market that would impact its own end-users. Also, it is unlikely that Openreach would remove features from its wholesale products that are popular with end users and therefore were a source of wholesale revenue. A number of developments since the last review have occurred. In 2006, Ofcom agreed that BT's WLR analogue product met the fit-for-purpose criteria set out by Ofcom. This was a pre-requisite to Ofcom considering the replicability of services at the retail level based on this wholesale product. Ofcom said that BT had met the replicability criteria

on 29 May 2007<sup>41</sup>. Further, BT is now required to provide WLR in accordance with its Undertakings and, in particular, on an EOI basis.

## NGA

- 13.23 As we set out in Section 5, whilst specific product obligations may need to be reviewed or removed, or new obligations imposed to take account of new technology, we have taken a technology neutral approach throughout this review to allow for new and/or replacement products to be developed using these new network technologies and for a consistent regulatory approach to be applied as the need arises.
- 13.24 In response to BT's specific comments regarding WLR, the WLR condition imposed in the narrowband exchange lines market requires BT to provide wholesale line rental wherever reasonable. Where the copper access network remains in place, it remains reasonable to require BT to provide WLR. This would apply to FTTC and FTTP brownfield deployments (at least initially). In an NGA environment where no copper exists, it may still remain appropriate for BT to be obliged to provide a wholesale narrowband access remedy. This would not necessarily be the WLR product provided today. The obligation placed on BT by the current SMP obligation is not technology specific. Indeed, the current obligation does not include the functional specification of the product at all. However, it is important that, at least until the full effect of any upstream remedies are well understood, other CPs are able to access a product that allows them to provide narrowband exchange line services. In particular, one feature of WLR is that it allows the CP to take over the retail relationship with the end user. We would expect this to remain in place, irrespective of the technical specification of any specific products.
- 13.25 In addition, the obligation to continue to provide a wholesale access remedy may particularly be appropriate where the approach to supporting voice over NGA aims to replicate the current narrowband network or product. Whilst the obligation to provide wholesale line rental does not specify the technology to be used, Ofcom recognises that a new product may be needed to meet this obligation, or a revision to specific product remedies may be more appropriate as the new products are introduced. Therefore we consider that the condition should be interpreted, in the NGA environment where no copper remains as:
- A CP should be able to provide a wholesale narrowband service via the NGA network, such that it can support a Publicly Available Telephony Service (PATS) and can own the retail relationship with the end customer.
  - However, this does not necessarily mean the existing WLR product needs to be replicated over NGA. Technology options that allow greater flexibility and innovation potential to CPs should be fully considered before the final product design is confirmed.

## Basis of charges obligation

- 13.26 We have set out our general approach to cost orientation in the exchange lines markets in Section 11 and provided guidance in Annex 14. In paragraphs 11.42 to 11.59 we concluded that a basis of charges condition would be an appropriate condition to impose, amongst other markets, the exchange line services markets. In imposing that condition it will apply to all services provided within a given market. This approach continues the regulatory approach previously imposed under SMP

<sup>41</sup> <http://www.ofcom.org.uk/consult/condocs/draftconsent/statement/>

condition AA3. In this context, services relates to the various product components that make up the overall product and are individually identified within the BT price list. For example, in the case of WLR, the rental charge for the basic product and the various enhanced care levels may be separate services.

- 13.27 However, we also consulted on whether cost orientation should apply to all features on the WLR product, or whether some of the features additional to the core service should not be required to be provided on a cost oriented basis.
- 13.28 We consider that the best place to set out which charges are subject to cost orientation is in the WLR charge control. This will therefore set out the comprehensive pricing model for WLR services including the “value added” services that we have consulted. Within that statement, should we determine that any particular WLR service should not be subject to cost orientation in accordance with SMP condition AAA3 we will amend the condition (as applicable to the exchange lines market only) to reflect this approach.

## Legal tests

- 13.29 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition. We also consider that the removal of the functional specification encourages innovation and that it facilitates self-regulation by promoting CPs to develop the product by agreement.
- 13.30 Ofcom considers that the WLR condition meets the requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition for the maximum benefit of consumers by enabling providers to compete in downstream access markets.
- 13.31 We detailed in paragraph 13.13 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.
- 13.32 In paragraph 13.14 of the March consultation, we indicated that we have taken into account the factors set out in section 87(4) of the Act and finally, in paragraph 13.15 of the March consultation we discussed why we believe this obligation meets the tests in section 88 of the Act.

## Conclusions

- 13.33 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and taking account of the relevant legal tests, we are imposing an obligation on BT to provide WLR in relation to the wholesale analogue exchange lines and wholesale ISDN2 exchange lines markets where we have concluded that it holds SMP.
- 13.34 As set out above, given the maturity of the product, we are not imposing a Direction which sets the functional specification for ISDN2. We will set out the specific features and services to which the cost orientation obligation applies in our WLR CC document.

## Section 14

# Carrier Selection and Carrier Pre-Selection

## Summary

- 14.1 In addition to the general remedies set out in Section 11, we are also imposing a requirement to provide carrier-pre selection (CPS) and carrier selection (CS) (referred to in the UK market 'Indirect Access' or "IA") as a result of the conclusion that BT and KCOM have SMP in the call origination market.
- 14.2 We are not imposing an obligation to comply with a functional specification for CPS on BT, due to the developments in the CPS product since the last review.

## Universal Service Directive

- 14.3 The Universal Service Directive<sup>42</sup> requires Ofcom to impose an obligation on providers with SMP in markets relating to the provision of fixed services that enables their subscribers to access the services of any interconnected provider of publicly available telephone services:
- on a call-by-call basis by dialling a carrier selection code; and
  - by means of pre-selection, with a facility to override any pre-selected choice on a call-by-call basis by dialling a carrier selection code.
- 14.4 In Section 6 of this statement we have concluded that BT and KCOM have SMP in call origination. Therefore we are imposing the condition requiring them to provide CPS and CS/IA products.

## CPS Condition

- 14.5 The existing condition requires CPS to be provided at the request of any customer and that relevant wholesale interconnection facilities are provided to CPs on reasonable terms. It further provides that the charges for such interconnection facilities are reasonably derived from the costs of providing those services and that the costs must be calculated on a forward looking long run incremental cost approach. The CPS condition also sets out the principles for recovery of costs incurred in the provision of CPS.
- 14.6 We proposed to retain the essence of the CPS condition which requires BT and KCOM to provide CPS upon request and to ensure that charges are based on a forward looking long run incremental cost basis, which can be agreed otherwise between BT and the CP. However, there will be differences in the level of detail regarding cost allocation and recovery retained in the separate conditions applicable to BT and KCOM.
- 14.7 In relation to BT, we proposed to remove the comprehensive detail relating to cost allocation and recovery methods. In line with our approach to WLR, we believe that BT's CPS product should also be considered mature and with embedded systems

<sup>42</sup> [http://ec.europa.eu/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/03673en1.pdf](http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/03673en1.pdf)



and processes, making the necessity for the inclusion of this information less critical than it was previously.

- 14.8 In relation to KCOM, we proposed to retain within the condition the cost allocation and recovery methods. In contrast to BT's situation, KCOM does not currently have a fit-for-purpose CPS product in place. We therefore believe it is appropriate to define how these costs should be established in the event a CPS product is required to ensure costs are appropriately recovered.

## **Legal tests**

- 14.9 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition, by enabling providers to compete in downstream markets.
- 14.10 Ofcom has considered the Community requirements set out in section 4 of the Act and believes that the condition meets the requirements. Specifically, section 4(8), as the condition has the purpose of securing efficient and sustainable competition for the benefit of consumers, by enabling providers to compete in downstream markets.
- 14.11 We detailed in paragraph 14.14 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. The March consultation should be read in conjunction with this statement and we believe that our arguments made against each criterion continue to remain valid.

## **CPS Functional Specification**

- 14.12 BT and KCOM are currently required to comply with the CPS functional specification which outlines the manner in which CPS and relevant wholesale interconnection facilities are made available. In our consultation we proposed that we would not impose a condition requiring BT to comply with the CPS functional specification due to the maturity of the product.

## **CS/IA Condition**

- 14.13 The proposed CS/IA condition is broadly unchanged from the current condition. It requires that CS/IA is provided on reasonable terms at the request of any customer and that relevant wholesale interconnection facilities are provided that will allow an alternative communications provider to provide CS/IA services to its customer. It further provides that the charges for such interconnection facilities are reasonably derived from the costs of providing those services and this must be calculated on a forward looking long run incremental cost approach.
- 14.14 The only change to the conditions for both BT and KCOM is the inclusion of the scope for charges to deviate from a forward looking long run incremental approach if agreed between BT or KCOM and the provider. This scope was and remains present in the CPS condition and we felt it should also be present in the CS/IA condition for consistency in approach.

## **Legal tests**

- 14.15 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in

relevant markets by the promotion of competition, by enabling providers to compete in downstream markets.

- 14.16 Ofcom has considered the Community requirements set out in section 4 of the Act and believes that the condition meets the requirements. Specifically, section 4(8), as the condition has the purpose of securing efficient and sustainable competition for the benefit of consumers by enabling providers to compete in downstream markets.
- 14.17 We detailed in paragraph 14.22 of our March consultation, why we considered the condition meets the criteria set out in section 47(2) of the Act. The March consultation should be read in conjunction with this statement and we believe that our arguments made against each criterion continue to remain valid.

## Consultation questions

- 14.18 In the consultation we asked:

**Question 14.1:** *Do you agree that Ofcom should impose an obligation on BT and KCOM to provide CPS? If not, please explain why.*

**Question 14.2:** *Do you agree that Ofcom does not need to impose an obligation on BT and KCOM to comply with a functional specification for CPS? If not, please explain why.*

**Question 14.3:** *Do you agree that Ofcom should impose an obligation on BT and KCOM to provide carrier selection (Indirect Access)? If not, please explain why.*

## Consultation responses

### CPS condition

- 14.19 All respondents, excluding BT, agreed that Ofcom should impose an obligation on BT to provide CPS.
- 14.20 BT made three arguments in its response opposing the retention of the CPS condition. Firstly, it argued that it was no longer appropriate to have any downstream regulation that only applies to BT, especially in light of Ofcom's analysis which shows that the retail calls and lines markets are competitive.
- 14.21 Secondly, it argued that the CPS obligation should not be replicated in NGA or new build areas. It stated that the Voice Enabled Port (VEP) on the GEA product (which is a type of Active Line Access product), meets the underlying objectives of carrier pre-selection.
- 14.22 Finally, it argued that the CPS condition should not apply to Featurenet as the demand is very low.

### CPS functional specification

- 14.23 There was a mixed response to our proposal to remove the CPS functional specification. BT, FCS and one confidential respondent agreed whilst C&W, Zen Internet and three confidential respondents disagreed.
- 14.24 Those respondents that disagreed reiterated the arguments they made in relation to our proposal to remove the WLR functional specification. Their main concern is that



without the specification in place BT will be able to amend the product specification for its own benefit.

- 14.25 C&W argued that Ofcom risked undermining the CPS product's ability to compete with BT Wholesale Calls, as this product had a number of advantages which had not been replicated for CPS.
- 14.26 One respondent stated that due to BT's dominant position in Northern Ireland the conditions must be reviewed with a view to stimulating competition.
- 14.27 BT stated that in the absence of the functional specification, it would develop a product design/description document. It also stated that any changes would still need to be agreed at industry level. It expects any issues regarding development requests for CPS could be managed either at the industry level or through commercial negotiation.

### **CS/IA condition**

- 14.28 All respondents agreed that Ofcom should impose an obligation on BT to provide CS/IA.

### **Ofcom's response**

#### **CPS condition**

- 14.29 In response to BT's first argument that it is inappropriate to retain downstream regulation, we believe that the existence of CPS as a wholesale remedy has facilitated competition in the retail environment and as such it is necessary for Ofcom to ensure that CPS continues to be available. As we have stated in our retail narrowband market review, it is the existence of these underlying wholesale remedies that have led to the removal of SMP on BT. It would therefore not be appropriate to remove these remedies based on the finding of no SMP in the retail market review. As we have found BT to hold SMP in call origination, it is proportionate to require BT to supply CPS and is consistent with the obligations placed on Ofcom by the Universal Service Directive.
- 14.30 We do not agree with BT's argument that the obligation to provide CPS should not apply in an NGA environment. The CPS condition is technologically neutral. In addition, we have proposed to remove the functional specification. As for WLR, we understand that the actual product required to meet this obligation may be different. For example, in its response BT highlighted that the Voice Enabled Port (VEP) deployed on the Generic Ethernet Access (GEA) product in Ebbsfleet allows for carrier pre-selection like functionality. In addition, the specific products that will be deployed to support voice services over NGA are not yet agreed. Furthermore, upstream remedies in the Wholesale Local Access market may mean that specific narrowband remedies become less relevant. Until such remedies are in place and effective in allowing competition to develop upstream, specific narrowband regulation remains appropriate. Until further clarity of product options to support narrowband services is available, we consider that the obligation to provide carrier pre-selection functionality as required under the Universal Services Directive should remain in place.
- 14.31 The above may also be true in 21CN, where BT is likely to continue to be required to provide carrier pre-selection services, but this may be met in different ways. For

example, depending on the specific features provided, a product such as WVC may meet this obligation.

- 14.32 In response to BT's final argument regarding Featurenet, Ofcom understands that BT has not received an order for this service in at least two years. Whilst maintaining the capability on the network may not be costly, there is a cost associated in maintaining resources to handle orders (in particular making sure staff training is kept up to date). In addition, following various re-arrangements following the agreement of BT's Undertakings, there may be some systems needed to process these orders that reside in Openreach. The order processes have not been updated to manage orders on the Featurenet platform. Finally, BT has indicated that the Featurenet platform is not part of Project Sustain, and as such may have a more limited lifetime than the PSTN. Taking these points into account, we consider it would be disproportionate for BT to be required to maintain this capability. Should a CP, in the future, have demand for this service, we would expect BT to consider the request under its general obligations to provide network access.

### **CPS functional specification**

- 14.33 We refer to the arguments made earlier in paragraphs 13.20 to 13.22 in relation to the WLR functional specification, which we consider are also relevant here. As with WLR, in 2003 it was necessary to implement a functional specification for CPS to enable third party CPs to compete with BT in the retail market. The CPS product facilitated increased competition in the retail market, to the point where we concluded in our retail narrowband market review, that BT no longer has SMP<sup>43</sup>.
- 14.34 We consider that the systems and processes in place to support CPS are embedded in how the service is delivered to and received by CPs and ultimately passed through to customers. There is limited scope in the subscriber options provided by CPS for drastic changes. BT is also required to provide network access on reasonable request and not to unduly discriminate. Therefore, if BT refuses to supply features it has previously supported, CPs are able to make use of Ofcom's complaints and disputes process to the extent they consider BT is not complying with its SMP obligations.
- 14.35 In response to C&W's point, the CPS functional specification does not include a requirement that any innovations BT introduces are automatically included for CPS. We consider that the SOR process is available to CPs who wish to request additional facilities or to make new network access requests.
- 14.36 Finally, since CPS is available across the whole of BT's network, we do not consider that it would be appropriate to review the functional specification in any specific geography.

### **Legal tests**

- 14.37 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition. We also consider that the removal of the functional specification encourages innovation and that it facilitates self-regulation by promoting CPs to develop the product by agreement.

<sup>43</sup> *Fixed Narrowband Retail services Markets*, 15 September 2009, [http://www.ofcom.org.uk/consult/condocs/retail\\_markets/statement](http://www.ofcom.org.uk/consult/condocs/retail_markets/statement)

- 14.38 Ofcom considers that the CPS condition meets the requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition for the maximum benefit of consumers by enabling providers to compete in downstream access markets.
- 14.39 We detailed in paragraph 14.14 of our March consultation why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.

## Conclusion

- 14.40 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and taking account of the relevant legal tests, we are imposing an obligation on BT and KCOM to provide CPS and CS/IA in relation to the wholesale call origination market where we have concluded that they hold SMP.
- 14.41 As set out above, given the maturity of the product, we are not imposing a Direction which sets the functional specification for CPS

## Section 15

# Number Translation Services Call Origination

## Summary

- 15.1 In addition to the general remedies discussed in Section 11 we are imposing the Number Translation Services (NTS) call origination condition on BT as a result of our conclusion that BT has SMP in the call origination market.
- 15.2 This condition requires BT to provide NTS call origination and includes a Retail Uplift charge control and a PRS Bad Debt Surcharge. We discuss charge controls in Section 16.
- 15.3 NTS calls discussed in this section refer to calls to the following numbers: Special Service numbers (including freephone, special services basic rate and special services higher rate) and Premium Rate Services (PRS - services currently provided under 090 and 091 number ranges). NTS also includes calls to the legacy 0500 freephone numbers which whilst still in use, are not listed in the National Telephone Number Plan (NTNP) as they are no longer available for new allocations. NTS does not include calls to directory enquiries 118, 05X corporate numbers and VoIP or 070 personal numbering services and Flat Rate Internet Access Call Origination.
- 15.4 The NTS call origination condition requires BT to originate and to retail NTS calls on behalf of the terminating operator. It allows BT to retain charges that relate to call origination and conveyance, a Retail Uplift designed to recover BT's reasonable costs for retailing NTS calls and an additional PRS bad debt surcharge to reflect the higher incidence of bad debt on these calls.
- 15.5 Ofcom believes that it is appropriate to re-impose the condition as the existing condition has been effective to date in ensuring that BT is not pricing above the costs involved to convey and retail NTS calls.
- 15.6 The requirements for the NTS call origination condition arise because NTS terminating operators do not have a commercial retailing relationship with the caller. Therefore, operators purchasing NTS call origination will require the retail operator (i.e. the operator that has the retail relationship with the end-user) to undertake the retailing of these calls on their behalf.
- 15.7 The Retail Uplift charge control is required because, in the absence of such regulation, neither the caller nor the terminating provider would be able to competitively constrain the price that BT sets for the Retail Uplift.

## NTS Retail Uplift charge

- 15.8 The NTS call origination condition allows BT a retention for the costs of call origination and conveyance. In addition, the retailing activity undertaken by BT (including billing and revenue collection from the customer, on behalf of the terminating operators purchasing NTS call origination) is necessary to enable the terminating operators to make effective use of the wholesale call origination service.

It would be impractical and costly for each terminating operator to establish a billing relationship with each calling party. Hence, this retailing activity undertaken by BT is a critical element of the service and terminating communications providers (TCPs) are reliant on BT to provide this function as this is the most efficient and economically viable way to provide a service to consumers.

## PRS Bad Debt Surcharge

- 15.9 In addition to the Retail Uplift, the NTS call origination condition allows BT an additional retention for bad debt incurred in the retailing of PRS calls. The level of the surcharge has previously been set at 3.03%. In our March consultation we proposed a new SMP condition, which retained the same wording as the previous SMP condition including the reference to the level of the surcharge at 3.03% to ensure continuity of regulation. However, we also proposed that a price control was an appropriate remedy in this market and this would be separately consulted upon in the Wholesale charges for Number Translation Services and PRS Bad Debt Surcharge, (the 'NTS July consultation')<sup>44</sup>. This consultation considered both the NTS Retail Uplift and the PRS Bad Debt Surcharge and proposed a higher number for the surcharge of 9.7%. Work is currently underway to carry out an independent review of BT's PRS bad debt levels.

## Hull area / KCOM

- 15.10 We are not imposing NTS call origination regulation on KCOM. We continue to be of the view that the existing regulatory arrangements appear to be satisfactory for consumers and operators and there would likely be costs in introducing specific regulation. Therefore, the introduction of specific regulation on KCOM would be unlikely to meet the proportionality test in section 47 of the Act. More general conditions, including the condition relating to the basis of charges, would still be relevant for NTS calls originating on KCOM's network. For clarity, the absence of specific regulation does not preclude KCOM from setting a charge for call origination that is different from BT's retention.

## Legal tests

- 15.11 Ofcom has considered its duties under section 3 of the Act. We consider that the NTS call origination condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition, by enabling providers to compete in downstream markets.
- 15.12 In our consultation we set out that we had considered the Community requirements in section 4 of the Act and believed that the proposed condition meets the requirements, specifically, section 4(8), as the proposed condition has the purpose of securing efficient and sustainable competition for the benefit of consumers by enabling providers to compete in downstream markets.
- 15.13 Section 47 of the Act requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. We said we believed that the proposed condition is objectively justifiable, not unduly discriminatory, proportionate and transparent.

---

<sup>44</sup> *NTS Retail Uplift charge control and PRS bad debt surcharge*, 28 July 2009, <http://www.ofcom.org.uk/consult/condocs/nts/>

- 15.14 We also said that we believed that we had considered the tests in section 88 of the Act which authorises Ofcom to implement regulation where there is a risk that, in situations where SMP is persistent, pricing will be distorted and not at competitive levels. We said that it is necessary to control the charge for wholesale input to retail services where the absence of competition will mean there is no other pressure on pricing.

### Consultation Question

- 15.15 In the consultation we asked:

**Question 15.1:** *Do you agree that Ofcom should impose an obligation on BT in relation to NTS call origination? If not, please explain why.*

### Consultation responses

- 15.16 The majority of respondents except BT agreed that we should impose the NTS call origination obligation on BT.
- 15.17 One confidential respondent argued that Ofcom had not taken sufficient account of the proposed de-regulation of the LTC/LTT market and the current functioning of the NTS termination market in assessing whether the NTS call origination obligation was required.
- 15.18 BT disagreed, raising a number of arguments. BT argued that because Ofcom was proposing that the retail calls market was competitive, it was unclear why a wholesale remedy should apply to a subset of this calls market. BT also argued that the regulation of the Retail Uplift was unjustified since it imposed on BT and not other CPs a restriction on the retention of retail revenues for NTS calls. BT also argued that only it was subject to the charging restrictions set by the NTNP. Taken together, BT argued that the NTS call origination condition and the Retail Uplift are not objectively justifiable, are discriminatory and are disproportionate. It argued that Ofcom should remove this obligation and instead, to the extent necessary, extend the end-to-end connectivity obligation.

### Ofcom's response

- 15.19 In our retail narrowband market review statement<sup>45</sup> we have concluded that BT does not have SMP in the retail calls market. This finding at the retail level assumes wholesale remedies are in place. It would be incorrect to assume that a finding of no SMP at the retail level should lead to a removal of remedies in the wholesale markets derived from that retail market.

### National Telephone Number Plan

- 15.20 In relation to BT's comments regarding the NTNP, we note that it is the interaction between the NTS call origination condition and TCPs' obligations under the NTNP that effectively requires BT to charge the prices specified in the NTNP. TCPs are bound by the NTNP but, unlike ordinary calls, with NTS calls, TCPs are able to compel BT to retail NTS calls at the prices set out in the NTNP by virtue of the NTS call origination condition. We said in our NTS July consultation that, if we were to

<sup>45</sup> *Fixed Narrowband Services Retail markets*, 15 September 2009, [http://www.ofcom.org.uk/consult/condocs/retail\\_markets/statement](http://www.ofcom.org.uk/consult/condocs/retail_markets/statement)

conclude that BT no longer has SMP in the retail market for calls, it would be appropriate to review the implications of that finding for the pricing rules set out in the NTNP. We do not consider here whether this is the most effective way to regulate NTS calls.

- 15.21 We note that BT and other respondents to this and other questions have highlighted concerns with the NTS regime. In addition, in our July NTS consultation we noted that, if we were to conclude that BT no longer has SMP in the retail market for calls, it would be appropriate to consider the implications of that finding for the pricing rules set out in the NTNP. As we are concluding in our retail narrowband market review that BT does not have SMP in the calls market, we believe that it is appropriate to carry out this review. We are considering the exact scope of the review but, in addition to the pricing rules in the NTNP and NTS Retail Uplift, it will need to take account of the relevant aspects of the wholesale regime for NTS. This would include NTS termination and transit of NTS traffic. We intend to consult on the review next year. Since, in advance of this review, any possible future changes to the NTNP or the wholesale NTS regime in general are not yet known, our analysis of NTS call origination in this Statement reflects the current regime. If the conclusions of the review were to imply important changes to the analysis of SMP for NTS call origination or remedies, we would address these once the conclusions of the review are known.

### **Difference in model of competition between NTS calls and geographic calls**

- 15.22 The services provided to consumers by NTS calls can differ in important respects from “ordinary” or geographic calls. NTS calls are used for the provision of a variety of services, for example access to call centres, information services and helplines. NTS itself was created to encourage the growth in the provision of access to new (and potentially cheaper) services via the telephone. Through the use of non-geographic NTS numbers, calls could be made to anywhere in the UK and the wholesale arrangements enable this to occur without the provider of the service having to pay to receive the calls.
- 15.23 In general for calls, and especially for NTS calls, there are consumers / customers at both ends of the call: the caller and the call recipient. In the case of NTS calls, the call recipient is the service provider (SP). The different nature of the services provided by NTS calls compared to geographic calls implies a different model of competition.
- 15.24 For geographic call types the model of competition revolves around the caller’s end. Retailers compete to provide retail calls for individual end users. The caller pays a retail price to the retailer (and the call recipient does not pay). The retailer either self-provides wholesale call origination or purchases it from the originating communications provider (OCP). Conceptually the retail provider also purchases termination from the TCP, as well as transit services, if relevant. Competition amongst retailers is promoted by remedies to SMP in wholesale call origination (such as discussed in Section 6, 11 and 14) and in termination (as set out in Sections 7 and 12).
- 15.25 For NTS call types the model of competition revolves around the call recipient’s end. These calls are made by callers based on the value of the content provided by SPs at the call recipient end of the call. SPs compete to provide a particular service (e.g. traffic information). The success of this service depends on how valuable or attractive its content is to a wide range of end users not directly known to the SP or the TCP. In order to encourage SPs to offer new and innovative services, competition at the

terminating end of the call among TCPs is required, so that they in turn can provide competitive services to SPs. Conceptually the OCP retails NTS calls on behalf of the TCP and SP. The TCP purchases origination and this retailing component from the OCP (and transit services, if relevant), and provides these along with termination and hosting services to SPs. For this competition model to work effectively, the payment regime for NTS calls needs to provide a level of revenue certainty to TCPs.

- 15.26 Therefore, the regulatory treatment of origination and termination reflects the differences in the respective models of competition and competitive constraints. In the case of geographic calls, the retailing operator, after paying other operators for wholesale services (transit, call termination, call origination) if necessary, keeps as profit the rest of the amount billed to the caller. On the other hand, NTS calls are retailed on behalf of the TCP and SP and any excess in the amount billed to the caller over and above the costs of originating and retailing the call is passed to the TCP (who may share the revenue with the SP, reflecting competition with other TCPs).
- 15.27 The purpose of the NTS call origination obligation, along with the regulation of the NTS Retail Uplift, is to prevent BT exploiting its SMP in call origination by unduly raising the charge for NTS call origination whilst allowing BT to recover the costs it incurs on behalf of TCPs. Therefore, (as discussed in greater detail below) the NTS call origination obligation and associated Retail Uplift charge is not a remedy that depends on BT's SMP in the retail calls market. Instead, it is the component of the wholesale charge that BT is allowed to retain in association with establishing and managing the retail relationship with the caller.

### **Absence of competitive constraints on BT**

- 15.28 In principle, there are two possible sources of competitive constraints on BT's ability (as the OCP) to raise the retail component of the charge for NTS call origination:
- switching by SPs; and
  - switching by callers.
- 15.29 First we consider whether switching by SPs could constrain BT's charge for NTS call origination including the Retail Uplift. If the caller is a BT customer, NTS terminating CPs must purchase both the retail and wholesale components of call origination from BT. If purchasers of NTS call origination are interested only in the total charge, that is, the sum of the standard origination charge and the Retail Uplift, then failure to control one element (the uplift) would in effect undermine the control on the other since BT could simply raise the combined price. An uncontrolled uplift would undermine the control on the wholesale origination charge at least for NTS calls from BT retail customers.
- 15.30 An increase in the Retail Uplift and hence charges for NTS origination would, for a given retail price, reduce the amount available to pass to NTS SPs. It is possible that SPs could respond to BT raising the Retail Uplift by seeking to change the number range to restore the value of their payments, though at a higher retail price point. Such migration could entail significant costs and would distort the pricing structure of NTS calls (i.e. SPs preferred combinations of retail price and outpayments). A change of number range would increase NTS charges for the customers of all CPs.
- 15.31 In addition, we should consider whether there are now sufficient constraints on BT's charges for wholesale NTS call origination arising from switching by callers,



particularly in the light of the finding of no SMP in the retail market for calls. There is a possible constraint on BT's ability to raise the Retail Uplift arising from competition from CPs using CPS and Carrier Selection/Indirect Access (CS/IA).

- 15.32 Callers would switch only if the increased Retail Uplift was passed on in the retail call price. This is unlikely for a number of reasons. Given the constraint placed on BT's NTS pricing by the NTNP, BT cannot, in most cases influence the retail price of NTS calls. Therefore, in the case of NTS calls where BT cannot set the retail price (such as freephone calls) callers are not directly affected by BT raising the Retail Uplift and thus will not switch telephony provider. This is a distinction between the nature of the competitive constraints on the NTS Retail Uplift, which is charged to TCPs, compared to the retail price for calls, which is charged to callers.
- 15.33 The only exception where BT is able to influence the retail price is where NTS call prices are linked to BT's geographic call prices. However, these NTS calls form a relatively small part of consumers' retail bills, which are likely to be most relevant to the switching decision. The decision to use an alternative operator is likely to be based on a consideration of the price of the retail calls bundle offered by those operators. In any case, BT would be able to increase the uplift without raising retail prices – at the expense of the TCPs.
- 15.34 Therefore, in contrast to retail prices for calls, it seems unlikely that switching by callers would constrain BT in raising the NTS Retail Uplift, because callers are unlikely to feel the direct effect of an increase in the Retail Uplift. Instead, it would be TCPs and thus SPs who would have smaller revenues as a result of BT raising the charge it retains for retailing NTS calls. This in turn would affect the services SPs offer and/or the retail price for all CPs if NTS services are migrated to more expensive number ranges.
- 15.35 Neither switching by SPs nor switching by callers constrains BT's Retail Uplift charge. Therefore, BT's SMP in wholesale call origination also applies to the Retail Uplift, which is an integral part of the service provided by BT as the OCP to the TCP for NTS calls. Without the imposition of the NTS call origination condition including regulation of the Retail Uplift it is likely that BT could increase its Retail Uplift at the expense of TCPs. This is so even though there is competition in retail calls, because switching by callers does not competitively constrain the amount of the Retail Uplift. Therefore, the fact that BT no longer has SMP in the retail calls market does not imply either an absence of SMP over the Retail Uplift or that the level of its Retail Uplift should not be regulated.

## **PRS Bad Debt Surcharge**

- 15.36 In the condition imposed in 2003, we set a level for the PRS Bad Debt Surcharge. This was to ensure that the condition operates in a consistent manner with the previous condition it has been designed to replace<sup>46</sup>. As the PRS bad debt surcharge is a price control, despite it being contained in the body of the substantive condition, we consider that it is appropriate to review it as part of the current review of charging for the NTS Retail Uplift and PRS bad debt surcharge charge control.
- 15.37 We are currently consulting separately on the NTS Retail Uplift and PRS bad debt surcharge and we are seeking views on a potential increase in the level of the PRS bad debt surcharge to 9.7%. The appropriate place for comment on this potential

---

<sup>46</sup> Condition AA11 of the 2003 review, 23 November 2003,  
[http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/nwe/fixednarrowbandstatement.pdf](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf)

increase is in response to that consultation and we encourage interested stakeholders to respond by the consultation end date of 29 September<sup>47</sup>. Accordingly, in condition AAA11 in our notification in Annex 7 we have not included the specific level of the PRS Bad Debt Surcharge. Although this has the potential to create regulatory uncertainty, BT has undertaken not to notify any changes to PRS out-payments until we have concluded our review or the end of the year, whichever is sooner. Any changes would be subject to a 90 day notification period, unless we have determined otherwise.

## Legal tests

- 15.38 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 15.39 Ofcom considers that the NTS call origination condition meets the requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition for the maximum benefit of consumers by enabling providers to compete in downstream access markets.
- 15.40 We detailed in paragraph 15.13 of our March consultation, which should be read in conjunction with this statement, why we considered the condition meets the criteria set out in section 47(2) of the Act. We believe that our arguments made against each criterion continue to remain valid.
- 15.41 In paragraph 15.14 we discussed why we believe this obligation meets the tests in section 88 of the Act.

## Conclusion

- 15.42 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation and taking account of the relevant legal tests, we are imposing an NTS call origination obligation on BT in relation to the wholesale call origination market where we have concluded that it holds SMP. As set out above, BT's pricing of NTS call origination is unlikely to be constrained by competition meaning BT has the ability and the incentive to raise the amount it retains. We therefore consider the imposition of a charge control is an appropriate remedy on the Retail Uplift.

---

<sup>47</sup> *NTS Retail Uplift charge control and PRS bad debt surcharge*, 28 July 2009, <http://www.ofcom.org.uk/consult/condocs/nts/>

## Section 16

# Charge controls

## Introduction

- 16.1 In addition to the general remedies set out in Section 11, in this section we impose charge controls in certain SMP markets. We are imposing charge controls in the following markets and related areas:
- Wholesale analogue exchange line services;
  - Call origination on fixed public narrowband networks;
  - Call termination on fixed public narrowband networks;
  - Interconnection circuits;
  - PPP; and
  - NTS Retail Uplift charge and PRS Bad Debt Surcharge.
- 16.2 Currently there are two separate wholesale exchange lines markets – residential and business. There are separate charge controls in these. In Section 5 we have concluded that residential and business exchange lines now sit in the same wholesale market.
- 16.3 There is currently a charge control in place in the LTC/LTT market. In Section 8 of this statement we have found that this market is effectively competitive and that no provider has SMP. Therefore, we are not imposing a charge control in this market. There is also a charge control in place on Single Transit. As set out in Section 9 of this statement, we have not concluded on this market, and are re-consulting. We are therefore not imposing a charge control within this statement on Single Transit.

## Approach to implementing the charge controls

- 16.4 In setting any SMP condition we must satisfy the tests set out in section 47 in the Act. In paragraph 16.30 of the March consultation we said why the imposition of a proposed SMP charge control condition met the criteria set out in section 47(2) of the Act. We argued that for each of the cases identified, a charge control meets the criteria set out in section 47(2) of the Act. For the reasons stated in the March consultation we consider that all four criteria are met. In considering the application of section 47, it is important to note that we will consider separately, when the mechanisms for each of the identified charge controls are set, the application of section 47 to the condition as drafted.
- 16.5 Where we have found SMP in a market, we have to impose appropriate remedies to address the identified competition concerns.
- 16.6 For each of the markets identified at paragraph 16.1 above, we have found in our market analysis that there is a risk that BT could set prices at an excessively high level. For that reason we consider that a remedy dealing with that risk is appropriate. The identification of that risk is a necessary precondition under section 88 to enable us to set an SMP condition imposing a charge control.

16.7 Section 88 requires a charge control SMP condition can only be set if:

- There is a relevant risk of adverse effects arising from price distortion;
- The setting of the condition is appropriate for the purposes of
  - i. promoting efficiency;
  - ii. promoting sustainable competition; and
  - iii. conferring the greatest possible benefits on the end users of public electronic communications services; and

we have taken into account the extent of the investment by the Dominant Provider.

16.8 Whilst we identify the particular market failure through our market analyses in this statement we will set the individual controls through separate documents. In setting SMP service conditions each condition will have to comply with the requirements of section 88.

16.9 Having identified the relevant risk in this statement, Ofcom will implement the charge control SMP conditions in the following documents:

- Wholesale analogue exchange line services: Ofcom has published a separate consultation regarding this charge control. This consultation was published on 3 July 2009<sup>48</sup>.
- Network Charge Control: Ofcom has published a consultation on the Network Charge Control including charge controls for call origination, call termination, interconnection circuits and PPP<sup>49</sup>. We are publishing the final statement on the NCC today<sup>50</sup>; and
- NTS Retail Uplift charge: Ofcom published the July NTS consultation, which consulted separately on consulted separately on the NTS Retail Uplift and PRS Bad Debt Surcharge, on 28 July 2009<sup>51</sup>.

16.10 In each of those documents we will ensure that any control is compliant with section 88. Generally Ofcom has previously used RPI +/- X controls which allow both common costs to be taken into account and for the incentive of a Dominant Provider being able to retain any increased profits should it be able to reduce its costs (through increased efficiency) below the level expected when the cap was set. However, the exact design of each control has been the subject of separate consultation, and each individual charge control review will have to ensure that the implemented condition satisfies the tests in both sections 47 and 88.

<sup>48</sup> *Charge controls for wholesale line rental and related services*, 3 July 2009,

<http://www.ofcom.org.uk/consult/condocs/wlrcc/>

<sup>49</sup> *Review of BT network charge controls – consultation on proposed charge controls in narrowband wholesale markets*, 19 March 2009 ([http://www.ofcom.org.uk/consult/condocs/review\\_bt\\_ncc/](http://www.ofcom.org.uk/consult/condocs/review_bt_ncc/))

<sup>50</sup> *Review of the BT network charge controls*, 15 September 2009,

[http://www.ofcom.org.uk/consult/condocs/review\\_bt\\_ncc/statement](http://www.ofcom.org.uk/consult/condocs/review_bt_ncc/statement)

<sup>51</sup> *NTS Retail Uplift charge control and PRS bad debt surcharge*, 28 July 2009,

<http://www.ofcom.org.uk/consult/condocs/nts/>

- 16.11 Below we summarise our reasoning, as set out in full in our sections on market analysis, in assessing the pricing risk for each market and our decision that a charge control is an appropriate remedy to be applied in order to address that risk .

## **Charge controls to be imposed on BT**

### WLR analogue

- 16.12 We said that in the absence of regulation, we believe that BT has incentives to set prices for WLR analogue services higher than could be expected in a competitive market. BT retains a very high market share at the wholesale level in the provision of exchange lines and the use of analogue WLR has been central to promoting competition in the retail narrowband markets. Barriers to entry in exchange lines mean that even CPs that have self-supplied in some cases remain dependent on a WLR product from BT if they are able to supply service on a national basis.
- 16.13 We said that a charge control was necessary because even though cost orientation may constrain prices to be based on BT's costs and the obligation not to unduly discriminate may also restrict BT's ability to price WLR in such a way as to provide competitive advantage to its retail divisions, BT would not have incentives to improve its efficiency as would be expected if the market was competitive. Therefore, a charge control was required to ensure CPs are able to purchase WLR at the prices that would be expected in a competitive market to continue to promote this competition in the retail markets.

### Wholesale call origination

- 16.14 We said that BT's high market share of the call origination market was linked to its high market share in exchange lines, since only the network to which a consumer is connected can provide call origination. The entry barriers for exchange lines explained above are also relevant for call origination.
- 16.15 Therefore, for the same reasons as for exchange lines, we believe a charge control is required on call origination.

### Wholesale call termination

- 16.16 Based on our proposal that BT has SMP in the termination market we said a charge control was also necessary. In the absence of a charge control, prices for call termination over BT's network would be likely to be excessively high because call termination is a 'bottleneck' service.
- 16.17 As for exchange lines and call origination, we said that without a charge control we do not believe BT has incentives to increase its efficiency in providing call termination.
- 16.18 Therefore, for the same reasons as for exchange lines and call origination, we believe a charge control is required on call termination.

### Interconnection circuits

- 16.19 We also said that a charge control was required on interconnection circuits, because, due to the nature of interconnection there is no constraint on the prices of these circuits. Since, by definition, interconnection circuits connect the BT network to another CPs' network, there may be an incentive on BT to price interconnection as

high as possible to limit competition in markets where its own retail divisions are active (and which would not be subject to such charges).

- 16.20 Whilst a cost orientation obligation may limit BT's ability to freely price interconnection circuits, the allocation of common costs to interconnection may act to raise the costs upon which prices are based. In addition, a cost orientation obligation would not provide BT with an incentive to increase its efficiency since CPs have to buy interconnection circuits in order to access the remedies in the call origination and call termination markets.
- 16.21 We also consider that for the charge control remedies on the call origination and termination to be effective in addressing the concerns we have identified above, a charge control also needs to be placed on interconnection circuits, as interconnection is required in order to access origination and termination products.

### PPP

- 16.22 We said that BT's policy, planning and product management (PPP) charge should be charge controlled. PPP is generated by BT's activities in providing products in markets where it has SMP. As for interconnection circuits, there is no competitive market for the provision of these services to constrain the cost. Given the nature of PPP, it is likely that the precise allocation of costs will be complex for other CPs to accurately interpret.
- 16.23 Because of this, we said that in the absence of a charge control BT would be able to recover, through PPP, costs not directly related to the provision of products that meet BT's obligations in markets where it has SMP or technical areas associated with these markets.

### NTS Retail Uplift

- 16.24 Finally, we proposed that the NTS Retail Uplift charge (and the additional PRS Bad Debt Surcharge related to PRS services) should be charge controlled. The Retail Uplift reflects BT's costs in retailing NTS services and is necessary to allow CPs providing NTS services to make effective use of the NTS call origination remedy BT is obliged to provide. There is no competitive market for the provision of these services to constrain the cost. Because of this, in the absence of a charge control BT would be able to set excessive charges for the NTS Retail Uplift which may inhibit the CPs ability to effectively provide NTS services for the benefits of consumers.
- 16.25 As explained in Section 15, we also consulted on increasing the level of the PRS Bad Debt Surcharge (the PRS Bad Debt Surcharge does not follow the same RPI+/-X% mechanism of other charge controls).

### **Hull area / KCOM**

- 16.26 We did not propose any charge controls on KCOM in the Hull Area. We said that based on our analysis this would not be proportionate. KCOM has been subject to a number of other remedies, including a requirement to provide network access on reasonable request, not to unduly discriminate and to provide services on a cost oriented basis. During the life of the existing remedies, there has been no significant entry into the Hull market.
- 16.27 We said we did not believe that increased regulation would prompt rapid entry into this market. The existing (and continued) suite of regulation set out in this statement

provides a framework that should support entry, in the event a CP approaches KCOM with a request for wholesale access. The addition of increased regulatory obligations on KCOM, without sufficient demand to justify this, would increase KCOM's cost base for the existing products and services it does supply. Any increase in costs would need to be recovered from its retail base, which would increase prices without necessarily influencing market entry.

- 16.28 Therefore, we did not believe that it would currently be a proportionate response to the market conditions to propose charge control regulation on KCOM.

## Consultation questions

- 16.29 In the consultation we asked:

**Question 16.1:** *Do you agree that Ofcom should impose charge controls on BT in wholesale analogue exchange lines, wholesale call origination, wholesale fixed geographic call termination, interconnection circuits, PPP and the NTS Retail Uplift charge? If not, please explain why.*

**Question 16.2:** *Do you agree that it would be disproportionate to impose charge controls on KCOM? If not, please explain why.*

## Consultation responses

- 16.30 All respondents excluding BT agreed with Ofcom's proposal to impose charge controls on BT. BT commented that it felt the question was redundant given Ofcom's intention to impose charge controls through the Network Charge Control and WLR analogue charge control consultations. However, as BT did not agree with the imposition of the NTS call origination obligation it said it did not agree that there should be a NTS Retail Uplift charge control.
- 16.31 All respondents, excluding Zen Internet, agreed that it was not proportionate to impose charge controls on KCOM. Zen Internet commented that the Hull Area is not sufficiently regulated.

## Ofcom's response

- 16.32 Ofcom does not agree with BT's comment that it is redundant of Ofcom to ask whether it is appropriate to impose charge controls. The decision to impose a charge control must be based on the competition concerns in the market. These would include, amongst other considerations, whether, without a charge control, the Dominant Provider would be constrained from setting excessive prices and, further, whether other obligations would be sufficient to constrain the dominant provider's prices to a level that would be expected in a competitive market. This includes savings that would accrue from efficiency savings. Therefore, the conclusion that a charge control is required to remedy the market failure evident in the particular market is a key outcome of the market review process.
- 16.33 The exact nature of the charge control is a subsequent step to the decision that a charge control is required and a respondent may, for example, disagree with the analysis Ofcom carries out in setting the specific charge control whilst fully agreeing with the requirement for a charge control to address the market failure.



- 16.34 In relation to the NTS Retail Uplift, we have set out in Section 15 why we consider that the NTS call origination condition including a regulated return (the Retail Uplift) is required. We have said that if the Retail Uplift is not regulated, BT would be free to set the level of returns to reduce out payments to TCPs.
- 16.35 We do not consider that a cost orientation obligation alone would be appropriate, since it would not necessarily be clear to terminating CPs what the relevant costs associated with the Retail Uplift would be. The Retail Uplift charge control is in addition to the cost orientation obligation imposed on BT in the call origination market. Ofcom notes that prior to the imposition of the Retail Uplift charge control, a series of disputes were brought under the cost orientation obligation. Therefore, we conclude that a charge control of the NTS Retail Uplift is required. Under this option, BT would continue to retain a charge for retailing NTS calls based on the underlying cost of retailing those calls. This price would be charge controlled.
- 16.36 The controlled charge would provide a stable environment without disputes on how much originating operators should retain for retailing NTS calls on behalf of TCPs.
- 16.37 Further, the charge control would ensure a stable revenue stream to TCPs and CPs on most NTS number ranges. The only exception is the 0845 range where BT can vary the deemed retail price.
- 16.38 In relation to Zen Internet's comments regarding the Hull Area, we set out in our consultation why we continue to believe that the suite of regulation that will exist in the Hull Area is sufficient based on the market dynamics in which KCOM operates. Imposing charge controls and other product specific regulation is not proportionate given the level of demand in this market.
- 16.39 In paragraph 16.30 of the March consultation we said why the proposed conditions met the criteria set out in section 47(2) of the Act. We also consider that the setting of charge control conditions will promote and secure efficient and sustainable competition in accordance with our duties under section 3 and 4 of the Act. We argued that for each of the cases identified, a charge control meets the criteria set out in section 47(2) of the Act. We consider that all four criteria are met:
- objectively justifiable. As explained in paragraphs 16.7 to 16.25 of our March consultation, without the proposed charge controls, BT may price excessively. The benefits expected of a competitive market would not be available to consumers without the imposition of an appropriate control.
  - not unduly discriminatory. While it does not apply to KCOM, we consider that it would not be proportionate based on market conditions to do so.
  - proportionate. We have identified a market failure that could allow BT to price excessively. Having examined the regulatory options available, a charge control provides the appropriate way to address the concern.
  - transparent. It is clear in its intention to control BT's charges preventing them from pricing controlled services at an excessive level.
- 16.40 Ofcom has considered the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition by ensuring that charges for wholesale services are at a level that enables operators to compete.



16.41 SMP conditions will be applied to the following markets in which our conclusion is that BT has SMP and relevant technical area:

- Wholesale analogue exchange line services;
- Call origination on fixed public narrowband networks;
- Call termination on fixed public narrowband networks;
- Interconnection circuits; and
- PPP.

16.42 It will also apply to:

- NTS Retail Uplift (as part of the call origination market).

### **Conclusion**

16.43 For the reasons set out above and presented in our consultation document, which should be read in conjunction with this statement, and having carefully considered all of the responses to consultation, and taking account of the relevant legal test, we are imposing charge control regulation on BT for the markets and technical areas identified in paragraphs 16.41 and 16.42 above.

## Section 17

# Price regulation of wholesale ISDN30 exchange lines

## Introduction

- 17.1 In our consultation we considered whether price regulation of wholesale ISDN30 exchange lines was warranted. We presented data from BT's regulatory financial reports showing that sales revenue from ISDN30 lines (including internal sales) had increased year on year. Return on sales had also increased, from 27% in 2004 to 56% in 2008. In the same period Return on Capital Employed (ROCE) increased from 13% to 64%.
- 17.2 We said that we recognised that, as ISDN30 has been deployed for some time, assets are close to being fully depreciated and this would have the effect of showing a higher ROCE. We also noted that the price had remained flat so that, in real terms, the price had fallen by RPI. A reduction in price from current levels may potentially stimulate some growth in demand (particularly if CPs using other solutions decide to instead migrate to ISDN30 provided by BT). This could lead to BT having to purchase new equipment to support this demand. This would require additional capital, thus reducing returns. Also, sourcing ISDN30 equipment may not be straightforward.
- 17.3 However, we also said that even after taking this into account, and the fact that in the future IP voice is likely to play an increasing role in supplying services traditionally provided by ISDN30, we were still concerned about the levels of return being made by BT. While we accept there may be some merit in the arguments above, we said that on balance, due to the limited restraint that supply-side substitutes apply to this product, the increasing returns BT is able to generate and the forecast of a flat market over the next four years, we need to consider some form of regulation to prevent the exploitation of final consumers of the product. We said that retaining the status quo would be appropriate to allow opportunities for infrastructure-based providers to compete using their own facilities, or possibly PPC's, to exert pricing pressure on BT if this acted to constrain BT's wholesale pricing. However, the evidence of BT's high, and possibly increasing returns, in a market where it has SMP and where constraints have not proved as strong as expected, coupled with the stable demand forecast for the service, means that it is very difficult for Ofcom to justify no action in this market.
- 17.4 Therefore, in our consultation we consulted on possible approaches to price regulation of wholesale ISDN30. We presented three options: no additional obligations, cost orientation or cost orientation plus a charge control. We asked:

**Question 17.1:** *Do you agree that, based on BT's reported returns, Ofcom should impose additional obligations on BT in relation to wholesale ISDN30 exchange lines? If not, please explain why.*

**Question 17.2:** *Would a cost orientation obligation be sufficient to address the concerns raised by Ofcom in relation to BT's returns?*

**Question 17.3:** *Would a charge control be a proportionate response to the concerns raised by Ofcom in relation to BT's returns?*

## Consultation Responses

- 17.5 The majority of respondents other than BT agreed some form of regulation of BT's prices was warranted. However, several CPs said that Ofcom should take considerable care in setting such charges so that CPs that had deployed infrastructure would not be disadvantaged. They also said that if the prices were such that migrations from other solutions became attractive, smooth migration processes would be required.
- 17.6 BT strongly opposed this approach. It said that not only had Ofcom not taken sufficient account of the substitutes in the market, but also that imposing a charge control would extend the life of the product and, potentially, drive an increase in demand. This increased demand would arise from other ISDN30 providers migrating off their current access networks (either PPCs or their own infrastructure). This would drive capital expenditure into BT, which would soon become a stranded investment and would reduce BT's ability to invest in new products being requested by its wholesale customers.

## Further developments

- 17.7 Following consultation, BT has provided updated forecasts to Ofcom. These show a much quicker drop in ISDN30 usage, based on new IP voice based solutions. This has the effect of pushing down the ROCE, since there are fewer lines recovering the fixed costs associated with the product. Further, it suggests the product is closer to the end of its life than previously forecast and that IP voice solutions may be an increasing constraint sooner than expected.
- 17.8 As we have said in Section 5, we need more time to consider this data from BT and to give other CPs an opportunity to provide their comments. Therefore, we are not concluding on the ISDN30 market definition or market analysis. As such we are not considering remedies. The existing remedies in the ISDN30 market will remain in place until we have concluded our review of the ISDN30 market.

## Section 18

# Revocation and amendment of regulation

## Introduction

- 18.1 Our general approach to implementing the remedies proposed in this review is to revoke the existing obligations and impose new ones. The existing obligations have developed over the past five years and as such the original notifications setting the conditions are spread through different statements. For clarity, we propose therefore to replace these conditions with new conditions within this review. This will involve renumbering the new SMP conditions as discussed at paragraphs 11.10 to 11.15 above.

## Revocation of SMP Conditions in LTC/LTT market

- 18.2 Where we have concluded that a Dominant Provider no longer has SMP in a market, then we are required by section 84(4) of the Act to revoke every SMP service condition that applies to that person by reference to the earlier SMP determination. This will affect SMP service conditions in the local-tandem conveyance / local-tandem transit market where we have concluded that BT no longer has SMP.
- 18.3 The SMP conditions for this market will be revoked in four phases, as follows:
- (a) Immediately on the publication of this statement:
    - (i) Requests for new network access.
  - (b) On 1 January 2010:
    - (i) Charge control (nb the last Relevant Year will have ended on 30 September 2009).
  - (c) On 31 July 2010:
    - (i) Cost accounting (for the financial year 2009/2010).
  - (d) On 15 September 2010:
    - (i) Requirement to provide network access on reasonable request;
    - (ii) Requirement not to unduly discriminate;
    - (iii) Basis of charges;
    - (iv) Requirement to publish a reference offer;
    - (v) Requirement to notify charges; and
    - (vi) Requirement to notify technical information.
- 18.4 The current charge control (SMP Condition AA4(c)) requires BT to submit information in the 3 months after a charge control period. We have decided that this condition

should be revoked at the end of this period to ensure BT's compliance in relation to its obligations for the period during which it had SMP. We discuss charge control conditions in more detail at paragraph 18.60 to 18.72 below.

- 18.5 The Conditions imposing financial reporting obligations require BT to submit information in the four months following the end of a financial year. We have decided that this condition should be revoked at the end of that four month period to ensure BT's compliance in relation to its obligations for the last financial year (1 April 2009 – 31 March 2010) during which it had SMP.
- 18.6 We have decided that the Conditions set out at paragraph 18.3(d), above, should be revoked after a transitional period of 12 months in order to provide sufficient notice to the parties affected by such a revocation of obligations. The rationale for this approach is discussed in detail at paragraphs 8.130 to 8.134, above.
- 18.7 The reasoning for our conclusions that BT no longer has SMP in this market is discussed in Section 8.

### **Revocation of SMP Condition AA12 - Requirement to provide Flat Rate Internet Access Call Origination (FRIACO)**

- 18.8 The 2003 market review found that BT had SMP in the call origination market and the local-tandem conveyance and transit market and imposed a requirement on BT to provide DLE FRIACO and ST FRIACO as SMP condition AA12. The aim of this regulation was to promote competition in the provision of wholesale and retail unmetered narrowband internet termination services. The supply of these products was closely linked to the development of competition in the downstream markets.
- 18.9 Analysis conducted for the 2009 market review indicates that demand for this product in the retail market and subsequently at the wholesale level, has virtually disappeared.
- 18.10 Due to this decline in the market, we do not believe that the legal tests would be met to impose regulation. Specifically, it would not be proportionate, given the lack of demand for this product, for Ofcom to retain a condition on BT to supply this service. Should there be a severe reversal of demand for this product, Ofcom may re-consider if specific regulation is necessary.

### **Consultation question**

- 18.11 In the consultation, we asked:

**Question 18.1:** Do you agree that Ofcom should revoke the obligation on BT to provide FRIACO? If not, please explain why.

### **Consultation responses**

- 18.12 All respondents agreed that Ofcom should revoke the obligation on BT in relation to the provision of FRIACO.

### **Conclusion**

- 18.13 Ofcom will therefore not impose a FRIACO obligation as part of the suite of new SMP conditions in this review as it would not satisfy the tests under section 47 of the Act, specifically, such an obligation would not be proportionate. SMP condition AA12 will

be revoked with effect from the publication date of this statement (along with other SMP conditions imposed as a result of previous market power determinations).

### Directions to be revoked

- 18.14 In the March consultation we proposed the revocation of certain Directions and these are discussed below.
- 18.15 As a result of the previous review, Ofcom imposed a number of Directions which we do not intend to consider retaining based on analysis conducted for the 2009 market review. This is either because the consumer demand for a product has disappeared; the Direction was revoked and replaced as part of another consultation; or the issue has been addressed during the life of the Direction. Additionally, as discussed in section 11, we are updating the KPI direction and, consistent with our approach to setting SMP conditions, we are revoking the existing KPI directions and replacing them with a new direction.
- 18.16 The sections below set out our reasoning for concluding that it is not necessary to retain particular remedies or Directions.

### Legal Tests

- 18.17 Section 49 of the Act sets out the procedure for revocation of Directions and requires that a direction must not be withdrawn unless the withdrawal is:
- objectively justifiable;
  - does not unduly discriminate;
  - proportionate; and
  - transparent.
- 18.18 Under section 49(3) we must act in accordance with our section 4 duties.
- 18.19 In addition, Notification requirements in section 49(4) require us to identify our proposal, set out the relevant Direction and set out the effect of the proposed withdrawal with reasons for making the proposal. We complied with this requirement in Section 18 of our March consultation and have included again in this section of our statement, when responding to stakeholder comments.

### BT's use of Cancel Other

- 18.20 In the March consultation, we provided an outline of the 'Cancel Other' Direction (see paragraphs 18.16 to 18.23), but did not ask any specific consultation questions. We said that the current Direction does not apply to CPs other than BT and that Ofcom has found it necessary to take enforcement action under General Condition 1.2 against other CPs found to have mis-used the Cancel Other function.<sup>52</sup>
- 18.21 In order for Ofcom to address the issue in the longer term, we are currently assessing the effectiveness of the existing Cancel Other rules and, in particular,

<sup>52</sup> For examples of enforcement action in relation to potential abuse of the Cancel Other function and guidance on the correct application of the Cancel Other function see our Bulletin: [http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ocases/open\\_all/cw\\_960/#\\_Guidance\\_on\\_the\\_correct\\_application](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ocases/open_all/cw_960/#_Guidance_on_the_correct_application)

whether it is appropriate that these rules should continue to only apply to BT. This was set out in Ofcom's consultation document, *Protecting consumers from mis-selling of fixed-line telecommunications services*, which was published on 17 March 2009 ('the mis-selling review').<sup>53</sup>

- 18.22 In that consultation, we proposed to extend Cancel Other rules to all Providers of fixed-line voice services as part of a General Condition, and considered the necessity for continuing with the current Direction, in light of those proposed changes.
- 18.23 Ofcom published a second consultation in relation to mis-selling and the future of the Cancel Other Direction on 10 September 2009.<sup>54</sup> This further consultation confirms Ofcom's proposal to withdraw the Cancel Other Direction applying to BT and incorporate a reduced set of requirements as part of a General Condition applicable to all providers of fixed-line telecommunications, including BT.<sup>55</sup>
- 18.24 It is therefore appropriate that this Direction be maintained until the mis-selling review is concluded. In this review we have taken the approach to revoke exiting remedies and impose new remedies in their place. The SMP condition that this Direction was made under (AA1(a)) is therefore being revoked, but will be replaced by SMP condition AAA1(a), which imposes the same obligations upon BT. In order to allow this Direction to continue we have drafted the new SMP condition to include paragraph AAA1(a).4, which specifically preserves this Direction.

## Legal Tests

- 18.25 In setting or modifying an SMP condition we have to ensure that the condition satisfies the test set out at section 47(2) of the Act and must consider our duties under sections 3 and 4 of the Act. . We consider that imposing SMP condition AAA1(a) with a paragraph to preserve this Direction does satisfy the test in section 47, in that it is:
- Objectively justifiable – it relates to regulation that is currently the subject of on-going review.
  - Not unduly discriminatory – it continues to apply only to BT as the SMP provider in the market.
  - Proportionate – its sole purpose is to maintain current regulation pending the outcome of an ongoing review; it does not seek to increase or alter any regulatory burden.
  - Transparent – it explicitly maintains a piece of regulation for a specific purpose.
- 18.26 We also consider that in allowing us to complete the mis-selling review which is an important area of regulation for consumers and competition we are compliant with our obligations under sections 3 and 4 of the Act.

---

<sup>53</sup> *Protecting consumers from mis-selling of fixed-line telecommunications services*, 17 March 2009

[http://www.ofcom.org.uk/consult/condocs/protecting\\_consumers/](http://www.ofcom.org.uk/consult/condocs/protecting_consumers/)

<sup>54</sup> *Protecting consumers from mis-selling of fixed-line telecommunications services*, 10 September 2009,

[http://www.ofcom.org.uk/consult/condocs/protecting\\_consumers\\_misselling/](http://www.ofcom.org.uk/consult/condocs/protecting_consumers_misselling/)

<sup>55</sup> *Ibid*, paragraph 5.57.



## Local-tandem transit and inter-tandem transit for Indirect Access traffic

- 18.27 In July 2003, a Direction was imposed on BT in resolution of a dispute, which required BT to provide a facility to Cable and Wireless, whereby it could host IA codes on its network and compete with BT in the provision of local-tandem transit and inter-tandem transit services.<sup>56</sup>
- 18.28 In the March consultation, we stated that, while our preliminary findings were that BT did not have SMP in the LTC/LTT market (and ITC/ITT was found competitive in 2005), our consideration of whether it is necessary to retain this Direction centres on the necessity to require BT to provide this facility. Since this Direction was imposed, other CPs have commenced offering various network based services to communications or service providers, such as hosted CPS and IA services. For example, Cable and Wireless and other providers have built a business based on the opportunity to provide infrastructure services.
- 18.29 We therefore proposed that, with these changed market conditions and the existence of other remedies (such as requirement to provide network access on reasonable request), we did not believe that it would be objectively justifiable to continue with this Direction. The proposed revocation was set out in Annex 10 on the March consultation.

### Consultation question

- 18.30 In the consultation we asked:

**Question 18.2:** *Do you agree that Ofcom should revoke the direction requiring BT to provide local-tandem transit and inter-tandem transit for Indirect Access traffic? If not, please explain why.*

### Consultation responses

- 18.31 While Zen Internet and BT agreed with our proposal to revoke the Direction, four confidential respondents did not.
- 18.32 One confidential respondent argued that the Direction was essential for 'security of supply' for the instances in which it must buy LTT from BT for the purposes of CS/IA. It does not believe it is adequate to rely on BT's general obligation to supply.

### Ofcom's response

- 18.33 It is worth clarifying that the Direction explicitly only applies to C&W and not other CPs, and only applies to CS/IA. This is because the Direction was issued as a resolution of a complaint brought to Ofcom by C&W in relation to a specific type of access it was requesting at the time.
- 18.34 Therefore, if other CPs were to request this same type of facility (or other types of network access) and BT refused to supply, a CP could refer to SMP condition AAA1, requirement to provide network access, if they chose to raise a complaint to Ofcom.
- 18.35 In response to the confidential respondents' comments, we do not consider that it is appropriate to continue with this Direction for a number of reasons.. Firstly, the

<sup>56</sup> *Indirect access dispute between BT and Cable and Wireless*, 15 July 2003  
<http://www.ofcom.org.uk/static/archive/Oftel/publications/licensing/2003/indirect0703.pdf>



Direction addressed a specific network access issue at the time. Since this Direction was imposed, BT also now provides such services for multiple CPs for CPS and CS/IA. Secondly, there are facilities in place to deal with complaints and this process would apply equally to an alleged breach of a Direction as it would an SMP condition and these facilities apply to all CPs. If the respondent has concerns regarding this, or other forms of network access, Ofcom would respond to those concerns through our established approach to complaints and disputes. We also consider that as there is other regulation in place with which to address network access requests this provides an additional safeguard for CPs.

18.36 Finally, Ofcom could re-impose a Direction under SMP condition AAA1 (or impose a new Direction), should we determine this is a necessary course of action to ensure competition is not adversely affected. If certain circumstances arose that required Ofcom to re-consider our position to rely on the SMP condition AAA1, then the condition specifically allows for Ofcom to introduce a binding Direction in relation to a specific issue.

### Legal Tests

18.37 In withdrawing this Direction, we have taken account of the tests set out in section 49(2) of the Act and considered our duties under sections 3 and 4 of the Act.. We believe that the withdrawal is:

- objectively justifiable - changes in the market mean that the requirement for the Direction no longer exists;
- does not unduly discriminate - in that the Direction related only to BT and C&W, its continuation, in light of the current market, would not have benefitted other CPs;
- proportionate - the withdrawal of this Direction is proportionate as other means of addressing this issue exist and the continuation of this direction would be unnecessary additional regulation; and
- transparent - the withdrawal of the direction is clear and unambiguous.

### Conclusion

18.38 We therefore revoke the local-tandem transit and inter-tandem transit for Indirect Access Direction imposed on BT. The revocation is set out at Annex 10.

### BT's Credit Vetting Supplemental Agreement

18.39 In February 2003, a Direction was imposed on BT in resolution of a dispute which required BT to modify its credit vetting supplemental agreement<sup>57</sup>. The obligation under this direction were re-imposed under the new Framework regime as part of the Review of the wholesale fixed narrowband exchange line, call origination, conveyance and transit markets in November 2003<sup>58</sup> ('the November 2003 review'). The direction was set out in Annex F to the November 2003 review. It is this Direction that we proposed to revoke in our March consultation.

<sup>57</sup> *Dispute between BT and the Operators listed in schedule 2 regarding BT's credit vetting supplemental agreement*, 20 February 2003

<http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/credit0203.pdf>

<sup>58</sup> *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, 28 Nov 2003 ([http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/nwe/](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/))

- 18.40 In our March consultation, we referred to a related dispute between BT and Apple regarding the level of security deposit required by BT in advance of the provision of nominated services<sup>59</sup>. We stated that one of the outcomes of the dispute was that the Direction was amended; this was, in fact, not the case.
- 18.41 BT's credit vetting supplemental agreement now forms part of the standard interconnect contracts that BT agrees with industry. Changes to this contract are implemented after BT consults industry and this may mean that changes are modified based on CP feedback. Should negotiations reach a point where changes instigated by BT cannot be agreed through a consultation process with industry, then disputes may be referred to Ofcom for resolution.
- 18.42 In the March consultation we stated that due to the implementation of this consultation process for agreeing core contract terms, we did not believe that it is necessary to retain a Direction specifically in relation to credit vetting. The proposed revocation of the existing direction was set out in Annex 11 of the March consultation.

### Consultation question

- 18.43 In the consultation we asked:

**Question 18.3:** *Do you agree that Ofcom should revoke the direction relating to BT's credit vetting supplemental agreement? If not, please explain why.*

### Consultation responses

- 18.44 While Zen Internet and BT agreed that we could revoke the Direction, two confidential respondents disagreed.
- 18.45 One confidential respondent argued the 'credit vetting supplemental agreement under which BT and CPs pay different percentages above LIBOR on disputed accounts is used to manage risk'. It stated that CPs have been 'attempting for some time to obtain symmetrical rates' and that the revocation of the Direction may stagnant this process.
- 18.46 Another confidential respondent stated that it does 'not have sufficient confidence in the consultation process for agreeing core contract terms and conditions and as such believes that the retention of the relevant direction is necessary in order to provide CPs with appropriate safeguards'.

### Ofcom's response

- 18.47 In the March consultation we provided a link to the Direction, but in summary, this Direction does not set BT's entire credit vetting agreement. The Direction, when imposed in 2003, required BT to remove certain paragraphs from its existing policy as well as include five further clauses. Those clauses were:
- BT shall ensure that an operator can understand how any credit limit has been set. If BT has relied on internal information for the purposes of setting an operator's credit limit, the Director considers that such information shall be made available to that operator;

<sup>59</sup> Resolution of a dispute between Apple and BT about the level of deposit required in advance of interconnection services, 3 June 2004  
[http://www.ofcom.org.uk/bulletins/comp\\_bull\\_index/comp\\_bull\\_ccases/closed\\_all/cw\\_745/resolution.pdf](http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_745/resolution.pdf)

- BT shall ensure that appropriate dispute resolution procedures apply to disputes arising from disputed credit vetting reports;
- BT shall ensure that an operator is given written notice when a late payment, sufficient to infringe a provision of BT's Supplemental Agreement, has been made. Such notice will be issued after BT has received both the first and the second late payment in question;
- BT shall ensure that paragraph 14B.6.3 of its Supplemental Agreement shall apply only when the Credit Vetting Report indicates that there is something adverse; and
- BT shall not credit vet an operator solely as a result of novation, if prior to that contractual change, and in the absence of a structural change that may lead to that operator being considered a financial risk, the operator's payment record was not sufficient to infringe BT's credit vetting provisions.

18.48 In response to the confidential respondents' concerns, we do not consider that they relate to the clauses specifically covered by the Direction.

18.49 Since the related dispute between BT and Apple was referred by Ofcom to an independent expert in 2004, there have been no further complaints to Ofcom regarding BT's credit vetting policy or more importantly for consideration here, the clauses covered specifically by this Direction. Consistent with our approach to assessing the ongoing appropriateness of other Directions, we need to consider the circumstances in which the remedy was imposed. Absent any evidence to suggest that this specific Direction is still required, we do not consider that it is objectively justifiable to retain it.

18.50 However, the responses indicate that CP's may have other concerns with the credit vetting process (which have not been raised with Ofcom to date). As stated previously, Ofcom would consider intervening in the future if other issues were raised by CPs which were considered to materially impact competition.

## Legal tests

18.51 In withdrawing this Direction, we have taken account of the tests set out in section 49(2) of the Act and considered our duties under sections 3 and 4 of the Act. We believe that the withdrawal is:

- objectively justifiable - the Direction related to the inclusion and exclusion of specific clauses from BT's credit vetting policy, which was originally developed in 2002. This policy now forms part of the standard interconnect agreement and no further issues have been raised with Ofcom since the imposition of the Direction in relation to the clauses covered by it;
- is not unduly discriminatory - the direction only applied to BT and is being withdrawn in its entirety.
- is proportionate - the decision to withdraw this Direction recognises that the issues identified at the time were resolved by the Direction and no further issues related to the specific clauses have been brought to Ofcom during the life of the Direction; and

- is transparent - the intended purpose of retaining regulation is to address specific competition concerns. We consider that the specific concerns relevant to this Direction have been addressed and therefore it is clear that our intention is to remove unnecessary regulation and rely on our existing ex post powers.

## Conclusion

18.52 We therefore intend to revoke the Direction regarding BT's credit vetting supplemental agreement effective from the date this statement is published. The revocation is set out at Annex 11 to this Statement.

## KPI Directions

18.53 We discuss in Section 11 above our proposals to maintain an obligation on BT to publish relevant KPIs and that we will issue a Direction to describe the required information. We have set a new KPI direction at Annex 8.

18.54 The new Direction is made under the new SMP condition AA7. The relevant existing KPI directions were made under the statement *Requirement on BT to publish Key Performance Indicators*, published on 23 September 2004 which set two relevant directions:

- Direction under the Quality of Service Condition (AA7) in the Fixed Narrowband Review (relating to Wholesale Line Rental KPIs); and
- Direction under the Quality of Service Condition (AA7) in the Fixed Narrowband Review (relating to Interconnection Circuits KPIs).

18.55 Both of these Directions were made under SMP condition AA7, which, in this review we are revoking. For the avoidance of doubt, and as we are specifically preserving the obligation upon BT to publish KPIs, we consider it appropriate to formally withdraw the existing two Directions in tandem with the setting of a new Direction. The legal instrument withdrawing these Directions is set out at Annex 12 to this statement.

## Legal Tests

18.56 In withdrawing these two Directions, we have taken account of the tests set out in section 49(2) of the Act. We believe that the withdrawal is:

- objectively justifiable - the Directions relate to the requirement upon BT to publish KPIs as part of the transparency requirement. This requirement has been reviewed and updated as part of this market review and a revised and more appropriate requirement has been made to replace these Directions.
- is not unduly discriminatory - the direction only applied to BT and is being withdrawn in its entirety.
- is proportionate – the withdrawal means that BT will now be subject to a revised and update requirement, which is consistent with the least burdensome regulation being imposed to achieve a particular regulatory aim.
- is transparent – in formally withdrawing these obligations, in tandem with the imposition of a new Direction, we are ensuring that there is complete clarity as to what information BT are required to publish in this area.

18.57 We have also taken account of our duties under sections 3 and 4 of the Act and consider that this withdrawal is consistent with those duties.

## Conclusion

18.58 We consider that it is appropriate to withdraw the directions and do so as set out in Annex 12 to this document.

## Charge Controls

18.59 We considered in our March consultation how we should deal with SMP conditions imposing charge controls on BT. Charge controls are currently set in the following markets and associated areas:

- (a) Call Origination (condition AA4(a))
- (b) Single Transit (condition AA4(b))
- (c) Local-Tandem Conveyance / Transit (condition AA4(c))
- (d) LECO / FRIACO (condition AA4(d))
- (e) FRIACO (condition AA4(e))
- (f) Call Termination (condition BA4(a))
- (g) PPP / Interconnect Circuits (condition PA1(a))
- (h) NTS Call Origination (condition AA4(f)).

18.60 Conditions AA4(a) to (e) and PA1(a) were imposed in Annex 3 to the August 2005 Review of BT's Network Charge Controls. Condition AA4(f) was imposed separately in August 2005<sup>60</sup>.

18.61 In addition, the charge controls set under 2003 notification (as amended), conditions AA4, BA4 and PA1, have not been formally revoked, although they no longer have any effect, as they were time limited in their application. We are proposing that these 2003 conditions are formally revoked.

18.62 Condition AA4 also imposed a charge control on WLR, however this was disapplied by the Direction in the January 2006 statement *WLR: Reviewing and Setting charge ceilings for WLR services*.

18.63 We have, in this review, concluded that charge controls are an appropriate remedy to findings of that BT holds SMP, in the following markets / technical areas:

- (a) wholesale call origination on a fixed narrowband network (including NTS);
- (b) wholesale geographic call termination;
- (c) PPP;

---

<sup>60</sup> *Charges between communications providers: Number Translation Services Retail Uplift and Premium rate Services Bad Debt surcharge*, 28 Sep 2005  
([http://www.ofcom.org.uk/consult/condocs/NTSfin/statement\\_nts\\_uplift/statement\\_nts\\_uplift.pdf](http://www.ofcom.org.uk/consult/condocs/NTSfin/statement_nts_uplift/statement_nts_uplift.pdf))

- (d) interconnection circuits;
  - (e) wholesale analogue exchange line services.
- 18.64 Ofcom consulted in parallel to this process on how to implement these charge controls in separate documents. One such consultation document was the *Review of BT network charge controls*, was published on 19 March 2009<sup>61</sup>. This covered charge controls to be implemented for call origination (excluding NTS call origination), call termination, PPP and interconnection circuits. We have today also published a Statement finalising decisions to impose charge controls on these markets and technical areas<sup>62</sup>. Separate consultations on the charge controls for NTS call origination<sup>63</sup> and WLR analogue<sup>64</sup> have also been published since March, with final statements setting any final charge control conditions still to be published.
- 18.65 The current charge control SMP conditions run to the end of a defined period, 30 September 2009.
- 18.66 We do not, therefore, propose to immediately revoke any of the current SMP service conditions relating to charge controls.
- 18.67 The existing charge control conditions impose an obligation upon BT to supply data to Ofcom in relation to performing the Percentage Change calculation (see, for example condition AA4(a).8). Such data is required to be provided within three months of the end of the Relevant Year, therefore obligations under current charge control conditions may remain live after the substantive obligations under each control cease at the end of the defined period.
- 18.68 It is important that such obligations continue in order that we can effectively monitor compliance with the conditions during their life.
- 18.69 In our March consultation, we proposed that some of the markets to which a charge control condition currently applies, should now be regarded as effectively competitive. This included the LTC/LTT and the Single Transit markets. We have now concluded that that the LTC/LTT market is effectively competitive, but we have not made any final decision in respect of the Single Transit market.
- 18.70 As discussed at paragraph 18.2 above, section 84(4) of the Act requires us to revoke conditions where a market is found to be effectively competitive. In relation to condition AA4(c), because of the ongoing requirement for BT to provide data in relation to periods when SMP was still held, it would not be appropriate for the condition to be revoked immediately, and therefore, we have decided that this condition be revoked with effect from 1 January 2010, three months after the end of the Relevant Year as defined in those conditions, and therefore after the period for the obligation to supply data expires. We consider this period is necessary to ensure BT's compliance in relation to its obligations for the period during which it had SMP.

<sup>61</sup> *Review of BT network charge controls – consultation on proposed charge controls in narrowband wholesale markets*, 19 Mar 2009 ([http://www.ofcom.org.uk/consult/condocs/review\\_bt\\_ncc/](http://www.ofcom.org.uk/consult/condocs/review_bt_ncc/))

<sup>62</sup> *Review of BT network charge controls*, 15 September 2009, ([http://www.ofcom.org.uk/consult/condocs/review\\_bt\\_ncc/statement](http://www.ofcom.org.uk/consult/condocs/review_bt_ncc/statement))

<sup>63</sup> *Wholesale charges for Number Translation Services and Premium Rate Services*, 28 July 2009, <http://www.ofcom.org.uk/consult/condocs/nts/>

<sup>64</sup> *Charge controls for Wholesale Line Rental and related services*, 3 July 2009, <http://www.ofcom.org.uk/consult/condocs/wlrcc/>

- 18.71 In relation to the remaining charge controls that exist in markets where we are proposing that BT still has SMP, we propose not to revoke the existing conditions. This will allow the obligations that continue to provide data relating to the period when the substantive control was operational to remain effective and is also consistent with the approach adopted in the August 2005 *Review of BT's Network Charge Controls*. This does not impose any additional requirements upon BT, as the conditions themselves are time limited and will cease to have effect from the end of the last Relevant Year, 30 September 2009, with only the reporting conditions continuing beyond this time.

### Ancillary amendments of associated regulation

- 18.72 In concluding that the LTC / LTT market is now effectively competitive, and making changes to the market definitions for access and call origination and termination, we are mindful that associated regulation needs to be amended to reflect our proposals.
- 18.73 On 22 July 2004, Ofcom published *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification (Accounting separation and cost accounting: Final statement and notification)* ('the July 2004 statement'), which set additional SMP conditions in relation to fixed wholesale narrowband markets in relation to accounting separation and cost accounting obligations.
- 18.74 The July 2004 statement will continue in force, by virtue of the continuation of SMP in those markets to which it applies. We have set out in the Notification to this statement, at Annex 7, that the obligations under the July 2004 statement shall continue to apply to the markets where we have found SMP.
- 18.75 It is therefore important to ensure that we propose amendments to the July 2004 statement in order to update the market definitions it relies upon, and to remove any obligation in relation to markets where we are proposing that SMP is no longer held by a CP.
- 18.76 The July 2004 statement contains two Notifications, one to BT produced at Annex 2 and one to Kingston (now KCOM) produced at Annex 3. Although the required amendments are similar, we will deal with each CP in turn.
- 18.77 It should be noted that, in parallel with this consultation, Ofcom is reviewing separately these obligations.

### BT

- 18.78 The July 2004 statement sets out a table at Schedule 1 of Annex 2 detailing the relevant SMP markets to which the conditions are then applied. We propose to amend the table to read, in relation to markets 1 to 10 as follows (the table has not been reproduced beyond market 10);



## Part 1: Wholesale Markets

Market identified and in which BT found to have SMP in previous Notification pursuant to section 79 of the Act	Date
1. Wholesale analogue exchange line services in the UK excluding the Hull Area	15.09.09
<b>2. removed</b>	
<b>3. removed</b>	
4. Wholesale ISDN2 exchange line services in the UK excluding the Hull Area	As above
5. Wholesale ISDN30 exchange line services in the UK excluding the Hull Area	As above
6. Wholesale call origination on a fixed narrowband network in the UK excluding the Hull Area.	As above
7. Local-tandem conveyance and transit on fixed public telephone networks in the UK excluding the Hull Area (SMP conditions in Schedule 2 to be revoked from 31.07.10 for this market)	18.08.05
<b>8. removed</b>	
9. Single Transit on fixed public narrowband networks in the UK excluding the Hull Area	28.11.03
10. Wholesale fixed geographic call termination provided by BT	15.09.09

18.34 Additionally we propose to amend paragraph 4 of the Notification to refer only to markets where we propose SMP continues, namely, markets 1, 4, 5, 6, 7, 9 and 10.

### KCOM

18.35 The July 2004 statement sets out a table at Schedule 1 of Annex 3 detailing the relevant SMP markets to which the conditions are then applied. We propose to amend the table to read, in relation to markets 1 to 7 as follows (the table has not been reproduced beyond market 7);



## Part 1: Wholesale Markets

Market identified and in which Kingston found to have SMP in previous Notification pursuant to section 79 of the Act	Date
1. Wholesale analogue exchange line services in the Hull Area	15.09.09
<b>2. removed</b>	
<b>3. removed</b>	
4. Wholesale ISDN2 exchange line services in the Hull Area	As above
5. Wholesale ISDN30 exchange line services in the Hull Area	As above
6. Wholesale call origination on a fixed narrowband network, in Hull Area	15.09.09
7. Wholesale fixed geographic call termination, provided by KCOM	15.09.09

18.36 Additionally we propose to amend paragraph 4 of the Notification to refer only to markets where we propose SMP continues, namely, markets 1, 4, 5, 6 and 7.

### Legal Tests

18.37 The legal justification for the modifications is the same for the proposals for both BT and KCOM.

18.38 Where an SMP service condition is modified, s48 of the Act requires that we set out the effect of the modification and give our reasons for making the decision.

18.39 We have considered that in each of the markets where we are concluding SMP that appropriate remedies to address the identified market failure include accounting separation and cost accounting.

18.40 Detailed conditions are already provided by the 2004 statement. We consider that they are the appropriate conditions to apply in this case. The conditions in the 2004 statement apply to markets that were previously defined in 2003, therefore, it is necessary for us to make amendments to the 2004 statement to reflect the our proposed market definitions and to remove any obligation to report on a market which we propose to be effectively competitive. We have considered in section 11, above, whether it would be appropriate to continue these obligations. We concluded that the continued imposition of these remedies satisfied the legal test set out in section 47 of the Act, and whether this would be consistent with our duties under sections 3 and 4 of the Act. We describe above why we are revoking the obligation in relation to the LTC/LTT market. Therefore, we consider that legal tests in section

47 are satisfied in making these modification to the July 2004 statement and that we are acting consistently with our duties under the Act.

## Section 19

# Additional Consultation

19.1 This section contains the two areas where we have decided, based on responses to our March consultation, that further analysis and re-consultation is required. These are:

- Wholesale transit services; and
- The obligation for CPs other than BT and KCOM to publish charges for fixed geographic call termination.

## Wholesale Transit Services

19.2 As we have said in Section 9, consideration of responses to consultation and subsequent analysis has led Ofcom to reconsider its market definition and market power assessment of wholesale transit services.

## Background

19.3 We propose in this section that there are two separate wholesale transit markets, Single Transit (ST) and Inter-tandem Conveyance/Transit (ITC/ITT). These proposed market definitions correspond to the current market definitions as defined in 2003 (ST) and 2005 (ITC/ITT). In making these proposals it is useful to set out a brief history of the regulation of transit services.

19.4 In 2003 the ST market was found not to be competitive, with BT having SMP in the market. BT remains subject to SMP conditions imposed under the authority of that decision.

19.5 In 2005 the ITC/ITT market was reviewed and it was found to be competitive, with all SMP conditions being revoked in accordance with section 84 of the Act.

19.6 In our March consultation we proposed a single market for Wholesale Transit covering both the ST and ITC/ITT markets. We proposed that this Wholesale Transit market was effectively competitive.

19.7 Having carefully considered the responses we received to the March consultation we have reconsidered our proposals for a Wholesale Transit market and are of the view that our market definition, and consequent market analysis should be revised.

## Summary of proposals

19.8 Having decided to review our market definitions we make the following proposals in this section.

### Market definition

19.9 Two separate markets exist, the ST market and the ITC/ITT market. In defining the ITC/ITT market we propose, on the basis of our previous market analysis in 2005, our updated analysis in the March consultation and having carefully considered relevant consultation responses, not to further analyse this market as it would not

satisfy the Commission's three criteria test as being a market susceptible to ex ante regulation.

### Market power analysis

19.10 The ST market is not effectively competitive and BT holds SMP in this market.

### Remedies

19.11 The following remedies should be imposed on BT in the proposed ST market:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Basis of charges;
- Requirement to publish a reference offer;
- Requirement to notify technical information;
- Requirement to notify charges, terms and conditions;
- Cost accounting; and
- Accounting separation.

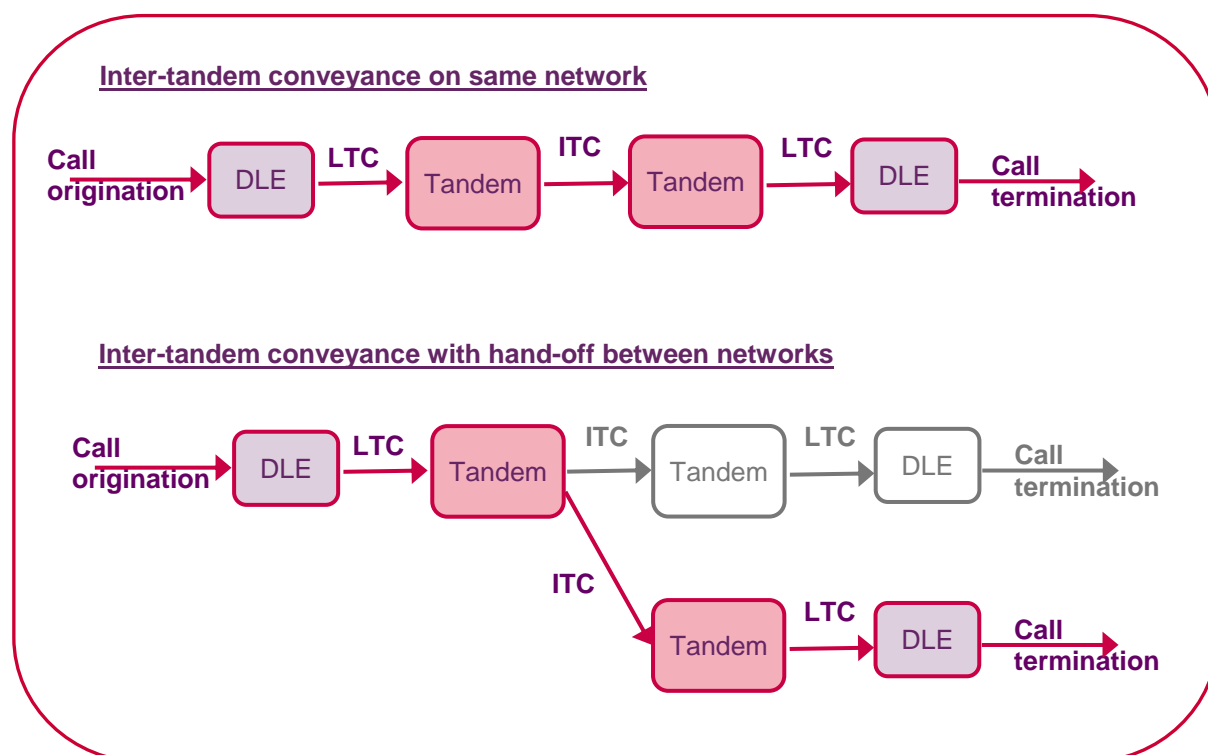
### **Market Definition**

19.12 We take the following approach when proposing market definitions. Firstly we identify the services relevant to this market. We then consider whether and to what extent substitution exists between those services. Thirdly we consider the forward look period for this review and finally we consider the issue of geographic markets. Having made proposals to define the market we also consider how the Commission's three criteria test contained in their Recommendation on product and services markets applies to our proposed definitions.

### **Inter-tandem conveyance**

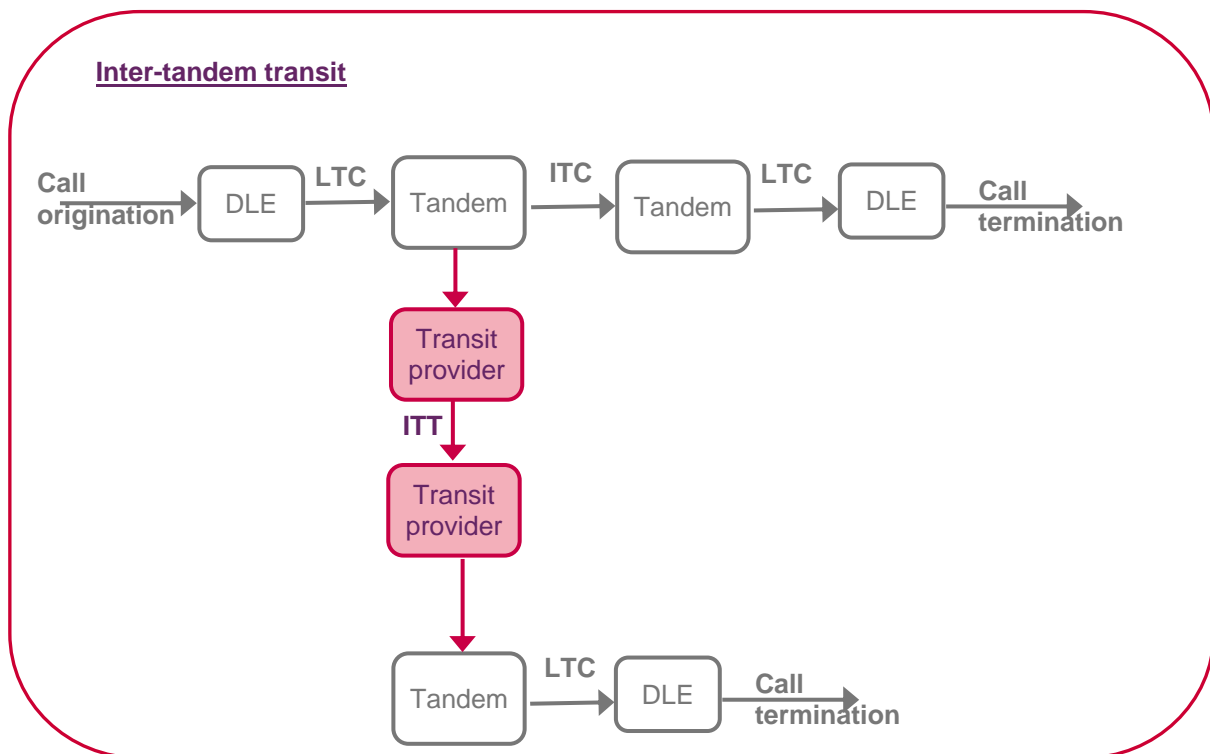
19.13 Inter-tandem conveyance (ITC) is the service that an originating or terminating CP provides to carry traffic between two or more tandem exchanges in its network (Figure 19.1a);

**Figure 19.1a: ITC**

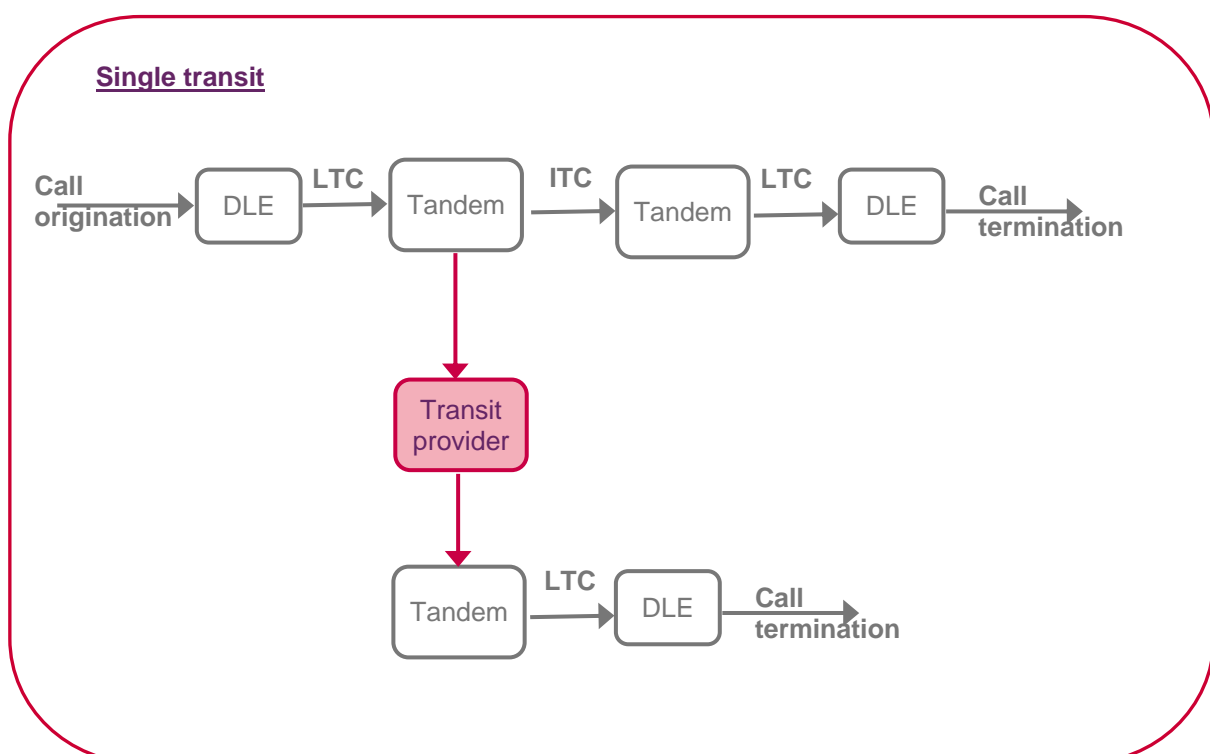


### Inter-tandem transit

19.14 Inter-tandem transit (ITT) is the service that a CP provides to carry traffic between its tandem exchanges in order to connect calls between two other CPs' networks (Figure 19.1b);

**Figure 19.1b: ITT****Single transit (ST)**

19.15 Single transit (ST) is the service that a CP provides to connect calls between two other CPs' networks, using only one of its tandem exchanges (Figure 19.1c).

**Figure 19.1c: ST**

- 19.16 BT currently provides separate ITC/ITT and ST products. Other transit providers tend to base their services on other factors. For example, a single rate may be offered for calls to all UK fixed geographic numbers, whilst a single rate per number range per terminating provider may be used for non-geographic traffic.

## **Substitution between conveyance (ITC) and transit (ITT)**

### Demand-side substitution

- 19.17 In our March consultation we said that we considered that demand side substitution between ITT and ITC exists for the following reasons:

- A terminating (or originating) CP purchasing ITT would be able to switch to purchasing ITC from the originating (or terminating) CP or build out interconnect links and provide ITC itself (although establishing interconnect links is only justified at larger volumes of traffic). and
- A CP purchasing ITC could switch to purchasing ITT, if there was a transit provider present between the originating and terminating CP's switches. ITT involves the cost of an extra switching stage but this cost is less significant over larger volumes and longer distances.

### Supply-side substitution

- 19.18 In our March consultation we also said that there is supply-side substitution between ITT and ITC for the following reasons:

- A CP that provides ITC to several other CPs and has an extensive interconnected network would easily be able to offer ITT; and
- A CP offering ITT would be able to provide ITC for calls originating and terminating on its own network.

- 19.19 It was our view that the competitive conditions in ITC and ITT were such that each service provides a competitive constraint on the pricing of the other. We consider this analysis still to be correct. Therefore, ITT and ITC services are part of the same market. This is consistent with the conclusion that Ofcom reached in its review of the market in 2005<sup>65</sup> in deregulating BT's supply of ITC and ITT.

## **Substitution between ITC/ITT and ST**

### Demand-side substitution

- 19.20 We said in our March consultation that there is limited substitutability on the demand side between ST and ITC/ITT. Currently, ITC/ITT prices are about three times higher than ST prices. This implies that if a hypothetical monopolist implemented a SSNIP in ST, other CPs requiring ST would be unlikely to switch to ITC/ITT as a result of the SSNIP. They may consider interconnecting directly between themselves depending on the relative cost of such alternative, but would be unlikely to switch to purchasing ITC/ITT.

---

<sup>65</sup> *Review of BT's network charge controls*, 18 Aug 2005  
(<http://www.ofcom.org.uk/consult/condocs/charge/statement/>)

### Supply-side substitution

- 19.21 In our March consultation we were of the view that due to the increased level of interconnection between CPs and the fact that transit providers did not necessarily price ST and ITT services separately, switching the supply of ITC/ITT to ST has become relatively easier. We considered that, if a hypothetical monopolist was to increase its prices for ST by 5-10%, CPs that are not directly interconnected could switch to transit services provided by another CP to which they both connect.
- 19.22 In response to our March consultation a number of CPs indicated that re-routing traffic to take advantage of these substitution opportunities may be sufficiently complex to restrict switching. In addition, alternative transit providers may not provide alternatives for all types of traffic to all other CPs. The main scenarios where this may arise are:
- Number Translation Service (NTS) traffic: the terminating CP pays the transit fee for a number of non-geographic call types. However, the originating CP controls call routing. Where the terminating CP sets the same termination rate to BT and to other CPs, there is no incentive on the originating CP to send the traffic directly, since there is no cost saving. In fact, there is additional cost. Within the NTS regime, an approach of Near End Hand-Off is used. This means the originating CP will hand the call to BT as soon as it can. If it routes the traffic directly to the terminating CP or via a transit CP, the call may have to be routed further within the originating CP's network. In addition, if all traffic to a number range is sent to BT, data management associated with call routing on the network is simplified. Routing certain number blocks within the range differently from the rest will add cost and complexity. Therefore, very significant volumes are needed to justify the additional complexity, even if routes exist between the originating CP and the terminating or transit CP; and
  - Geographic traffic: in particular where traffic volumes are limited, options for direct interconnection or the use of an alternative transit provider to BT may be limited.
- 19.23 ST is a switching only product. It does not include transmission. As such, the price is low. The current BT product is subject to a charge control, but BT has been pricing below this charge control since 1 April 2008. The price change has therefore not been merely transitory and we consider the current price level to be a good indication that prices are driven by the more competitive segments of the market. Since, in the absence of competition, there would be no incentive on BT to price below the charge control level, we take the current price to be broadly reflective of the competitive level (with BT's pricing subject to a no undue discrimination obligation).
- 19.24 The price of single transit is currently 0.0375 pence per minute peak, including the charge for PPP. In order for a SSNIP on this price to be unprofitable, a CP would need to be able to re-route traffic via an existing route to a transit provider or via a direct interconnection. However, even if there is already a route with available capacity, there would need to be a significant volume of traffic to be re-routed in order to make such re-routing viable if updating routing data is complex and the one-off costs of re-routing are substantial.
- 19.25 Therefore, a SSNIP may be only unprofitable if applied to very large traffic streams where CPs either have interconnection in place already or can use a transit provider to which they are both already connected, or can easily deploy interconnection. On the other hand, where a SSNIP is applied to the transit price across a number of



different routes each with a smaller volume of traffic, the price increase is more likely to be profitable.

- 19.26 Therefore, we now propose that, in fact, supply side substitution between ST and ITC/ITT may not be feasible.
- 19.27 An alternative approach to market definition for transit was suggested by stakeholders in response to our March consultation. Under this suggested approach the ST market would be further sub-divided so that competitive segments of the market could be distinguished from uncompetitive segments. We have considered two broad ways of sub-dividing the market to assess whether such an approach would be appropriate. Each route could be defined as a separate market, or alternatively, the market could be split into a less competitive segment ("thin" routes) and a more competitive segment ("thick" routes). The "thick" routes would be competitive whereas the "thin" routes would not. From a market definition perspective, a separate market for each route or a separate "thin routes" market would be based on an assessment of, pricing, traffic volumes and the level of interconnection of each CP in the market in order to ascertain the competitive constraints in place on a route by route basis
- 19.28 The pricing of transit services may be complex. For example, there may be some types of traffic where having a different transit rate for each CP results in simpler overall pricing for the originating CP. For example, some transit products provided by CPs other than BT may be offered as part of a bundle (e.g., fixed geographic traffic calls to 01 and 02 number ranges), at a single price. Since each CP has a different termination rate, this implies a different transit price is charged for each call. However, transit providers are much less likely to provide the same approach for calls to mobile number ranges or to NTS numbers, because the variation in call termination rates between different services and different CPs is large. In these cases, it is more likely that a transit provider would provide a set transit fee for each type of traffic.
- 19.29 Ofcom does not think that it would be practical or appropriate to analyse every route in the market and assess the competitive conditions that exist on each of them. Further, it is also likely that such an approach could lead to uncertainty in the market. The market analysis would need to be updated regularly to take account of changes in interconnection and traffic volumes and this would place a high administrative burden on CPs to retain traffic data and provide this data to Ofcom. It is not clear to Ofcom that a set of clear guidelines as to the process we would follow in order to assess whether any specific route was competitive or not could be established.
- 19.30 Therefore, given the overall lack of substitution between ST and ITC/ITT both on the demand and supply-side, we consider that ST and ITC/ITT are separate markets and that there is one ST market for all routes.

## Forward look

- 19.31 It is important to assess the market on a forward look basis in order to determine whether any lack of effective competition, where it exists, is likely to last during the review period by taking into account foreseeable market developments over a reasonable period.
- 19.32 We consider that there is good reason, as we have done in this review, to assess wholesale narrowband services together in a single market review. This allows us to provide a comprehensive analysis of narrowband wholesale markets and the

interrelationship between the different services provided. We consider it appropriate for the forward look period for this revised consultation to remain linked to the next review for wholesale narrowband services notwithstanding the additional time that this further consultation will take. We consider that the appropriate forward look period is one of four years and have applied this in making our proposals.

- 19.33 In considering a four year period we have taken into account the specific characteristics of this market. In particular, we consider that the nature of the market is such that, whilst there may be some increase in competition, developments in the less competitive areas of the market are unlikely to be significant during the period, based on the current technology deployed.
- 19.34 We have also taken account of the impact of NGN over the period. We have outlined in Section 3 BT's current plans for 21CN. Other CPs are also in the process of migrating to NGNs. It is likely that NGN technology will allow CPs greater flexibility in changing routing because:
- The management of routing data is more flexible in call server and other routing databases in NGN deployments than the databases in legacy TDM networks; and
  - Interconnection to smaller networks may be more feasible because voice and other traffic can be carried over shared links (such as Ethernet circuits). This may allow greater scale on interconnects to smaller CPs.
- 19.35 Therefore, as the UK network progressively moves to an NGN environment, it may be the case that different transit services become more substitutable. However, we do not consider that, during the next four years, sufficient change will have occurred to affect our conclusion on market definition. In particular, in Section 3 we have said that BT's plans for deployment of NGN will be slower than we expected in our March consultation. We therefore expect that a significant proportion of ST will be supplied on the current PSTN technology throughout the review period.

## **Geographic market**

- 19.36 We explained in our March consultation that we did not consider that price differentiation on a geographic basis was practical, since transit services are supplied at the tandem switch layer. Tandem switches tend to be located in larger cities and cover wider areas so there is less likely to be an argument for geographic differences in pricing. We remain of the view that there is a single geographic market in the UK excluding Hull.
- 19.37 The only network provider in the Hull Area is KCOM. The product market in the Hull Area is different from the rest of the UK and KCOM does not provide ITC, ITT or single transit services. The product market in the Hull Area has been explained in Section 6.
- 19.38 Therefore, we consider that there are the following geographic markets:
- Single Transit in the UK excluding Hull; and
  - ITC and ITT in the UK excluding Hull.

## **Relationship between the wholesale market definition and the Commission's Recommendation on product and service markets.**

- 19.39 In Section 4 we have explained what we must do before making a market determination and that Ofcom must take due account of the Commission's recommendations.
- 19.40 The Commission has not included a market for transit services in the products and services markets identified in its current Recommendation, having previously defined the following market in the 2003 Recommendation.
- Transit services in the fixed public telephone network (formerly market 10 in the 2003 Recommendation)
- 19.41 The removal of the market from the list published by the Commission indicates that the Commission no longer presumes that, in principle, *ex-ante* regulation is warranted for this market. This does not mean, however, that NRAs are not in a position after an analysis of the relevant market and the finding of SMP to impose regulatory remedies in these markets, should the national circumstances justify such a step and whilst taking due account of the Commission's SMP Guidelines and Recommendation.
- 19.42 Ofcom found the ITC / ITT market competitive in the 2005 review '*Review of BT's Network Charge Controls*'. We do not consider that competitive conditions in this market have changed, taking into account the analysis undertaken for wholesale transit services in our March consultation, and having carefully considered the responses to that consultation, and therefore do not consider that the three criteria test would be met.
- 19.43 In relation to the ST market, we still found SMP in the 2005 review (confirming that there had been no material change from 2003 in that market), and found that it was necessary to regulate the ST market. Given the current continued regulation we are required, under section 84 of the Act, to carry out a further analysis of the market to review the market power determination.
- 19.44 We are proposing, following our review of wholesale transit services that there are separate markets for ITC/ITT and ST. As we discuss below, we are further proposing that BT retains SMP in the ST market.
- 19.45 As Ofcom is proposing a market definition outside of those contained within the Commission's Recommendation, of which we have taken due account, careful consideration has been given to the three criteria set out in the EM (section 2.3) namely:
- Barriers to entry and to the development of competition;
  - Dynamic aspects – no tendency towards competition; and
  - Relative efficiency of competition law and complementary ex ante regulation.

We are mindful that the three criteria test is different from the SMP assessment. Specifically, the three criteria test focuses on the general characteristics of a market, whilst an SMP assessment is made in relation to a specific operator in a given market. Certain issues are relevant to both the three criteria test and to a consideration of market power. In assessing the three criteria, below, we refer to

some of the arguments set out in our subsequent discussion of SMP. We believe that such discussion is relevant and helpful to assessing the three criteria. However, we have not set the arguments out in full in both sections in order to keep such discussion in a single section of the document to avoid unnecessary repetition of argument.

### Barriers to entry

- 19.46 We consider barriers to entry in detail below at paragraphs 19.59 to 19.79, in relation to our assessment of SMP. We are of the view that structural barriers to entry exist. In particular, on certain routes it is not economically viable for CPs other than BT to directly interconnect. This has been shown by the data submitted by some competing CPs, set out below in paragraphs 19.59 to 19.79. Since direct interconnection is a pre-requisite to providing a transit service for traffic to a terminating CP, this forms a barrier to entry. Whilst CPs may choose to interconnect to each other on a case-by-case basis, they are still likely to depend on BT to terminate traffic to a significant number of other CPs.

### Dynamic aspects

- 19.47 A number of dynamic aspects may suggest the market is tending towards competition. The UK market is currently characterised by a very large number of CPs. Currently, there are in excess of 140 CPs that terminate traffic in the UK on fixed geographic, non-geographic and mobile number ranges. Evidence of a high degree of consolidation among these CPs could indicate a move towards a market with fewer, larger CPs in which a smaller number of larger routes would be needed to replicate or replace transit provided by BT. However, there is no evidence to suggest such a consolidation is likely to occur in the forward look period we are considering in this market review.
- 19.48 Second, deployment of new technology may provide opportunities that lead to greater competition. However, the key developments likely to occur in the forward look period revolve around NGN and NGA deployments. NGN deployments may make competition more effective to the extent that they provide greater flexibility in call routing and greater economies of scale due to the ability to provide multiple services over a single interconnect link. However, this is unlikely to be the case for the majority of routes that constitute the ST market. Therefore, these developments are unlikely to address the main issue that providing infrastructure to connect two networks is currently uneconomic on many routes. .
- 19.49 We do not believe NGA deployments will significantly impact this market as they are focused at the connection to the end customer, not between networks.

### Relative efficiency of competition law and complementary ex ante regulation

- 19.50 We have identified that some routes within the ST market are less competitive than other routes. These routes generally relate to the smaller and less well interconnected CPs. There is a risk that BT could abuse its dominant position in the market by raising prices to such CPs. The complexity of the market is such that these routes and therefore the CPs that could be potentially affected are difficult to identify. We do not consider that competition law, on its own, would be sufficient to resolve this issue. We consider that ex ante regulation is required in order to provide legal certainty to CPs. This would ensure that they can obtain supply service from BT and be protected against excessive pricing. Further Ofcom would be able to intervene in a timely manner to deal with any competition concerns that did arise.

19.51 Therefore, we believe ex ante regulation is required to address BT's SMP in the single transit market.

## Summary of market definition

19.52 Based on the analysis of responses to our consultation set out above, we propose that there are two separate markets:

- Single transit in the UK excluding Hull; and
- ITC and ITT in the UK excluding Hull.

19.53 Based on the discussion above, we are re-consulting on the market definition.

**Question 19.1:** *Do you agree with Ofcom's assessment that there are separate single transit and inter-tandem conveyance/transit markets in the UK excluding the Hull Area? If not, please explain why.*

## Updated SMP Analysis

19.54 In undertaking an SMP analysis we have taken due account of the Commission's guidelines on market analysis and assessment of SMP ('SMP guidelines'), as discussed at paragraph A6.30-A6.35 of Annex 6 below. The SMP guidelines confirm that the existence of a dominant position cannot be established on the sole basis of large market share, and that a thorough and overall analysis is required before coming to a conclusion on SMP. The SMP guidelines provides a non exhaustive list of criteria which it is suggested can be used to measure the market power of an undertaking. We have set these out fully at paragraph A6.35 of Annex 6. In assessing SMP for the ST market we have analysed those criteria that we consider relevant to this market and also addressed other relevant issues (such as different traffic types) that are specific to this market. Below, we set out our analysis of market share, barriers to entry, economies of scale, traffic types, pricing and profitability countervailing buyer power, and the overall size of the undertaking, before coming to our preliminary conclusion to make a proposal that BT holds SMP in the proposed ST market.

## Single transit

### Market Shares

19.55 The SMP guidelines note that market shares are often used as a proxy for market power<sup>66</sup>. However, in our March consultation we set out the difficulties in effectively measuring market shares for transit services. As BT is the only CP that explicitly provides a single transit service, it could be argued that BT has a 100% market share.

19.56 We therefore consider that this does not fully capture the single transit market, and it is important to consider other transit services that are offered by CPs that include ST (and fulfil the same role as BT's ST product) in the context of a thorough and overall analysis of market power. We also need to analyse services (i.e., interconnection) that are outside the ST market but have a major effect on the competitive conditions in this market.

---

<sup>66</sup> Para 75 Commission guidelines on market analysis and the assessment of significant market power (2002/C 165/03)

- 19.57 Transit providers tend to offer a single rate for termination of a certain traffic type (for example, UK geographic traffic). Some of this traffic will be routed via only one switch in the transit provider's network and as such would be single transit.
- 19.58 In our March consultation, in paragraphs 9.31 to 9.34 including table 9.4, we showed that the traffic carried by BT's ST product had increased year on year. However, this also showed that mobile network to mobile network traffic was a significant user of ST, and the growth in this traffic was lower than would be expected given the overall growth in mobile volumes. We also indicated that accurate estimate of single transit market share was not possible because CPs that provide transit services do not necessarily provide differentiated ST and ITC/ITT products and, the total market volume is dependent on the degree to which CPs implement direct interconnection. Transit is a product used to provide inter-CP traffic routing in place of direct interconnection. Therefore, the market is, to some degree, a function of the volumes of the originating and terminating CP. For example, a CP other than BT which provides a transit service would count traffic it routes for other CPs to BT as transit. BT, on the other hand, would not treat this traffic as transit, since it terminates on its own network. As such, estimating market share across the transit market is problematic, since the overall size of the market depends on the CPs involved.

#### Barriers to entry and economies of scale

- 19.59 The SMP guidelines state, at paragraph 80, that a finding of dominance depends upon an assessment of ease of market entry. Barriers to entry are an important consideration in assessing market power, especially in light of our assessment of the relatively low impact of progression to NGN technology during the forward look period.
- 19.60 In order to enter the ST market a CP would need interconnection to other CPs. A CP that generates significant levels of its own traffic may interconnect to a high number of other CPs in order to terminate this traffic. In this case, these routes could be used to provide a single transit product. CPs are more likely to provide direct routes where the traffic volumes are largest. Therefore, on larger traffic routes it is possible for a transit CP to provide a competing product, although these are also the routes where a direct interconnection between the two providers is attractive. However, it is less likely that a CP will provide direct routes to terminating CPs where the traffic volumes are low. In some cases, the ability to use this route for both its own traffic and transit traffic may help support the business case for the route. However, in many cases, the CP is unlikely to build a direct route where its own traffic does not justify the business case. On the other hand, BT is interconnected to the vast majority of CPs operating in the UK. BT's own retail activities generate traffic to these CPs. This traffic volume is significantly higher than that generated by other CPs' retail activities as shown in Table 19.2 below.

**Table 19.2: BT share of retail minutes for Q4 2008 – excluding international minutes**

<b>Call type</b>	<b>All fixed operators (mil mins per quarter)</b>	<b>BT (mil mins per quarter)</b>	<b>BT share</b>
UK geographic calls	22,315	9,998	44.8%
Calls to mobiles	3,119	1,452	46.5%
Other UK calls (including all NTS and directory enquiries)	7,405	3,786	51.1%

Source: Ofcom communications market data<sup>67</sup>

19.61 In their responses to our March consultation, CPs said that they face two challenges in avoiding routing traffic via BT:

- Deploying direct interconnection is not cost effective for some routes. Without such interconnection, a CP is unable to route its traffic directly or offer a transit service. C&W estimated that it believes BT may be the only CP with direct interconnection to 70 or more of the CPs in the UK. Another confidential respondent said that whilst it may have a relatively large number of interconnects in total, the number available for use for UK geographic and NTS traffic is significantly lower, with the rest being for international or traffic to MNOs only. Four other respondents agreed with these points.
- Avoiding transit charges is difficult for some traffic types (such as NTS) since the terminating CP pays the transit fee. Re-routing NTS traffic may be complex and may require significant changes to network routing data, which may not be justifiable as the benefits do not flow to the CP re-routing the traffic through reduced transit charges. For example, C&W estimated in its response that BT routes 2 billion minutes of NTS transit traffic per annum for which no alternative route exists. Three other respondents agreed with this general point, although they did not estimate the traffic volumes involved.

19.62 As shown above, the large volume of BT's own retail traffic which needs to be terminated and its high degree of interconnection to the majority of other CPs in the UK means it does not face these two issues to the same degree. A CP offering a transit service only has routes to a limited number of other CPs and so would not be able to provide a single transit product equivalent to that of BT, since BT is connected to the majority of CPs.

19.63 We said in the March consultation document (at paragraph 9.37) that the largest CPs are interconnected between themselves but not necessarily with smaller CPs. In general, this is supported by further data collected by Ofcom since the consultation. Whilst larger CPs may be able to avoid single transit on some routes, we continue to be of the view that, on a case by case basis, direct interconnection might not always be justified, especially where traffic volumes are low.

19.64 The ST market is complex in that whilst the BT product can be defined relatively easily, the competitive constraints to this product differ based on traffic type and on both the originating and terminating CP. In assessing market power and the

<sup>67</sup> Telecommunications market data update Q4 2008, 21May 2009, [http://www.ofcom.org.uk/research/cm/tables/q4\\_2008/](http://www.ofcom.org.uk/research/cm/tables/q4_2008/)

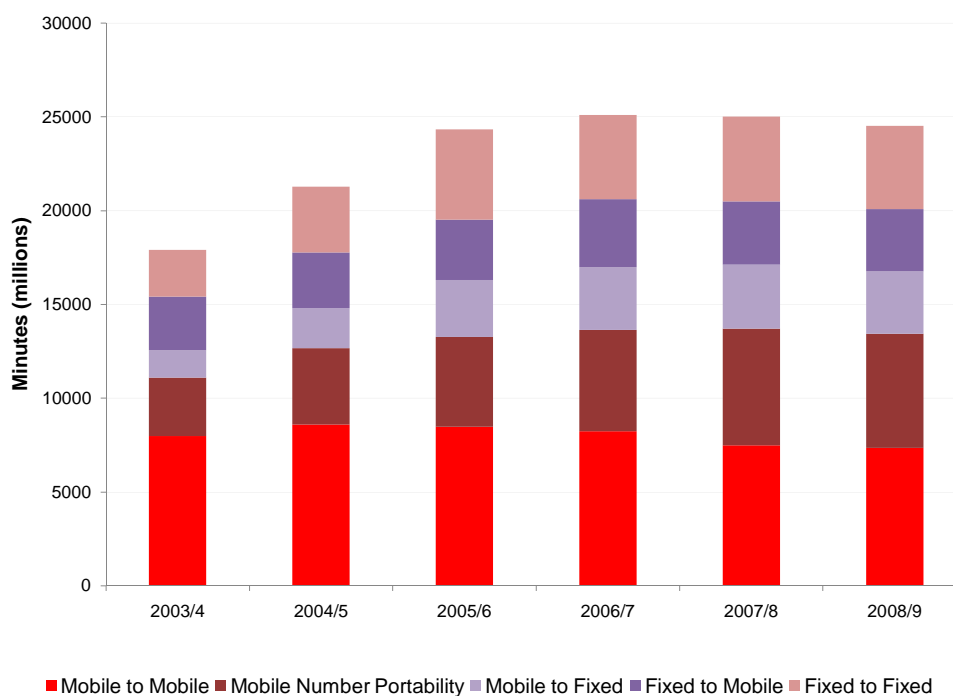
existence of a dominant position we consider that, for the particular characteristics of the ST market it is important to consider particular traffic types. We have identified five broad groupings of traffic types, which we have considered separately:

- Mobile operator to mobile operator (non-ported traffic);
- Mobile operator to mobile operator (ported traffic);
- Fixed operator to mobile operator;
- Fixed or mobile operator to fixed operator for geographic traffic; and
- Fixed or mobile operator to fixed operator for NTS traffic.

19.65 In general, mobile operators are considered to have significant scale. This is not always the case for fixed operators. Therefore, for many of the above traffic flows (where a fixed operator either originates or terminates the call) the size of the operators in question and/or the volume of traffic need to be taken into account.

19.66 Figure 19.3 below shows overall minutes split by type of originating and terminating CP.

**Figure 19.3: BT single transit minutes<sup>68</sup>**



Source: Ofcom (based on BT data)

### Traffic to and from MNOs

19.67 The MNOs terminate a very high volume of traffic, both from other MNOs and from fixed networks. A number of CPs have indicated to Ofcom that establishing

<sup>68</sup> Ofcom has estimated the split between traffic types for 2008/9 based on the percentage splits in 2007/8



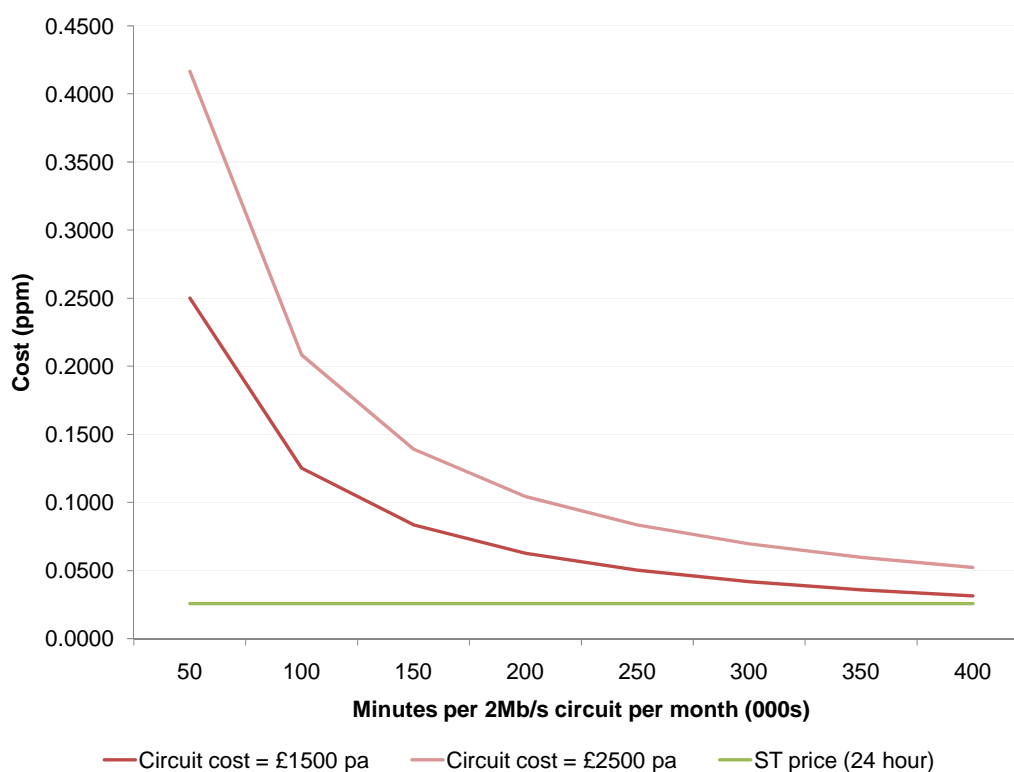
interconnection to MNOs can be challenging because there is little incentive on the MNOs to directly interconnect with a large number of other CPs, or with smaller CPs with limited traffic volumes, as they receive the same payment whether the traffic is delivered via BT or another route due to the charge control on their rates..

Notwithstanding the MNOs' obligations to negotiate interconnection under the General Authorisation Regime, the MNOs may not necessarily be incentivised to support a large number of small routes because large routes tend to be more efficient.

- 19.68 However, several fixed network operators have deployed interconnection to the MNOs. It is likely to be in their interests to offer transit to the MNOs in order to use these routes to carry as much traffic as possible to make efficiency gains. This in turn may act to constrain BT's pricing of transit traffic on these routes.
- 19.69 BT has presented evidence that indicates that the MNOs have found alternate ways to route traffic to each other so that the volume of traffic between MNOs carried on the BT network has not grown at the rate expected given the increasing volumes in MNO traffic. However, BT continues to carry a very substantial volume of MNO traffic on its network.
- 19.70 In addition to the traffic between MNOs, and from fixed CPs to the MNOs, the other traffic types highlighted above need to be considered.

#### *Traffic between large CPs*

- 19.71 Whilst transit traffic on routes between larger CPs may be constrained by the possibility of direct interconnection, this would need to be considered on a case-by-case basis to take account of the architecture of the networks.
- 19.72 These interconnects may be established by one CP building infrastructure to the other CP's network. However, this is unlikely to be justified unless there is a very large volume of traffic, because the dig costs would be at least £80 per metre. Unless the two networks are close together, this cost is likely to be prohibitive (a ½ km dig would cost £40k). Alternatively, the CPs could provide interconnection by purchasing a circuit (e.g. a PPC from BT). CPs have estimated that the rental cost for a 2Mb/s circuit is between £1500 and £2500 per annum. Figure 19.4 below illustrates that for interconnection to be profitable, a circuit would need to either cost less than this, or utilisation would need to be very high, to make direct interconnection efficient. In addition, there would be installation charges for this. There would also be switch equipment costs and ongoing costs for supporting interconnection (account management, billing, etc.).

**Figure 19.4: Cost of direct interconnection**

Source: Ofcom, CP data, BT carrier price list

- 19.73 The above would apply whether the CPs are fixed or mobile network operators. A further complication is that routing all traffic on a direct route may be complicated and the incentives to do this may not reside with the originating CP that controls call routing. This occurs in the case of NTS traffic, which we discuss separately below.

#### *Traffic to and from smaller CPs*

- 19.74 The arguments set out above apply equally to traffic to smaller CPs. Indeed, defining which are the larger and which are the smaller CPs may not be a simple task as traffic volumes change and different CPs will have different calling patterns based on their disparate customer basis.
- 19.75 In paragraphs 9.45 to 9.46 of our March consultation we set out why we did not think there was necessarily a concern that BT may be able to exploit CPs with lower traffic volumes. For a CP with limited interconnection to BT, it is likely to incur higher charges for termination of traffic both to BT and to other CPs as it will incur a high percentage of inter-tandem conveyance or inter-tandem transit. This implies that interconnecting to other CPs in order to avoid BT's higher charges is likely to be considered by these CPs. Nonetheless, smaller CPs may be reliant on BT, since, as set out above, even the largest transit providers other than BT are unlikely to have routes to all other CPs.

### *Number Translation Services (NTS)*

19.76 The NTS regime is discussed in Section 9 of this document in relation to LTC. In relation to transit, as already discussed above, the issue is that because the transit fee is paid by the terminating CP, the originating CP has little incentive to re-route traffic. In order to get the originating CP to re-route traffic so that the terminating CP can avoid the transit fee, the terminating CP would need to provide a rate to the originating CP that is sufficiently attractive. The terminating CP could do this the following way. The net in-payment the terminating CP receives from BT on transit traffic is the termination rate (the POLO as explained in paragraph 8.104 above) minus the transit fee. The originating CP, meanwhile, pays to BT the termination rate (which is a straight pass through payment). Therefore, if the terminating CP offered a discount on the termination rate that was in between zero and the transit rate, the originating CP would have a lower out-payment and the terminating CP would receive a higher in-payment.

19.77 For this approach to be economically attractive, the lower termination rate available to the originating CP would need to more than compensate any increased costs. A necessary condition for this is that the increased cost per minute is lower than the BT transit rate. These costs could be:

- Cost of re-routing traffic;
- Cost of new or additional interconnect circuit capacity between the two CPs; and
- Cost of any additional capacity used in the originating CP's network. This is likely to occur because, whilst some CPs are very heavily interconnected with BT and so can hand this traffic off at the earliest opportunity, this is not likely to be the case for many other CPs. Therefore, the originating CP is more likely to have to route traffic across its own core network to the point of interconnection.

19.78 This implies that BT can also increase the transit fee since this is paid by the terminating CP. It would not be able to increase this without constraint. This is because the higher the transit fee, the lower the revenue that the terminating CP will keep (as this will be the NTS termination payment minus the transit fee). The transit fee is the difference between the payment by the originating CP and the revenue received by the terminating CP. Therefore, if the transit fee gets too large, it will become commercially viable for the terminating CP to offer a termination rate to the originating CP that is sufficiently below the payment it makes to BT to more than cover its costs of re-routing traffic onto a direct route. However, the complexity of the terminating CP creating an attractive offer to an originating CP compared to BT's rates is more difficult to achieve because, under the NTS regime, BT controls all the relevant costs used to establish the NTS rates.

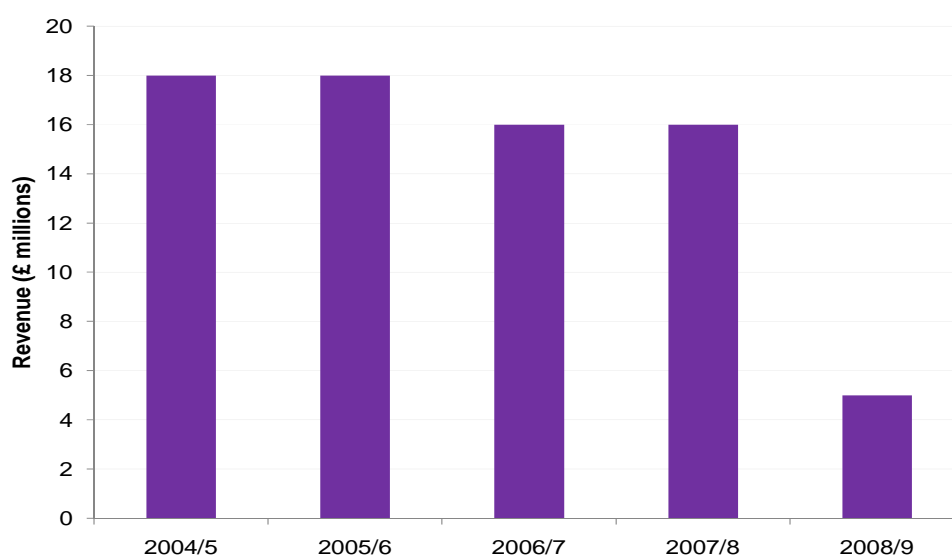
19.79 Taken together, all the above implies that there are substantial barriers to entry and therefore all CPs are reliant on BT's single transit product to some extent.

### Pricing and profitability

19.80 As set out in our updated market definition section, we have considered whether defining separate markets for separate routes is appropriate. However, we think this would be problematic. For instance, we would need to collect data updates of interconnection throughout the industry on a regular basis. As routes grow or shrink, or CPs increase or decrease levels of interconnection, this could potentially mean the specific routes within the regulated market could change.

- 19.81 As stated above, the revenue available to BT from the transit market is low compared to, for example, call origination, call termination and LTC. However, if BT is deregulated, it would have the ability to price discriminate. For instance, it would not be unreasonable to assume that BT would significantly raise its prices on less competitive routes (in particular since BT implemented a 66% price cut in April 2008).
- 19.82 In order to do this, BT would need the capability to price and bill on a per-route basis. Ofcom does not believe this is necessarily very likely because of the way the BT billing systems work. These systems are not the same as those developed by CPs that allow a high degree of pricing flexibility for carrier offers. BT's systems were developed in the 1990s based on the regulated market structure that existed at that time. Pricing is based on the regulated market definitions and based on the assumption that all CPs are charged the same rates. Development of the system to support sophisticated route-by-route pricing is likely to be time consuming and expensive, compared to the returns available.
- 19.83 However, it may be possible for BT to increase the price of all transit traffic and manually discount the rates to a few specific customers. BT has taken this approach on inter-tandem conveyance and transit traffic since it was de-regulated in 2005.
- 19.84 We have also considered the financial returns reported by BT for this market. The revenues, costs and mean capital employed disclosed by BT are very small compared to other markets that utilise the same core network asset and cost base. For these very small markets it is not unusual to see high variability in returns as a result of the sensitivities in the cost attribution process and roundings in the reported numbers. BT reduced its prices by 66% in April 2008, resulting in an approximate 50% reduction in turnover. Figure 19.5 below shows BT's revenue from ST and the effect of its price reduction on it. Whilst volumes have stayed relatively flat, revenues have fallen from £16m to £5m.

**Figure 19.5: BT's revenue from single transit**



*Source: BT regulatory accounts*

### Countervailing buyer power (CBP)

- 19.85 The extent to which a purchaser can impose CBP on the transit provider will depend on the ability of the purchaser to refuse to pay the prices set by the transit provider. This analysis overlaps with our assessment of the different traffic types discussed above. A CP with large traffic volumes to another large CP (mobile or fixed) will have more ability to exert CBP since alternative routing options exist. We consider that there will be a significant number of occasions, either due to traffic volume, traffic type or both, where the originating CP is not able to exert sufficient CBP to constrain the pricing of ST.

### Overall size of the undertaking

- 19.86 BT benefits in the transit market from a number of effects. Its own retail operations generate large traffic streams which require termination. As such, BT is well placed to implement direct interconnection. Nonetheless there are other significant CPs in the UK (both fixed and mobile operators) that may be in a similar position, at least in relation to larger traffic routes.
- 19.87 BT also benefits from its position as the largest provider of telephony in the UK. There has been a tendency amongst new entrants in the market towards a presumption that an interconnection to BT is required in order to be able to support a full service. This has resulted in BT having a much higher number of CPs connected to its networks than other CPs although, more recently, some CPs have not taken this approach (by either hosting their services on other CPs networks or by interconnecting to CPs other than BT). C&W, as the second most interconnected CP in the UK, has around half the number of other CPs connected to it compared to BT.
- 19.88 The data required on the network in order to route traffic becomes more complex as it gets more granular. Providing data to route traffic efficiently for every area code across multiple CPs requires a large amount of routing data to be implemented across a CP's network. This may act to restrict the level of routing granularity carried out by a CP. As such, a CP is more likely to use only one single transit provider (per traffic type) to reduce the operational complexity. Given BT's level of interconnection, it is well placed to fulfil this purpose. This does not necessarily rule out other CPs acting as the transit provider but they may, for example, have to include transit via BT within their own transit offer to route traffic to all UK numbers.

### **Proposal on market power assessment**

- 19.89 We have set out above the complex nature of the single transit market. In theory every route for each type of traffic may be subject to different competitive constraints. In practice, ascertaining the precise level of competition on a route by route basis (whether these are defined as separate markets or as being part of the same market) would be a complex task and would not necessarily be instructive in concluding whether a route was effectively competitive or not. In addition, the burden placed on CPs to provide data to assess competitive conditions would appear to be disproportionate based on the limited size of the ST market (£5m revenue in 2008/9).
- 19.90 As discussed above, BT has reacted to the levels of competition experienced on some routes by reducing its prices. Its obligations have resulted in this price reduction also applying to routes with different competitive conditions.

- Therefore, whilst some specific routes in the single transit are more competitive than others we propose that BT has SMP in the single transit market in the UK excluding Hull.

**Question 19.2:** *Do you agree with Ofcom's assessment that BT has SMP in the single transit market? If not, please explain why.*

## Remedies

19.91 In order to address the SMP held by BT in the ST market discussed above, we propose the following remedies:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Basis of charges;
- Requirement to publish a reference offer;
- Requirement to notify technical information;
- Requirement to notify charges, terms and conditions;
- Cost accounting; and
- Accounting separation.

19.92 We set out below why we consider these remedies are appropriate in addressing our competition concerns in this specific market.

## Approach to remedies

19.93 Annex 6 provides a detailed outline of the legal framework for this review and we summarise here our approach in considering each possible remedy and the legal tests we must demonstrate that each proposed condition has met.

19.94 Under section 45 of the Act, Ofcom is empowered generally to set SMP services conditions authorised or required by sections 87 to 92. As discussed in paragraph A6.7, Ofcom must have regard to the Community requirements set out in section 4 of the Act.

19.95 In paragraph A6.05, we detail the requirements under section 47(2) of the Act that each remedy must satisfy, which is that: it is objectively justifiable, does not unduly discriminate, is proportionate and transparent.

19.96 Ofcom must also consider the relevant tests from section 87(4) outlined in paragraphs A6.51 to A6.52 and, in relation to price controls, section 88 which is outlined and discussed at paragraphs A6.53 – A6.59.

19.97 Finally, as discussed in paragraphs A6.60 to A6.562, Ofcom has taken into account the 'Revised ERG common position on the approach to appropriate remedies in the new regulatory framework' publication when considering remedies in response to SMP findings.

19.98 We have also covered in paragraphs 4.35 to 4.49 of this document when we consider ex ante regulation is necessary, as opposed to a reliance on ex post competition law.

### **Proposed remedies**

19.99 Ofcom last reviewed the single transit market in 2005. At that time we found that BT had SMP and imposed the following remedies:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Basis of charges;
- Charge control;
- Requirement to publish a reference offer;
- Requirement to notify charges, terms and conditions;
- Requirement to notify technical information;
- Transparency as to quality of service;
- Cost accounting; and
- Accounting separation.

19.100 We have set out above our view that there are differing levels of competition existing in the single transit market. Overall we consider that BT holds a position of SMP, but we believe BT's pricing is constrained to some extent on some routes. For the reasons that we have set out above, we believe it would be inappropriate to define separate sub markets (say, on a route by route basis) within the ST market due to the difficulty and complexity of managing these multiple markets.

19.101 In making a proposal that BT hold SMP Article 16(4) of the Framework Directive requires us to impose appropriate specific regulatory obligations on BT. We do not consider that it would be appropriate to impose no ex ante regulation in this case.

19.102 In defining one overall ST market, we must consider the type of remedies needed in order to overcome the evident market failure.

19.103 The key market failure we have identified are BT's ability to price excessively on routes where less competition exists and that, should a uniform price apply across the entire market, competition on less competitive routes may not develop as the ability of other CPs to compete with the BT price may be limited. BT's ability to act independently by potentially setting excessive prices also gives rise to a concern that it could also treat some CPs less favourably than others by, for example, refusing to deal with them or offering different terms and conditions.

19.104 In order to address these concerns we are required to impose appropriate remedies that are based upon the underlying competition problem. In this section we set out how each of the proposed remedies, listed at paragraph 19.80 above, is appropriate to deal with the identified market failures and is consistent with the various legal tests imposed by the Act.

### Requirement to provide network access on reasonable request

19.105 We propose to retain a remedy requiring BT to meet reasonable requests for network access in the single transit market.

19.106 Section 87(3) of the Act authorises Ofcom to set SMP services conditions requiring the dominant provider to provide network access as it may, from time to time, direct. These conditions may, pursuant to section 87(5), include provision for securing fairness and reasonableness in the way in which requests for network access are made and responded to, and that conditions are complied with within the periods and at the times required.

19.107 When considering the imposition of such conditions, Ofcom must have regard to the six factors set out in section 87(4) of the Act, including, inter alia, the technical and economic viability of installing other competing facilities and the feasibility of the proposed network access.

### *Aim of regulation*

19.108 This remedy is designed to promote competition in downstream markets by requiring providers with SMP to provide wholesale access to their network facilities. As discussed in paragraphs 19.59 to 19.79 above, BT's SMP arises from the scale of its network and the level of interconnection it has to other CPs. The level of investment required by a third party to avoid using BT's facilities in order to route traffic directly to reach all other CPs in the UK would be prohibitive. This represents a significant barrier to entry. Ofcom considers that in the absence of such a requirement, BT would have an incentive not to provide access in order to confer advantage on its own retail operations by limiting the ability of other CPs to provide an any-to-any connectivity service at competitive prices. The ability of competing CPs to gain wholesale access will therefore facilitate the development of competition in retail markets.

### *Proposed condition*

19.109 The proposed condition, as set out in Annex 13 to this document, will require requests made to BT for network access to be 'reasonable' requests. The condition will also require BT to provide network access in response to such a reasonable request and that access should be provided on fair and reasonable terms, conditions and charges.

### *Legal tests*

19.110 Ofcom has considered its duties under section 3 of the Act. We consider that the condition would further the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition, specifically facilitating the development of competition at the retail level.

19.111 Ofcom has considered the Community requirements as set out in section 4 of the Act. In our view the proposed obligation would promote competition in relation to the provision of electronic communications networks and encourage the provision of network access for the purpose of securing efficient and sustainable competition in markets for electronic communications networks and services.

19.112 We consider that the proposed condition meets the criteria set out in section 47(2) of the Act. We believe the proposed condition is:



- objectively justifiable as its intention is to promote competition. The proposed condition will achieve this by ensuring all CPs can connect to all other CPs in the UK for the purposes of providing a full narrowband service to its end customers, and that this will be achieved on reasonable terms;
- non-discriminatory as it is only imposed on those providers who are found to have SMP, in particular, BT;
- proportionate, since without such an obligation BT could refuse to provide access and this would mean other CPs would not be able to effectively compete in markets where Ofcom proposes BT holds SMP or in markets downstream of this. It does not require BT to provide access where it is not technically feasible or reasonable. Thus we consider this obligation is required to pursue our policy objectives and duties in addressing BT's proposed SMP. The means employed to achieve those aims appear both necessary and the least burdensome to address effectively the concerns that we have set out; and
- transparent as it is clear from the proposed condition that the intention and its effect is to ensure that BT provides access to its networks in order to facilitate competition. The text of the proposed condition is the same as the SMP condition AAA1(a) set for other markets which is set out at Part 2 to Schedule 1 to Annex 13 of this document.

**Question 19.3:** *Do you agree that Ofcom should impose a requirement to provide network access on reasonable request on BT in the market? If not, please explain why.*

### Requirement not to unduly discriminate

19.113 We propose to retain a remedy requiring BT not to unduly discriminate in the proposed ST market.

19.114 Section 87(6) of the Act authorises Ofcom to set SMP services conditions requiring the dominant provider not to discriminate unduly against particular persons, or against a particular description of persons, in relation to matters connected with network access to the relevant network or with the availability of the relevant facilities.

19.115 Section 87(6) transposes Article 10 of the Access Directive, which enables national regulatory authorities to impose obligations of non-discrimination, in relation to interconnection and/or access. Its Article 10(2) makes clear that such obligations shall ensure, in particular, that the SMP operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services.

### *Aim of regulation*

19.116 In proposing to apply this obligation to BT, we are seeking to ensure that BT does not unduly discriminate by preventing BT from exercising its (proposed) SMP in the ST market to the detriment of competition and consumers. In particular, the obligation seeks to promote competition and to secure efficient and sustainable competition by preventing BT from leveraging its market power into downstream markets. An obligation to provide network access (as proposed in paragraphs 19.105 to 19.112 above) on its own may not be adequate to promote downstream competition. This is because, in the absence of a requirement not to unduly discriminate, BT could set

favourable terms for some CPs over others, which could have the effect of restricting or distorting competition in the downstream market.

- 19.117 Such an obligation would not, however, necessarily require the same price to be set for all customers. If BT were to price uniformly across the market, such behaviour may, whilst constraining prices to a single level, in fact, give rise to competition concerns. This may, for example, arise in because the routes that are less competitive would have the same price as the more competitive routes and this may act to inhibit the ability of other CPs to provide competing transit services and, potentially, to directly interconnect to each other rather than purchasing transit services from BT. Such behaviour may also fail in taking into account whether the same transaction conditions (uniform price) offered to two or more customers reflect relevant differences in those customers' circumstances.
- 19.118 Accordingly, the responsibility falls under this proposed obligation on BT to assess and show whether prices would comply with it, taking account of such guidance given by Ofcom from time to time as to how it might treat undue discrimination on a case by case basis. In this regard, Ofcom's current approach is set out in the guidelines dated 15 November 2005 and entitled 'Undue discrimination by SMP providers' (the "Undue Discrimination Guidelines")<sup>69</sup>.
- 19.119 That guidance makes it clear that, firstly, Ofcom will consider whether any differences in transaction conditions offered to two customers reflect relevant differences in the customers' circumstances; or whether any relevant similarities in customer's circumstances are reflected in transaction conditions offered to the two customers. The guidance also states that, in most cases, customers' circumstances will be relevant if they affect the costs of supplying to them. Secondly, Ofcom will consider the capability of any differences (or similarities) in transaction conditions not objectively justified by relevant differences (or similarities) in the customers' circumstances to harm competition.
- 19.120 We have also considered whether allegations or evidence of discriminatory behaviour could be adequately addressed through competition law. However, Ofcom considers that in order to meet our objective to promote efficient and sustainable competition at the wholesale level, a non undue discrimination condition is necessary. This proposed condition ensures, in particular, that all parties are treated on an equivalent basis in equivalent circumstances, thereby creating the right environment for competition to develop. Our view is that this ex ante obligation is therefore needed to create legal certainty and to ensure that Ofcom could intervene in a timely manner to deal with these competition concerns.

#### *Legal tests*

- 19.121 Ofcom has considered its duties under section 3 of the Act. We consider that the proposed condition would further the interests of citizens as well as further the interests of consumers in relevant markets by the promotion of competition.
- 19.122 Ofcom has considered the Community requirements as set out in section 4 of the Act. The proposed condition encourages the provision of network access and service interoperability for the purpose of securing efficient and sustainable competition in the downstream markets for access and calls, by ensuring BT does not unfairly favour some CPs over others to distort competition.

<sup>69</sup> <http://www.ofcom.org.uk/consult/condocs/undsmp/contraventions/contraventions4.pdf>

19.123 We consider that the proposed condition is appropriate as based on the nature of the competition problems identified in our market analysis and furthermore meets the criteria set out in section 47(2) of the Act. We believe the proposed condition is:

- objectively justifiable, as it provides a safeguard to prevent BT discriminating against certain CPs, without necessarily constraining the price within the proposed ST market to that of the lowest price route;
- not unduly discriminatory as it is only imposed on BT as the only provider found to have SMP in the proposed ST market;
- proportionate since it only prevents discriminatory behaviour that is undue and is an obligation necessary to create legal certainty and timely intervention as discussed above; and
- transparent, as it is clear that its intention is to prevent undue discrimination. The text of the proposed condition is the same as the SMP condition AAA2 set for other markets which is set out at Part 2 to Schedule 1 to Annex 13 of this document, and its aims and effects are also aided by our explanations above, including by the guidance given in the Undue Discrimination Guidelines.

**Question 19.4:** *Do you agree that Ofcom should impose a requirement not to unduly discriminate on BT in the ST market? If not, please explain why.*

### Basis of charges

19.124 We consider that in order to address the identified market failure of BT being able to set excessive prices for ST services some form of price control is appropriate.

19.125 The ST market has been subject to a RPI-X charge control since the last market review. Under this method of charge control, incentives are created on the dominant provider to increase its efficiency, thereby imitating the effect of a competitive market. If the firm can reduce its costs below the level expected when the cap was set, then the firm retains the increased profits, at least for the period the control is in place.

19.126 BT has reduced its prices significantly below the level of the charge control to react to competition on some of the routes within this market. Therefore, we consider that the prices are currently reflective of the competitive level on those more competitive routes.

19.127 We have considered whether it would be appropriate to propose a charge control on BT in the proposed market. Whilst we consider some control on BT's pricing is required to ensure it does not increase its prices on the less competitive routes (and on the less competitive NTS traffic) to excessive levels, we believe that it would not be proportionate to impose a charge control in the ST market, given the size of the market (a revenue of £5m in 2008/9) and the specific competitive conditions in this market.

19.128 Calculation of a charge control is based on a forward forecast of volumes. Given that competition on some routes may be affected to some extent by BT's pricing, accurately forecasting volumes and revenue would be problematic. Whilst this may be a challenge in many charge controls, it may be particularly the case in this market since, as set out above, some routes are likely to be subject to more competition than others, making volumes more volatile.

19.129 Having considered and rejected the idea of a charge control as the appropriate price control to apply to this market we have also considered whether a basis of charges (cost orientation) obligation is an appropriate price control remedy to address the market failure. A cost orientation obligation would allow some flexibility of pricing but would act to limit BT's ability to set excessive charges, as charges would have to be cost oriented, and we consider for the reasons set out below this would be an appropriate remedy.

19.130 We therefore propose to oblige BT to comply with a cost orientation condition, whereby charges must be on the basis of long run incremental costs plus an appropriate mark-up for costs which are common across products, and for recovery of the cost of capital. In Annex 14, we have set out that there may be different occasions when Ofcom imposes a basis of charges obligation and the interpretation of this condition. In this particular case our interpretation would be as set out in paragraph A14.5 since we are not imposing a charge control in the ST market.

19.131 Section 87(9) of the Act authorises the setting of SMP services conditions imposing on the dominant provider rules concerning the recovery of costs and cost orientation.

#### *Aim of regulation*

19.132 We have set out above that in the absence of a cost orientation obligation, BT may have the ability to charge excessive prices within the ST market. This would impact the cost base of competing providers who purchase ST from BT and could make it difficult for third party CPs to compete at the retail level with BT in the long term. In the ST market we consider that the guidance set out in paragraph A14.5 in Annex 14 would apply.

#### *Legal tests*

19.133 Ofcom has considered the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and secures efficient and sustainable competition by ensuring that charges for wholesale services are at a level that enables operators to compete.

19.134 We consider that the proposed condition meets the criteria set out in section 47(2) of the Act. Ofcom considers the proposed condition is:

- objectively justifiable as it enables competitors to purchase services at charges that will enable them to develop competitive services to the benefit of consumers, while also allowing BT a return to recover common costs and cost of capital;
- not unduly discriminatory, as it is only imposed on BT and no other operator has SMP in these markets;
- proportionate as without such an obligation the price-setting behaviour of BT would not necessarily be constrained by competitive pressure, allowing it to set charges which restricted the ability of other CPs to buy wholesale products that allow them to provide competitive products to consumers; and
- transparent as it is clear the intention is to ensure that BT charges on a cost-oriented basis. The text of the proposed condition is the same as the SMP condition AAA3 set for other markets which is set out at Part 2 to Schedule 1 to Annex 13 of this document.

19.135 Ofcom has also considered the tests set out in section 88 and believes the proposed obligation is appropriate. Further to the arguments outlined above, there is a risk that, in situations where SMP is persistent, pricing will be distorted and not at competitive levels, as dominant providers are likely to want to charge excessive prices in order to maximise profits by increasing their revenues and the costs of competing providers. The proposed condition promotes efficient and sustainable competition and provides the greatest possible benefits to consumers by enabling competing providers to buy wholesale services at levels that might be expected in a competitive market.

19.136 The extent of investment of the dominant operator has been taken into account as set out in section 88(2), as the obligation provides for a mark-up for an appropriate return on capital employed.

**Question19.5:** *Do you agree that Ofcom should impose a requirement that BT's charges should be subject to a cost orientation obligation in the ST market? If not, please explain why.*

**Question19.6:** *Do you agree with Ofcom's proposed interpretation of this condition as set out in Annex 14? If not, please explain why.*

### Requirement to publish a reference offer

19.137 Ofcom proposes to require BT to publish a reference offer (RO) for products offered in the single transit market in which it holds SMP.

#### *Aim of regulation*

19.138 The main reasons for requiring the publication of a RO are to assist with transparency in monitoring for potential anti-competitive behaviour and to give visibility to the terms and conditions on which other providers would be able to purchase wholesale access services. The publication of a RO would therefore help to ensure stability in markets and that incentives to invest would not be undermined.

19.139 The publication of a RO would allow for speedier negotiations and might avoid possible disputes. Together with a non-discrimination requirement, the publication of a RO would give confidence to those purchasing wholesale services that they were being provided on non-discriminatory terms.

#### *Proposed condition*

19.140 Ofcom considers that it is appropriate for the published RO to include:

- a clear description of the services on offer;
- terms and conditions including charges and ordering, provisioning, billing and dispute resolution procedures. The RO should provide sufficient information to enable providers to make technical and commercial judgements such that there is no material adverse effect on competition;
- information relating to technical interfaces and points of interconnection. Such information should ensure that providers are able to make full and effective use of all the services provided;

- conditions relating to maintenance and quality (service level agreements and guarantees). The inclusion of service levels, as part of the contractual terms of the RO, that provides for a minimum acceptable level of service, will ensure that services are provided in a fair, reasonable, timely and non-discriminatory fashion;
- the amount applied to network components; and
- terms and conditions that are fair and reasonable. This will ensure that products are offered on terms and conditions as they would in a competitive market and that they are sensible, practical, and do not impose a margin squeeze on competitors.

### *Legal tests*

19.141 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

19.142 Ofcom considers that the proposed condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and encourages the provision of Network Access and service interoperability for the purpose of securing efficient and sustainable competition for the maximum benefit for consumers. The publication of a RO would mean that other communications providers would have the necessary information readily available to allow them to make informed decisions about entry into the market.

19.143 We consider that the proposed condition meets the criteria set out in section 47(2) of the Act. The proposed obligation is:

- objectively justifiable in that it requires that terms and conditions are published allowing competing providers the ability to ensure they are receiving offers that do not unduly discriminate in favour of the dominant provider's own retail operations or other CPs, therefore encouraging competition to the benefit of consumers;
- not unduly discriminatory as it is applied only to those operators who hold SMP and all providers are subject to the same obligation;
- proportionate in that only information that is necessary to ensure that there is no material adverse effect on competition is required to be provided; and
- transparent as it is clear the obligation is designed to ensure that potential competitors have sufficient information to make investment decisions about entry into this market. The text of the proposed condition is the same as the SMP condition AAA5 set for other markets which is set out at Part 2 to Schedule 1 to Annex 13 of this document.

**Question 19.7:** *Do you agree that Ofcom should impose a requirement to publish a reference offer on BT in the single transit market? If not, please explain why.*

### Requirement to notify technical information

19.144 Ofcom considers it is appropriate to retain a requirement on BT to notify technical information a minimum of 90 days in advance of providing new wholesale services or amending existing technical terms and conditions.

#### *Aim of regulation*

19.145 The aim of an obligation to provide advance notification of technical characteristics is to ensure that competing providers have sufficient time to respond to changes that may affect them. For example, a competing provider may need to introduce new equipment or modify existing equipment or systems to support a new or changed technical interface.

19.146 Technical information includes new or amended technical characteristics, including information on network configuration, locations of the points of network access and technical standards (including any usage restrictions and other security issues). Relevant information about network configuration is likely to include information about the function and connectivity of points of access, for example, the connectivity of exchanges to end users and other exchanges.

#### *Proposed condition*

19.147 The existing condition requires the notification of new technical information 90 days in advance of providing new wholesale services or amending existing technical terms and conditions. Ofcom continues to believe that 90 days is the minimum time that competing providers would need to make modifications to their network to support changes.

19.148 This condition for 90 days notice relates to changes to technical information related to SMP services. All CPs are required to comply with General Condition 2<sup>70</sup>, which obliges them to apply compulsory standards, or in the absence of these, voluntary standards. Such changes should be agreed through NICC. Therefore, agreement of such standards should normally have been agreed at NICC prior to this 90 day period.

#### *Major changes and NGN*

19.149 For major changes to the existing network and migration to NGNs, Ofcom considers that industry consultation (including through NICC) continues to be an appropriate way to progress modifications. This consultation and agreement phase would not fall within the notice period; therefore the formal 90 day notification period would follow the industry process. That is, the notification should be made only following the conclusion of the consultation process.

#### *Legal tests*

19.150 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition, ensuring that providers have

---

<sup>70</sup> The General Authorisation regime ([http://www.ofcom.org.uk/telecoms/ioi/g\\_a\\_regime/](http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/))

sufficient notification of technical changes to the dominant provider's network to enable them to compete.

19.151 Ofcom considers that the proposed condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have sufficient notification of technical changes to the dominant provider's network to enable them to compete.

19.152 We consider that the proposed condition meets the criteria set out in section 47(2) of the Act. It is:

- objectively justifiable as it enables competing operators to make full and effective use of network access. The period allows CPs time to react to proposed changes without imposing an unnecessarily long notification period on BT that may restrict their ability to develop and deploy new features or products;
- not unduly discriminatory as it is only imposed on those providers who have SMP and all providers are subject to the same obligation;
- proportionate in that 90 days is considered the minimum period necessary to allow competing providers to modify their networks; and
- transparent in that it is clear in its intention that BT notify technical information. The text of the proposed condition is the same as the SMP condition AAA6(b) set for other markets which is set out at Part 2 to Schedule 1 to Annex 13 of this document.

**Question 19.8:** *Do you agree that Ofcom should impose a requirement to notify technical information on BT in the single transit market? If not, please explain why.*

### Requirement to notify charges

19.153 Ofcom considers it is appropriate to retain a requirement on BT to publish any planned changes to charges in advance of those changes taking place.

#### *Aim of regulation*

19.154 Notification of changes to services at the wholesale level can further assist competition, as it means other CPs would have the opportunity to consider whether these changes require amendments to their own wholesale and retail offerings.

19.155 The notification of charges obligation at the wholesale level has the purpose to assist transparency for the monitoring of potential anti-competitive behaviour. It also provides advanced warning of charge changes to competing providers who purchase wholesale access services. The latter purpose ensures that competing providers have sufficient time to plan for such changes. Notification of changes therefore helps to ensure stability in markets.

19.156 In 2005, we set the notification period for the ST market to 90 days. At the same time, we reduced the notification periods in the LTC market to 28 days due to our view that the market was prospectively competitive. We have set out that the ST market has various levels of competition on different routes. Whilst it may therefore be appropriate to consider that on some routes shorter periods may be sufficient due



to the level of competition evident on those routes, there exist a substantial number of routes where BT does not face competition. We therefore consider that a notification period of 90 days is appropriate, since, for a large number of routes, CPs will be reliant on BT.

### *Proposed condition*

19.157 We consider that the notice should include:

- A description of the access service;
- The location of terms and conditions in the RO;
- The effective date or period from which the changes will have effect;
- The current and proposed charge and the relevant usage factors applied to each network component;
- Other charges for services that would be directly affected by the proposed change; and
- The network tariff gradient.

### *Legal tests*

19.158 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition by ensuring that providers have the necessary information to allow them to make informed decisions about competing in the relevant market.

19.159 Ofcom considers that the proposed condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers have the necessary information to allow them to make informed decisions about competing in the relevant market.

19.160 We consider that the proposed condition meets the criteria set out in section 47(2) of the Act. It is:

- objectively justifiable, because general and reliable visibility of a dominant operator's prices is needed to enable competitors to set prices for their services that are based on purchasing the regulated inputs. It also allows Ofcom and other CPs to monitor BT prices for possible anti-competitive behaviour;
- not unduly discriminatory as it is only imposed on those providers who have SMP and all providers are subject to the same obligation;
- proportionate, in that only information that other network providers would need to know in order to adjust for any changes would have to be notified. Periods are proposed to be the minimum required to allow changes to be reflected in retail offers; and
- transparent as it is clear the intention is to ensure that BT notifies those who purchase wholesale access of changes to charges, terms and conditions. The

text of the proposed condition is the same as the SMP condition AAA6(a) set for other markets which is set out at Part 2 to Schedule 1 to Annex 13 of this document.

**Question 19.9:** *Do you agree that Ofcom should impose a requirement to notify charges, terms and conditions on BT in the single transit market? If not, please explain why.*

**Question 19.10:** *Do you agree that Ofcom should impose a notification period of 90 days, or would 28 days be sufficient in this market?*

## Cost accounting

19.161 Ofcom considers that it is appropriate to retain a cost accounting obligation on BT in relation to the ST market. The cost accounting obligation will require BT to demonstrate that its charges are cost orientated on the basis of LRIC with an appropriate mark-up for the recovery of common costs, and therefore meet the cost orientation obligation. We also consider it appropriate and necessary to propose an amendment to the Notification to the 2004 Regulatory financial reporting obligations statement<sup>71</sup> ('the Financial Reporting Obligations Statement') to reflect that the conditions will continue to apply to any revised SMP finding.

19.162 Under sections 87(9) to 87(11) and 88 of the Act, appropriate cost accounting obligations may be imposed on dominant providers in respect of the provision of network access, the use of the relevant network and the availability of relevant facilities. Cost accounting rules may be made in relation to charge controls, the recovery of costs and cost orientation.

19.163 Paragraphs 19.121 to 19.127 above outline our arguments for why we propose to impose a basis of charges obligation.

19.164 BT is required to comply with obligations governing cost accounting systems and processes as set out the Financial Reporting Obligations Statement. The outputs include:

- Generic cost orientation and non-discrimination requirements:
  - Preparation of a variety of financial statements;
  - Preparation of extensive supporting documentation explaining how the financial statements have been put together;
  - Provision of an independent assurance statement;
  - Publication of most of the information; and
  - Preparation of reconciliation statements;
- Cost orientation specific requirements:

<sup>71</sup> 'The regulatory financial reporting obligations on BT and Kingston Communications, Final Statement and notification: Accounting separation and cost accounting', 22 July 2004, [http://www.ofcom.org.uk/consult/condocs/fin\\_reporting/fin\\_report\\_statement/](http://www.ofcom.org.uk/consult/condocs/fin_reporting/fin_report_statement/)

- Preparation of service level cost data (LRIC and FAC) compared to average charges;
- Preparation of costs of network components used to deliver services; and
- Analysis of service cost stack by component;
- Non-discrimination specific requirements:
  - Analysis of internal and external sales including volume data.

### *Legal tests*

19.165 Ofcom has considered the Community requirements set out in section 4 of the Act and believes that the proposed condition meets the requirements. Specifically, Section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant providers comply with cost orientation and charge control remedies implemented to promote competition.

19.166 Ofcom deems the proposed condition meets the criteria set out in section 47(2) of the Act. The obligation is:

- objectively justifiable as it relates to the need to ensure competition develops fairly, to the benefit of consumers;
- non-discriminatory as it is imposed on BT in a market where it holds SMP;
- proportionate as it is necessary as a mechanism to allow third parties sight of regulatory accounts to ensure compliance with cost orientation obligations; and
- transparent as it is clear the intention is to monitor compliance with specific remedies and the particular cost accounting requirements of BT are clearly documented.

**Question 19.11:** *Do you agree that Ofcom should impose an obligation on BT to comply with obligations governing cost accounting systems and processes as set out by Ofcom in the ST market? If not, please explain why.*

### Accounting Separation

19.167 Ofcom considers that it is appropriate to retain an accounting separation obligation on BT. The accounting separation obligation will require BT to account separately for internal and external 'sales'. The publication of this data will allow Ofcom and third party CPs to monitor the activities of BT. Whilst discrimination in favour of its own downstream business is less likely in the transit market, this data will provide transparency for CPs to monitor BT's sales activities in the ST market. We also consider it appropriate and necessary to propose an amendment to the Notification to the Financial Reporting Obligations Statement to reflect that the conditions will continue to apply to any revised SMP finding.

19.168 Under section 87(7) and 87(8) of the Act, appropriate accounting separation obligations may be imposed on the dominant provider in respect of the provision of

network access, the use of the relevant network and the availability of relevant facilities. This means that the dominant provider may be required to maintain a separation for accounting purposes between such different matters relating to network access or the availability of relevant facilities.

### *Legal tests*

19.169 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

19.170 Ofcom has considered the Community requirements set out in section 4 of the Act and believes that the proposed condition meets the requirements. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant providers do not favour their own downstream businesses, thereby disadvantaging third party CPs.

19.171 Ofcom considers the proposed condition meets the criteria set out in section 47(2) of the Act. The obligation is:

- objectively justifiable as it relates to the need to ensure competition develops fairly, to the benefit of consumers;
- non-discriminatory as BT is the only provider to hold SMP in the relevant markets;
- proportionate as it is necessary as a mechanism to allow Ofcom and third parties to monitor for discriminatory behaviour by dominant providers; and
- transparent as it is clear the intention is to monitor compliance with specific remedies and the particular accounting separation requirements of BT are clearly documented<sup>72</sup>.

19.172 The accounting separation condition would apply to BT in the ST market.

**Question 19.12:** *Do you agree that Ofcom should impose an obligation on BT to comply with obligations governing accounting separation as set out by Ofcom in the ST market? If not, please explain why.*

## **Product management, policy and planning (PPP) for Single Transit**

19.173 BT makes a product management, policy and planning (PPP) surcharge to cover its administrative costs in dealing with interconnection relationships in narrowband markets. The charge covers BT's internal costs in managing such relationships over and above the charges that it incurs for actually conveying and switching calls across its network.

19.174 Any competing provider purchasing services from BT is required to pay the PPP surcharge on a once per minute per call basis. In markets in which BT has SMP, the

<sup>72</sup> 'The regulatory financial reporting obligations on BT and Kingston Communications, Final Statement and notification: Accounting separation and cost accounting', 22 July 2004, [http://www.ofcom.org.uk/consult/condocs/fin\\_reporting/fin\\_report\\_statement/](http://www.ofcom.org.uk/consult/condocs/fin_reporting/fin_report_statement/)

surcharge therefore covers one part of BT's costs (i.e. its administrative costs) in handling such calls, in the same way as the single transit charge covers BT's costs in switching the call. Therefore, to the extent that BT maintains SMP, the competing providers have little alternative but to pay BT not only for the transit service but also to pay BT PPP. In competitive markets, competing providers could choose to purchase conveyance services from alternative providers and a portion of the charge they would pay would directly or indirectly be attributable to a function of a similar nature to BT's PPP activity.

19.175 We therefore need to consider how PPP should be regulated in the ST market. For other markets where PPP applies and we have found in this statement that BT has SMP (call origination and call termination), we have charge controlled both the service and PPP. However, in ST we do not propose a charge control for ST.

19.176 We do not consider it would be appropriate to charge control PPP in ST since we do not propose to impose a charge control on the ST service itself. However, as BT may set a higher PPP charge where there is less competition evident, we propose to oblige BT to comply with a cost orientation condition, whereby charges must be on the basis of long run incremental costs plus an appropriate mark-up for costs which are common across products, and for recovery of the cost of capital. In Annex 14, we have set out that there may be different occasions when Ofcom imposes a basis of charges obligation and the interpretation of this condition. In this particular case our interpretation would be as set out in paragraph A14.5 since we are not imposing a charge control.

19.177 Section 87(9) of the Act authorises the setting of SMP services conditions imposing on the dominant provider rules concerning the recovery of costs and cost orientation.

#### *Aim of regulation*

19.178 We have set out above that in the absence of a cost orientation obligation, BT may have the ability to charge excessive prices on at least some routes within the ST market. This would impact the cost base of competing providers who purchase ST from BT and could make it difficult for third party CPs to compete at the retail level with BT in the long term. In the ST market we consider that the guidance set out in paragraph A14.5 in Annex 14 would apply. We consider it is appropriate to apply the same approach to PPP on ST services.

#### *Legal tests*

19.179 Ofcom has considered the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and secures efficient and sustainable competition by ensuring that charges for wholesale services are at a level that enables operators to compete.

19.180 We consider that the proposed condition meets the criteria set out in section 47(2) of the Act. Ofcom considers the proposed condition is:

- objectively justifiable as it enables competitors to purchase services at charges that will enable them to develop competitive services to the benefit of consumers, while also allowing BT a return to recover common costs and cost of capital;
- not unduly discriminatory, as it is only imposed on BT and no other operator has SMP in these markets;

- proportionate as without such an obligation the price-setting behaviour of BT would not necessarily be constrained by competitive pressure, allowing it to set charges which restricted the ability of other CPs to buy wholesale products that allow them to provide competitive products to consumers; and
- transparent as it is clear the intention is to ensure that BT charges on a cost-oriented basis. The text of the proposed condition is the same as the SMP condition AAA3 set for other markets which is set out at Part 2 to Schedule 1 to Annex 13 of this document.

19.181 Ofcom has also considered the tests set out in section 88 and believes the proposed obligation is appropriate. Further to the arguments outlined above, there is a risk that, in situations where SMP is persistent, pricing will be distorted and not at competitive levels, as dominant providers are likely to want to charge excessive prices in order to maximise profits by increasing their revenues and the costs of competing providers. The proposed condition promotes efficient and sustainable competition and provides the greatest possible benefits to consumers by enabling competing providers to buy wholesale services at levels that might be expected in a competitive market.

19.182 The extent of investment of the dominant operator has been taken into account as set out in section 88(2), as the obligation provides for a mark-up for an appropriate return on capital employed.

**Question 19.13:** *Do you agree that Ofcom should impose a requirement that BT's charges should be subject to a cost orientation obligation for PPP related to the ST market? If not, please explain why.*

**Question 19.14:** *Do you agree with Ofcom's proposed interpretation of this condition as set out in Annex 14? If not, please explain why.*

## **Notification of call termination charges to be imposed on all CPs other than BT and KCOM**

19.183 As discussed in Section 12, in our March consultation we stated that several CPs had indicated to Ofcom that deregulation of BT in certain markets (in particular LTC/LTT and ST) may have a knock-on effect in the call termination market. This would arise since, in order to meet certain obligations previously imposed in these markets, BT published the call termination rates it had agreed with other CPs. This could then be used as a basis for commercial negotiations by other CPs looking to establish direct interconnection. Removal of regulation on BT may result in these rates no longer being published.

19.184 We considered whether to impose an obligation to publish rates on all providers as we were concerned that without it, providers of call termination may attempt to set different prices for some CPs. However, in the March consultation we stated that this proposal may not meet the tests set out in section 47(2) of the Act, in that it would not be proportionate to impose this regulation on all other CPs.

19.185 Further to the mixed responses we received in response to our March consultation as outlined in Section 12, we decided that it was necessary to re-consult on this issue and we now propose to introduce this regulation for all other CPs. We consider that a lack of transparent pricing may make it difficult for CPs to determine if the charges they are negotiating with another CP are fair and reasonable. This has the potential to disrupt interconnection negotiations and for disputes to be raised with Ofcom

## Implementation of the proposed obligation

- 19.186 In terms of the practicality of implementing the proposed condition, we consider that it would not be unduly onerous for CPs to publish this information on their company website. We consider this is required because without published rates, CPs will not have transparency as to the rates provided by the terminating CP and this may limit the ability of originating CPs to freely negotiate. We do not consider that reliance on BT's price list is sufficient to ensure that CPs with SMP in call termination on their own network are not able to set excessive prices for termination to some other CPs. Those CPs whom Ofcom understands would be subject to the proposed condition are listed in Annex A of Schedule 2 in Annex 13 of this document.
- 19.187 We also need to consider what, if any, notification period should be provided. Each CP could be required to provide 90 day notification. This would be consistent with that imposed on BT. Alternatively, a different approach could be imposed on these CPs.
- 19.188 Whilst consistency has its merits, we are of the view that, as CPs' termination prices are set based on those of BT (due to reciprocity), CPs would need time to react to the BT price changes. Therefore, a 90 day period would mean CPs rate changes would not be able to be made at the same time as BT changes its rates. We therefore consider that 90 days is not appropriate in this case.
- 19.189 Further, the specific competition concern we have is that a lack of transparency could arise if CPs are not required to publish their rates, and that this would make it more difficult for CPs to consider whether or not to pursue direct interconnection. Prior to interconnection, it is Ofcom's expectation that negotiations will take place on the basis of the current rates. Therefore, no notification period would be needed. Once interconnection is established, it is Ofcom's expectation that the commercial terms agreed by the two CPs would include the advance notification that should be provided for rate changes. For example, the BT standard interconnect agreement sets a period of 56 days for notification of price changes. These arrangement should be, in Ofcom's opinion, sufficient to provide notification of price changes.
- 19.190 In general, a notification of charges obligation requires the CP to also publish a reference offer setting out the terms and conditions upon which the charges are set. We do not propose to impose this condition at this time on CPs other than BT and KCOM. However, should CPs publish multiple rates or attach specific conditions other than general interconnection obligations in order to obtain a rate, we would expect these would be made available to any CP requesting them.

## Legal tests

- 19.191 Ofcom has considered its duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition by ensuring that termination rates are transparent which facilitates providers being able to negotiate interconnection in good faith in the interests of securing a positive outcome for consumers.
- 19.192 Ofcom considers the proposed condition meets the Community requirements set out in section 4 of the Act. In particular, the proposed condition promotes competition and secures efficient and sustainable competition for the maximum benefits of consumers by ensuring that providers are able to negotiate interconnection in good faith in the interests of securing a positive outcome for consumers.

19.193 We consider that the proposed condition meets the criteria set out in section 47(2) of the Act. It is:

- Objectively justifiable, because it provides visibility of key charges and ensures that negotiations for interconnection take place under the framework of SMP providers offering fair and reasonable terms;
- Not unduly discriminatory, as this condition would be imposed on all CPs other than BT and KCOM, whom are subject to similar regulation also;
- Proportionate, in that only fixed geographic call termination charges would be required to be notified and we propose to implement this in the least onerous way possible for CPs; and
- Transparent, as it is clear the intention is to ensure that all CPs provide visibility of their fixed geographic call termination prices to aid with interconnection negotiations.

**Question 19.15:** *Do you agree that Ofcom should impose a requirement for other CPs to notify their charges? If not, please explain why.*

**Question 19.16:** *Do you agree that a notification period does not need to be set by Ofcom as commercial arrangements are sufficient? If not, please explain why.*

**Question 19.17:** *Do you agree that Ofcom should not impose an obligation to impose an obligation to publish a reference offer? If not, please explain why.*



## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 16 October 2009**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at [http://www.ofcom.org.uk/consult/condocs/wnmr\\_statement\\_consultation/howtorespond1/](http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/howtorespond1/), as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [steve.perry@ofcom.org.uk](mailto:steve.perry@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Steve Perry  
Floor 4  
Competition Group  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Steve Perry on 020 7783 4151.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

### Next steps

- A1.11 Following the end of the consultation period included in this document, Ofcom intends to publish a statement in late 2009.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

### Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom  
Sutherland House  
149 St. Vincent Street  
Glasgow G2 5NW

Tel: 0141 229 7401  
Fax: 0141 229 7433

Email [vicki.nash@ofcom.org.uk](mailto:vicki.nash@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

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

Nothing Name/contact details/job title

Whole response Organisation

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

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

### DECLARATION

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

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

Name

Signed (if hard copy)

## Annex 4

## Consultation questions

## Sub heading

- A4.1 Below we list all the questions we ask in this consultation. Respondents are advised to consider the analysis included in this consultation in answering these questions.

**Question 19.1:** Do you agree with Ofcom's assessment that there are separate single transit and inter-tandem conveyance/transit markets in the UK excluding the Hull Area? If not, please explain why.

**Question 19.2:** Do you agree with Ofcom's assessment that BT has SMP in the single transit market? If not, please explain why.

**Question 19.3:** Do you agree that Ofcom should impose a requirement to provide network access on reasonable request on BT in the market? If not, please explain why.

**Question 19.4:** Do you agree that Ofcom should impose a requirement not to unduly discriminate on BT in the ST market? If not, please explain why.

**Question 19.5:** Do you agree that Ofcom should impose a requirement that BT's charges should be subject to a cost orientation obligation in the ST market? If not, please explain why.

**Question 19.6:** Do you agree with Ofcom's proposed interpretation of this condition as set out in Annex 14? If not, please explain why.

**Question 19.7:** Do you agree that Ofcom should impose a requirement to publish a reference offer on BT in the single transit market? If not, please explain why.

**Question 19.8:** Do you agree that Ofcom should impose a requirement to notify technical information on BT in the single transit market? If not, please explain why.

**Question 19.9:** Do you agree that Ofcom should impose a requirement to notify charges, terms and conditions on BT in the single transit market? If not, please explain why.

**Question 19.10:** Do you agree that Ofcom should impose a notification period of 90 days, or would 28 days be sufficient in this market?

**Question 19.11:** Do you agree that Ofcom should impose an obligation on BT to comply with obligations governing cost accounting systems and processes as set out by Ofcom in the ST market? If not, please explain why.

**Question 19.12:** Do you agree that Ofcom should impose an obligation on BT to comply with obligations governing accounting separation as set out by Ofcom in the ST market? If not, please explain why.

**Question 19.13:** Do you agree that Ofcom should impose a requirement that BT's charges should be subject to a cost orientation obligation for PPP related to the ST market? If not, please explain why.

**Question 19.14:** Do you agree with Ofcom's proposed interpretation of this condition as set out in Annex 14? If not, please explain why.

**Question 19.15:** Do you agree that Ofcom should impose a requirement for other CPs to notify their charges? If not, please explain why.

**Question 19.16:** Do you agree that a notification period does not need to be set by Ofcom as commercial arrangements are sufficient? If not, please explain why.

**Question 19.17:** Do you agree that Ofcom should not impose an obligation to impose an obligation to publish a reference offer? If not, please explain why.

## Annex 5

# Impact Assessment

## Introduction

- A5.1 The analysis presented in this annex represents an impact assessment, as defined in section 7 of the Communications Act 2003 (the Act).
- A5.2 You should send any comments on this impact assessment to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.
- A5.3 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on our website:  
[http://www.ofcom.org.uk/consult/policy\\_making/guidelines.pdf](http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf)
- A5.4 In this document we have concluded on markets considered in our consultation of 19 March 2009.
- A5.5 In addition, we are re-consulting on the single transit market and on whether to impose an obligation on CPs other than BT to publish rates for fixed geographic call termination on their networks. The analysis presented in this Annex, when read in conjunction with the rest of this document, represents an Impact Assessment ("IA"), as defined by section 7 of the Act.

## The citizen and/or consumer interest

- A5.6 For the markets reviewed in this consultation we have focused in particular in assessing which options will most effectively promote competition between providers of narrowband services, since we believe that citizens and consumers will gain the most benefit from competition in the retail market.

## Ofcom's policy objective

- A5.7 Ofcom's overarching aim in these markets is to further the interests of citizens and consumers whilst also minimising the burden of regulation. This objective is derived from Ofcom's statutory duties as set out in the Act. Under Section 3 of the Act, Ofcom's principal duties are:
- Section 3(1)(a): to further the interests of citizens in relation to communications matters; and
  - Section 3(1)(b): to further the interests of consumers in relevant markets, where appropriate by promoting competition.



- A5.8 We have placed particular emphasis on the promotion of competition, which we consider is likely to be the most effective way of furthering citizen and consumer interests in the markets under review.
- A5.9 Ofcom will always seek the least intrusive regulatory measures to achieve its policy objectives. This principle is derived from Ofcom's duty under Section 6 of the Act to minimise the burden of regulation.
- A5.10 In addressing these policy objectives, we have taken account of the following issues, which we believe are important in delivering the appropriate wholesale products in order to promote the competition at the retail level that we consider will deliver the most benefit to consumers:
- service availability: to promote the availability of services throughout the UK;
  - choice: to ensure that wherever possible consumers have a choice of supplier;
  - prices: to ensure that services are available at prices that are reasonably related to the efficient costs of supply, preferably as a result of effective competition;
  - service quality: to promote the availability of high quality services which are designed to meet consumer requirements;
  - investment and innovation: to promote efficient investment in the development of new and innovative services; and
  - access to bottleneck facilities: to ensure that bottleneck facilities and services are made available to competing service providers in a manner that is not unduly discriminatory.

### **Analysis of the different options**

- A5.11 For each of the markets where we are proposing to find SMP, the options considered are broadly as follows:
- continue with existing regulation; or
  - impose different regulation, including, where relevant, additional measures or the removal of existing regulation.
- A5.12 Where we have proposed a finding of SMP we do not consider it appropriate to consider an option of imposing no regulation, as Article 16(4) of the Framework Directive requires NRAs to impose appropriate specific regulatory obligations where it has identified an undertaking with significant market power.
- A5.13 These options have been assessed in terms of their impact on the objectives set out above. Although the markets reviewed related to the provision of wholesale services, particular emphasis has been placed on the extent to which they are likely to promote effective competition, and thereby further the interests of citizens and consumers, whilst minimising the burden of regulation.
- A5.14 Our assessment of the various options has been informed by the findings of our market analysis and SMP analysis, as set out in Section 5 to 10.

## Markets where we are proposing no SMP

A5.15 For those markets where we are not proposing to find SMP, we are obliged under the Communications Act to remove any existing remedies and impose no new ones. This market is:

- Inter-tandem conveyance and Inter-tandem transit.

A5.16 For this market we have not conducted a formal assessment of options, since the only policy option available is the removal of regulation.

## Markets where we are proposing to find SMP

### Single transit

A5.17 We are proposing that regulation in the single transit market should be amended to take account of developments in the competitive conditions that have occurred since the previous market review.

A5.18 If we did not impose any regulation in this market, BT would not have incentives to supply fit-for-purpose wholesale products at prices that would be expected in a competitive market. We consider that this may be detrimental to consumers, since it could lead to there being less choice of narrowband service providers in the retail market.

A5.19 We believe that maintaining the existing regulation would not be proportionate, because developments in the market mean that some specific obligations can be amended.

A5.20 We propose a number of remedies in this market. We discuss these, and why we think each remedy is appropriate (as opposed to not imposing the remedy) as follows:

- requirement to provide network access on reasonable request: we discuss this in paragraphs 19.1105 to 19.112;
- requirement not to unduly discriminate: we discuss this in paragraphs 19.113 to 19.123;
- basis of charges: we discuss this in paragraphs 19.124 to 19.136;
- requirement to publish a reference offer: we discuss this in paragraphs 19.137 to 19.143;
- requirement to notify technical information: we discuss this in paragraphs 19.144 to 19.152;
- requirement to notify charges: we discuss this in paragraphs 19.153 to 19.160;
- cost accounting: we discuss this in paragraphs 19.161 to 19.166; and
- accounting separation: we discuss this in paragraphs 19.167 to 19.172.

A5.21 We have also considered how to treat PPP in relation to single transit in paragraphs 19.173 to 19.182.

### Fixed geographic call termination

- A5.22 We are proposing that regulation of CPs other than BT and KCOM in the wholesale fixed geographic call termination market should be amended to take account of developments in other markets (notably the potential lack of transparency that may arise as a result of proposed changes to regulation of BT).
- A5.23 We believe that maintaining the existing regulation would not be appropriate since it could lead to competitive issues arising from CPs not having transparent access to rates offered for termination by other providers. We discuss the remedy we propose to impose to address this in paragraphs 19.186 to 19.193.

## Annex 6

## Regulatory Framework

A6.1 This Annex sets out the relevant main provisions of the legal and regulatory framework that applies to issues considered in this Explanatory Statement. In particular, the following is covered below:

- the key features and legal basis of the charge control regime;
- generally about the framework under the EC Communications Directives;
- the implementing UK legislation, the Communications Act 2003;
- the procedures and the three stages for market reviews;
- the reasons why *ex ante* regulation is needed as opposed to relying on competition law remedies;
- Ofcom's statutory Notifications of its decisions; AND
- Impact Assessments

A6.2 The present regulatory framework for electronic communications networks and services entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The basis for the regulatory framework is five EU Communications Directives (together "the Directives"):

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("Framework Directive");
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ("Access Directive");
- Directive 2002/20/EC on the authorisation of electronic communications networks and services ("Authorisation Directive");
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, ("Universal Service Directive"); and
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ("Privacy Directive").

A6.3 This framework is currently being reviewed, but the Community legislation has yet to adopt legislative proposals.

### **The Communications Act 2003**

- A6.4 The Framework Directive, the Access Directive, the Authorisation Directive and the Universal Service Directive were implemented in the United Kingdom on 25 July 2003 via the Communications Act 2003 ("the Act"). The Privacy Directive was implemented by separate regulations which came into force on 11 December 2003.
- A6.5 In particular part 2 of the Act sets out the majority of that Act's provisions that implement the Directives. Sections 32, 45-50 and 78-90 are of particular importance. Ofcom is required to act in accordance with its general and specific duties in sections 3 and 4 of the Act, respectively.
- A6.6 Under section 3, Ofcom must, in carrying out its functions further the interests of citizens in relation to communications matters and the interests of consumers in relevant markets, where appropriate by promoting competition. As to the latter Ofcom must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money. This corresponds with the policy objective in Article 8(2) of the Framework Directive.
- A6.7 Section 4 of the Act requires that Ofcom acts in accordance with the six Community requirements set out at sections 4(3) to 4(9). Where it appears to Ofcom that its general duties conflict with its section 4 duties, priority must be given to the latter.
- A6.8 Ofcom has, however, a wide measure of discretion in balancing its statutory duties and objectives including where they conflict. In doing so, Ofcom will take all relevant considerations into account, including consultation responses

### **European Commission Guidance and Recommendations**

- A6.9 As a National Regulatory Authority (NRA) Ofcom, by virtue of Article 15 of the Framework Directive, is required to take "utmost account" of the Recommendation on relevant product and services markets and Guidelines for market analysis and assessment of SMP. Further, under Article 19(1) of the Directive NRAs are required to take utmost account of recommendations on the harmonised application of the provisions of the Directive.
- A6.10 The requirement to take "utmost account" has been transposed into national law in section 79 of the Act which requires Ofcom to take "due account" of all applicable guidelines and recommendations issued by the Commission relating to market analysis or SMP determination. We have therefore referred to taking "due account" of such guidance and recommendations, but consider that the two phrases are identical.
- A6.11 Neither "Utmost account" nor "due account" is defined in the Directives or the Act.
- A6.12 Similar phrases such as "having regard to" have been considered and interpreted as meaning that the recommendation or guidance concerned is not required to be followed, nor is there a presumption that it should be followed, but where an authority seeks to depart from the recommendation or guidance it is required to give its reason for doing so and those reasons must be sufficient to show that proper consideration has been given to the recommendation or guidance and that the reasons for not following it have demonstrated that the decision reached was sound

A6.13 This is the approach that has been taken where Ofcom is required to take utmost account or due account of relevant guidance or recommendations.

### **Market Reviews**

A6.14 The Directives require National Regulatory Authorities ('NRA') to carry out reviews of competition in communications markets to ensure that regulation remains appropriate and proportionate in the light of changing market conditions.

A6.15 Each market review normally has three stages, namely:

- definition of the relevant markets;
- assessment of competition in each market, in particular whether any undertakings have SMP in a given market;
- and assessment of appropriate regulatory obligations where there has been a finding of SMP.

A6.16 The three stages will be summarised, in turn, below. More detailed requirements and guidance concerning the conduct of market reviews are provided in the EU Communications Directives, the Act and in additional documents issued by the Commission, of which Ofcom are required to have taken due account.

A6.17 Table A6.1 below indicates the relevant legislative framework for each stage.

**Table A6.1: Legislative framework**

<b>Authority / Stage of Review</b>	<b>Communications Act 2003</b>	<b>EU Communication Directives</b>	<b>Other Guidance</b>
<b>Definition of Markets</b>	s78-86 s84 (duty to review)	A15-16 Framework Directive	Commission Recommendation on Markets (2007)
<b>SMP</b>	S86 – only set on market review / no material change S78 – circumstances required for SMP conditions	A14 Framework Directive (definition : market power)	Commission SMP Guidelines (2002)
<b>Remedies</b>	S45-47 power to set condition; to whom they apply; test for setting / modifying S87-92 SMP service conditions : subject matter	A9-13 Access Directive A17-19 Universal Service Directive A16 Framework Directive	ERG Common Position on Remedies
<b>Notification</b>	S48-49; 79-80	Article 7 Framework Directive	Commission Recommendation on notifications (2008)

**Market Definition Stage**

A6.18 Section 79(1) of the Act provides that, before making a market power determination, Ofcom must identify the market, which is, in its opinion, the one which, in the circumstances of the United Kingdom, is the market in relation to which it is appropriate to consider making such a determination and to analyse that market. The procedure is set out mainly in Article 15 of the Framework Directive and sections 78 to 86 of the Act.

A6.19 Article 15(3) of the Framework Directive requires that NRAs shall, taking the utmost account of the Recommendation and SMP Guidelines published by the Commission, define the relevant markets *appropriate to national circumstances*, in particular relevant geographic markets within their territory, in accordance with the principles of competition law.

*The Recommendation on relevant product and services markets.*

A6.20 The Commission has, in accordance with Article 16 of the Framework Directive, issued a Recommendation on relevant markets where it identifies a set of product and service markets within the electronic communication sector, in which *ex ante* regulation may be warranted.

A6.21 The Recommendation seeks to promote harmonisation across the EC by ensuring that the same markets are subject to a market analysis in all Member States. NRAs are, however, able to regulate markets that differ from those identified in the

Recommendation where this is justified by national circumstances and where the Commission does not raise any objections under Article 7(4) of the Framework Directive.

- A6.22 The Commission adopted its first recommendation on 11 February 2003, defining seven retail level market and 11 wholesale level markets. Article 15(1) of the Framework Directive imposed an obligation upon the Commission to regularly review its Recommendation. The Commission reviewed the initial recommendation and, on 17 December 2007, adopted the second edition of the Recommendation, under which some markets in the 2003 Recommendation were removed or amended. The current 2007 Recommendation lists one retail level market and six wholesale level markets.
- A6.23 The removal of the market from the list published by the Commission indicates that the Commission no longer presumes that, in principle, *ex-ante* regulation is warranted for this market. This does not mean, however, that NRAs are not in a position after an analysis of the relevant market and the finding of SMP to impose regulatory remedies in these markets, should the national circumstances justify such a step and whilst taking due account of the Commission's SMP Guidelines and Recommendation.
- A6.24 Article 16 of the Framework Directive requires each national regulatory authority (NRA) to carry out an analysis of the relevant markets as soon as possible after the adoption of the recommendation on relevant product and service markets ("the Recommendation") or any updating thereof.

### **Market (SMP) Analysis Stage**

#### *General*

- A6.25 The second market review stage concerns the assessment of competition in each identified services market to decide whether any undertaking has SMP.
- A6.26 In carrying out a market analysis, the key issue for an NRA is to determine whether the market in question is effectively competitive. The 27<sup>th</sup> recital to the Framework Directive clarifies the meaning of that concept. Namely, "[it] is essential that *ex ante* regulatory obligations should only be imposed where there is not effective competition, i.e. in markets where there are one or more undertakings with significant market power, and where national and Community competition law remedies are not sufficient to address the problem".
- A6.27 Thus, Article 16 further prescribes, in effect, what regulatory action NRAs must take depending upon whether or not the market in question has been found effectively competitive. If it has, then NRAs are prohibited to impose specific (SMP) obligations and must withdraw such obligations where they exist. On the other hand, where the market is not effectively competitive, the NRAs must identify the undertakings with SMP on that market and shall impose on them appropriate obligations.
- A6.28 Under the Act, the process of designating an undertaking as having SMP is referred to as the making of a market power determination under section 79. To reflect the provisions in Article 16, there is a close link in this analysis with the imposition of remedies. This is because section 45 of the Act details the various conditions that may be set. Section 46 of the Act prescribes who those conditions may be imposed upon.



- A6.29 In relation to SMP services conditions, section 46(7) provides that they may be imposed on a particular person who is a communications provider or a person who makes associated facilities available and who has been determined to have significant market power in a “services market” (i.e. a specific market for electronic communications networks, electronic communications services or associated facilities). Accordingly, having identified the relevant market, Ofcom is required to analyse the market in order to assess whether any person or persons have SMP as defined in section 78 of the Act (Article 14 of the Framework Directive).

*Guidelines for market analysis and the assessment of SMP*

- A6.30 The Commission have also published guidelines on market analysis and the assessment of SMP (the “SMP Guidelines”). This guidance was published, in accordance with Article 15(2) of the Framework Directive, by the Commission in July 2002.

- A6.31 Oftel published its own additional guidelines on the criteria to assess effective competition. These supplement the SMP Guidelines and have been taken into account where appropriate.

- A6.32 The SMP Guidelines state:

“NRAs will assess whether the competition is effective. A finding that effective competition exists on a relevant market is equivalent to a finding that no operator enjoys a single or joint dominant position on that market.”<sup>73</sup>

- A6.33 The SMP Guidelines go on to state:

“NRAs will conduct a forward looking structural evaluation of the relevant market, based on existing market conditions. NRAs should determine whether the market is prospectively competitive, and thus whether any lack of effective competition is durable, by taking into account expected or foreseeable market developments over the course of a reasonable period. The actual period used should reflect the specific characteristics of the market and the expected timing for the next review of the relevant market by the NRA. NRAs should take past data into account in their analysis when such data are relevant to the developments in that market in the foreseeable future.”<sup>74</sup>

- A6.34 In the SMP Guidelines, the EC discusses market shares as being an indicator of market power:

“...Market shares are often used as a proxy for market power. Although a high market share alone is not sufficient to establish the possession of significant market power (dominance), it is unlikely that a firm without a significant share of the relevant market would be in a dominant position. Thus, undertakings with market shares of no more than 25 % are not likely to enjoy a (single) dominant position on the market concerned. In the Commission's decision making practice, single dominance concerns normally arise in the case of

---

<sup>73</sup> Paragraph 19

<sup>74</sup> Paragraph 20

undertakings with market shares of over 40 %, although the Commission may in some cases have concerns about dominance even with lower market shares, as dominance may occur without the existence of a large market share. According to established case law, very large market shares — in excess of 50 % — are in themselves, save in exceptional circumstances, evidence of the existence of a dominant position...”<sup>75</sup>

A6.35 However, the EC also notes that:

“It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. As mentioned above, the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power. In that regard, the following criteria can also be used to measure the power of an undertaking to behave to an appreciable extent independently of its competitors, customers and consumers. These criteria include amongst others:

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

A dominant position can derive from a combination of the above criteria, which taken separately may not necessarily be determinative.”<sup>76</sup>

---

<sup>75</sup> Paragraph 75

<sup>76</sup> Paragraphs 78-79

### ***The need for ex-ante regulation***

- A6.36 Before turning to the last stage market review stage concerning remedies, it is necessary to consider whether competition law remedies are sufficient to address the problem. This consideration is necessary to establish, in line with the abovementioned 27<sup>th</sup> recital to the Framework Directive, whether or not a market is effectively competitive. (In this context, it is to be noted that the importance of identifying that problem reappears under Article 8(4) of the Access and Interconnection Directive. This is because obligations imposed in accordance with Article 8 shall be based on the nature of the problem identified, proportionate and justified in the light of the objectives laid down in Article 8 of the Framework Directive.)
- A6.37 Ofcom's own guidelines on Impact Assessment note that we will consider the option of no regulation in its impact assessment process.

### ***Remedies Stage***

#### *Subject matter of the SMP remedies*

- A6.38 The third and final market review stage concerns remedies. As noted above, Article 16 of the Framework Directive dictates the imposition or removal of SMP remedies depending upon whether or not a finding of SMP in an identified services market has been made. Where an SMP finding has been made, Ofcom will consider what appropriate SMP remedies are available.
- A6.39 Under section 45 of the Act, Ofcom is empowered generally to set SMP services conditions authorised or required by sections 87 to 92. The latter implement Articles 9 to 13 of the Access and Interconnection Directive and Articles 17 to 19 of the Universal Service Directive. In addition, Ofcom's power to set such conditions includes additional powers specified in section 45(10), such as powers to include provisions in SMP services conditions for Ofcom to make directions in respect of specified markets.
- A6.40 The SMP obligations relevant to the markets covered by this document are discussed in Sections 11-17.
- A6.41 Section 46 of the Act provides that SMP services conditions set under section 45 may only be applied if the person to whom they are to apply is a communications provider (or a person who makes associated facilities available) and is a person whom Ofcom has determined to be a person having SMP in a services market. It is therefore important to consider the precise identity of the regulated entity on whom it is appropriate to impose obligations.

#### *SMP conditions in 'Technical Areas'*

- A6.42 In the Commissions 2003 Recommendation it was recognised that for SMP remedies to be effective in a defined market, then it would often be the case that adjacent or related remedies are applied to *technical areas* as part of the overall obligation that addresses SMP. This was set out in the explanatory memorandum to the Recommendation.

- A6.43 The Commission reviewed and updated its Recommendation in 2007. The explanatory memorandum to the recommendation confirms the principle that obligations may be set in relation to services both inside and outside a reviewed market, provided two tests are met. The two tests are:
- That the proposed obligation is the most appropriate and efficient means of remedying the lack of effective competition found on the relevant market; and
  - The proposed obligation is an essential element in support of obligation(s) imposed on the relevant SMP market without which those obligations would be ineffective.
- A6.44 This review proposes to identify interconnect circuits as a technical area, in which appropriate obligations would need to be imposed in order to ensure the effectiveness of the proposed SMP remedies in the call origination and call termination markets.

#### *Regulated entity*

- A6.45 As noted above, section 46 provides that a person to whom an SMP services condition is applied must be a 'communications provider' or a 'person' who makes associated facilities available and a 'person' who Ofcom has determined to have SMP in a specific market for electronic communications networks, electronic communications services or associated facilities (i.e. the 'services market').
- A6.46 Article 16 of the Framework Directive requires that, where an NRA determines that a relevant market is not effectively competitive, it shall identify "undertakings" with SMP on that market and impose appropriate specific regulatory obligations. For the purposes of EC competition law, "undertaking" includes companies within the same corporate group (*Viho v Commission* Case C-73/95 P [1996] ECR I-5447), for example, where a company within that group is not independent in its decision making.
- A6.47 Ofcom considers it appropriate to prevent a dominant provider to whom a SMP service condition is applied, which is part of a group of companies, exploiting the principle of corporate separation. The dominant provider should not use another member of its group to carry out activities or to fail to comply with a condition, which would otherwise render the dominant provider in breach of its obligations. In this consultation Ofcom proposes that the following providers have SMP in at least one market:
- BT;
  - KCOM; AND
  - Other Communication Providers as set out at Annex A to Schedule 3 to the Notification accompanying this consultation document.

and will define each company as including any of its subsidiaries or holding companies, or any subsidiary of such holding companies (as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989)

#### *The legal tests*

- A6.48 However, before Ofcom can set or modify SMP services conditions on such a regulated entity, it must be satisfied that certain legal tests have been satisfied in imposing the SMP condition in question.
- A6.49 In Sections 11 to 17 of this document, Ofcom sets out its reasons explaining why those tests would be satisfied based on evidence presently before Ofcom. In addition to need of satisfying the general and specific duties, the appropriateness of the remedy and identifying the nature of the competition problem mentioned above, Ofcom must satisfy a number of additional tests.
- A6.50 First, under section 47(2) of the Act, Ofcom must show for each and every SMP services condition that it is:
- *objectively justifiable* in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - *not such as to discriminate unduly* against particular persons or against a particular description of persons;
  - *proportionate* to what the condition or modification is intended to achieve; and
  - in relation to what it is intended to achieve, *transparent*.
- A6.51 Secondly, each of the tests set out in section 87(4) of the Act which Ofcom considers relevant must be satisfied. That section requires that Ofcom:
- “...must take into account, in particular, the following factors—
- (a) the technical and economic viability, having regard to the state of market development, of installing and using facilities that would make the proposed network access unnecessary;
- (b) the feasibility of the provision of the proposed network access;
- (c) the investment made by the person initially providing or making available the network or other facility in respect of which an entitlement to network access is proposed;
- (d) the need to secure effective competition in the long term;
- (e) any rights to intellectual property that are relevant to the proposal; and
- (f) the desirability of securing that electronic communications services are provided that are available throughout the member States.”
- A6.52 It is to be emphasised that this list is not exhaustive and other reasons can therefore be added by Ofcom for imposing the access obligation(s) in question.
- A6.53 Thirdly, in addition to the above-mentioned tests, Ofcom must also satisfy the tests set out in section 88 of the Act in relation to network access pricing etc. obligations, namely: price control; cost orientation and cost recovery rules; use of cost accounting system rules; obligations to adjust prices.
- A6.54 Section 88 only allows Ofcom to impose such obligations where:

- it appears to Ofcom from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion (see below for the meaning of this term); and
  - It also appears to Ofcom that the setting of the condition is appropriate for the purposes of promoting efficiency, promoting sustainable competition, and conferring the greatest possible benefits on the end-users of public electronic communications services. In considering these matters, Ofcom may have regard to the prices at which services are available in comparable competitive markets and may determine what they consider to represent efficiency by using such cost accounting methods as they think fit.
- A6.55 There is a relevant risk of adverse affects arising from price distortion if the SMP designated undertaking might fix and maintain some or all of its prices at an excessively high level, or impose a price squeeze, so as to have adverse consequences for end-users of public electronic communications services.
- A6.56 In addition, Ofcom must show that in setting the network access pricing obligation it has taken account of the extent of the SMP provider's investment in the matters to which the condition relates.
- A6.57 It is to be noted that the term "price control" has not been defined in the EC Communications Directives. The 20<sup>th</sup> recital to the Access and Interconnection Directive suggests that it could cover a range of obligations concerning prices:
- "Price control may be necessary when market analysis in a particular market reveals inefficient competition. The regulatory intervention may be relatively light, such as an obligation that prices for carrier selection are reasonable as laid down in Directive 97/33/EC, or much heavier such as an obligation that prices are cost oriented to provide full justification for those prices where competition is not sufficiently strong to prevent excessive pricing. In particular, operators with significant market power should avoid a price squeeze whereby the difference between their retail prices and the interconnection prices charged to competitors who provide similar retail services is not adequate to ensure sustainable competition. When a national regulatory authority calculates costs incurred in establishing a service mandated under this Directive, it is appropriate to allow a reasonable return on the capital employed including appropriate labour and building costs, with the value of capital adjusted where necessary to reflect the current valuation of assets and efficiency of operations. The method of cost recovery should be appropriate to the circumstances taking account of the need to promote efficiency and sustainable competition and maximise consumer benefits."
- A6.58 Article 12 of that Directive, however, expressly empowers NRAs to impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, *inter alia* in situations where the NRA considers that denial of access or unreasonable *terms and conditions* having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest, and that NRAs may attach to those obligations conditions covering fairness, reasonableness and timeliness.
- A6.59 In the light of the potential interplay between these provisions, Ofcom has addressed the section 88 test also under the requirement to provide network access on fair and reasonable terms and conditions, including charges.

### *ERG Common Position on Remedies*

- A6.60 At a plenary meeting on 18/19 May 2006, the European Regulators Group (“ERG”) adopted a revised version of its document entitled ‘Revised ERG Common Position on the approach to Appropriate remedies in the new regulatory framework’, ERG (06) 33, (the “Common Position on Remedies”).
- A6.61 That document sets out NRAs’ views on imposing remedies in a manner that contributes to the development of the internal market and ensures a consistent application of the new regulatory framework under the EC Communications Directives. .
- A6.62 Ofcom has therefore taken into account those views in proposing appropriate remedies.

### **Ofcom’s Notifications of Proposals**

#### *Public (national) consultation & notification of Ofcom’s findings*

- A6.63 Ofcom is required to give interested parties an opportunity to make representations on its proposals contained in this document. That statutory obligation to consult is set out in:
- section 49(4) of the Act in respect of any proposed directions, approvals or consents given under SMP services conditions; and
  - sections 48(2) and 80(1) of the Act in respect of any proposals on services market identifications, market power determinations and modifications to the relevant SMP services conditions, of the Act in accordance with Article 6 of the Framework Directive where the proposed draft measures have a significant impact on the relevant markets.
- A6.64 Ofcom is entitled, by virtue of section 80(2) of the Act, to publish a single notification of its proposals as to services market identifications, market power determinations and modifications to the relevant SMP services conditions. Such a notification is published at Annex 7 to this document.
- A6.65 To conclude the consultation process and in making its final decisions in respect of services market identifications, market power determinations and modifications to, as well as setting and revocation of, the relevant SMP services conditions, Ofcom is required to publish a notification under sections 48(1), 79(4) and 86 of the Act. Again, by virtue of section 79(5) of the Act, Ofcom may publish a single notification in respect of all of those matters. Subject to the outcome of our consultation Ofcom expects to publish such further notification in July 2009.

## Annex 7

## Legal Instruments

**NOTIFICATION UNDER SECTIONS 48(1) AND 79(4) OF THE COMMUNICATIONS ACT 2003****Identifying markets, making market power determinations and the setting of SMP services conditions in relation to BT, KCOM and specified Communication Providers under section 45 of the Communications Act 2003****Background**

1. On 28 November 2003, the Director General of Telecommunications ("The Director") published a *Review of the fixed narrowband line, call origination, conveyance and transit markets*<sup>77</sup>; and a *Review of fixed geographic call termination markets*<sup>78</sup>.
2. On 29 December 2003, Ofcom took over the functions and responsibilities under the Communications Act 2003 relating to the EC Communications directives from The Director.
3. On 22 July 2004, Ofcom published *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification (Accounting separation and cost accounting: Final statement and notification)*<sup>79</sup>.
4. On 30 July 2004, Ofcom published a *Review of BT's product management, policy and planning (PPP) charge*<sup>80</sup>, setting a new Significant Market Power ('SMP') services condition in relation to BT.
5. On 10 February 2005, Ofcom published *Modifications to BT's SMP services conditions AA4, BA4 and PA1*<sup>81</sup>.
6. On 18 August 2005, Ofcom published a *Review of BT's Network Charge Controls*<sup>82</sup> which reviewed the markets for local-tandem conveyance / transit and inter-tandem conveyance / transit. The review found the market for inter-tandem conveyance / transit to be competitive, determining that BT no longer had SMP in the market, and SMP conditions relating to that market were therefore revoked. Further SMP conditions were set for a four year charge control period.

<sup>77</sup> *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, 28 Nov 2003 ([http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/nwe/](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/))

<sup>78</sup> *Review of fixed geographic call termination markets*, 28 Nov 2003, ([http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/Eureviewfinala1.pdf](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/Eureviewfinala1.pdf))

<sup>79</sup> *The regulatory financial reporting obligations on BT and Kingston Communications, Final Statement and notification: Accounting separation and cost accounting*, 22 July 2004, [http://www.ofcom.org.uk/consult/condocs/fin\\_reporting/fin\\_report\\_statement/](http://www.ofcom.org.uk/consult/condocs/fin_reporting/fin_report_statement/)

<sup>80</sup> *Review of BT's product management, policy and planning charge*, 30 July 2004 ([http://www.ofcom.org.uk/consult/condocs/rev\\_bt\\_pm/statement/statement.pdf](http://www.ofcom.org.uk/consult/condocs/rev_bt_pm/statement/statement.pdf))

<sup>81</sup> *Consents to disapply BT's SMP services conditions that require the notification of charges, terms and conditions and technical information in respect of certain products and processes relating to LLU and LLU backhaul*, 10 Feb 2005, ([http://www.ofcom.org.uk/consult/condocs/dissmpbt/expl\\_sn/llusmp\\_explsn.pdf](http://www.ofcom.org.uk/consult/condocs/dissmpbt/expl_sn/llusmp_explsn.pdf))

<sup>82</sup> *Review of BT's Network Charge Controls*, 18 Aug 2005 (<http://www.ofcom.org.uk/consult/condocs/charge/statement/>)



7. On 19 March 2009, Ofcom published a *Review of the wholesale fixed narrowband markets*<sup>83</sup>, a consultation on proposals reviewing market definitions, market analyses and, where appropriate, the setting of SMP services conditions.

8. This Notification relates to decisions made following consultation on the proposals referred to in paragraph 7 above. However, Ofcom is not, in this Notification, making decisions in relation to the following, previously defined, markets:

(a) for the United Kingdom, except the Hull Area:

- (i) inter-tandem conveyance and transit on fixed public narrowband networks;
- (ii) single tandem transit on fixed public narrowband networks; and
- (iii) wholesale ISDN30 exchange line services;

(b) for the Hull Area:

- (i) wholesale ISDN30 exchange line services.

9. Ofcom will further consult on proposals for the markets set out in paragraphs 8(a) and 8(b). Existing market definitions, market power determinations and conditions will remain in force for these markets.

10. SMP service conditions<sup>84</sup> for the markets set out in paragraphs 8(a)(ii), (iii) and 8(b)(i) will remain in force unless specifically withdrawn in this Notification.

### **Decisions on market definition and market power analysis**

11. Ofcom hereby makes, in accordance with sections 48(1) and 79 of the Communications Act 2003 (the “Act”), the following decisions identifying markets, making market power determinations and setting SMP services conditions by reference to such determinations (“SMP conditions”).

12. Ofcom has decided to identify the following markets for the purpose of making market power determinations:

(a) for the United Kingdom, except the Hull Area:

- (i) wholesale analogue exchange line services;
- (ii) wholesale ISDN2 exchange line services;
- (iii) wholesale call origination on a fixed narrowband network;
- (iv) local-tandem conveyance and transit on fixed public narrowband networks; and

(b) for the Hull Area:

- (i) wholesale analogue exchange line services;
- (ii) wholesale ISDN2 exchange line services;
- (iii) wholesale call origination on a fixed narrowband network; and

---

<sup>83</sup> [http://www.ofcom.org.uk/consult/condocs/review\\_wholesale/](http://www.ofcom.org.uk/consult/condocs/review_wholesale/)

<sup>84</sup> SMP conditions set in the Notification to *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, published on 28 Nov 2003, as amended.

(c) for the United Kingdom:

(i) wholesale fixed geographic call termination on each individual network.

13. Ofcom has decided to make market power determinations that the following persons have significant market power:

- (a) in relation to each of the markets set out in paragraph 12(a)(i) to (iii) above, BT;
- (b) in relation to each of the markets set out in paragraph 12(b) above, KCOM;
- (c) in relation to the market set out in paragraph 12(c) above, BT, KCOM and the operators set out at Annex A to Schedule 3 of this Notification (the extent of each person's public telephone network to constitute a separate market for the purposes of this Notification).

14. Ofcom has decided that the market set out in paragraph 12(a)(iv) above is effectively competitive and, therefore has determined that BT is no longer a person with SMP in that market .

### **Decisions to set SMP service conditions**

15. Ofcom has decided to set SMP conditions on the persons referred to in paragraphs 13(a), (b) and (c) above as set out in Schedules 1, 2 and 3, respectively, to this Notification.

16. The effect of, and Ofcom's reasons for making, the decisions identifying the markets set out in paragraph 12 above and for making the market power determinations set out in paragraphs 13 and 14 above are contained in the case of the markets set out in:

- (a) paragraphs 12(a)(i), 12(a)(ii), and 12(b)(i), 12(b)(ii), in Section 5 of the statement accompanying this Notification;
- (b) paragraphs 12(a)(iii) and 12(b)(iii), in Section 6 of the statement accompanying this Notification;
- (c) paragraph 12(a)(iv), in Section 8 of the statement accompanying this Notification;
- (d) sub-paragraph 12(c)(i), in Section 7 of the statement accompanying this Notification.

17. The effect of, and Ofcom's reasons for making, the decisions to set the SMP conditions set out in Schedules 1, 2 and 3 to this Notification are contained in Sections 11 to 17 of the statement accompanying this Notification.

### **Decision to revoke SMP service conditions**

*Revocations for exchange line services markets (except for ISDN30), call origination and call termination markets*

18. Ofcom has decided to revoke existing SMP service conditions, as detailed in paragraph 19, below, in so far as they relate to the following markets:

- (a) in relation to BT only, the markets set out at paragraphs 12(a)(i), 12(a)(ii), 12(a)(iii);
- (b) in relation to KCOM only, the markets set out at paragraphs 12(b)(i), 12(b)(ii), 12(b)(iii);
- (c) the market set out at paragraph 12(c)(i).

19. The SMP conditions referred to in paragraph 18, above, are as follows:

- (a) The conditions (as modified)<sup>85</sup> set out at Annex A of the Notification to the *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, published by the Director on 28 November 2003;
- (b) The conditions (as modified)<sup>86</sup> set out at Annex B of the Notification to the *Review of fixed geographic call termination markets* published by the Director on 28 November 2003;
- (c) Condition PA1 as set out in Schedule 2 of the Notification to the *Review of BT's product management, policy and planning (PPP) charge* published by Ofcom on 30 July 2004.

20. The revocations set out in paragraphs 18 and 19, above, shall take effect on the publication of this Notification.

*No revocations on single transit market or ISDN30 market*

21. For the avoidance of doubt, Ofcom is not revoking any SMP service condition in relation to the markets referred to at paragraphs 8(a) and 8(b).

*Revocations for local-tandem conveyance / transit market*

22. Ofcom has further decided to revoke the following SMP service conditions previously set in relation to the market set out at paragraph 12(a)(iv);

- (a) conditions AA1(b) and AA3 (as modified)<sup>87</sup> set out at Annex A of the Notification to the *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, published by the Director on 28 November 2003;
- (b) condition AA4(c), as set out in schedule 2 of Annex 3 to the Notification to the *Review of BT's Network Charge Controls*;
- (c) conditions AA1(a), AA2, AA5, AA6(a), AA6(b), AA7, AA10 (as modified)<sup>88</sup> set out at Annex A to the Notification of the *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, published by the Director on 28 November 2003;
- (d) conditions (as modified)<sup>89</sup> set out at Annex 2 of the Notification to *The regulatory financial reporting obligations on BT and Kingston Communications*, published on 22 July 2004.

23. The revocations set out at paragraph 22 shall take effect as follows:

- (a) in relation to those conditions set out at paragraph 22(a), above, on the publication of this Notification;
- (b) in relation to those conditions set out at paragraph 22(b) above, on 1 January 2010;

---

<sup>85</sup> The SMP conditions set in the November 2003 reviews (footnotes 1 and 2 above), have been amended from time to time. The revocation of the substantive conditions includes any amendment that has subsequently been made to those conditions.

<sup>86</sup> As for footnote 9 above

<sup>87</sup> As for footnote 9 above.

<sup>88</sup> As for footnote 9 above.

<sup>89</sup> The SMP conditions set in the July 2004 Financial Reporting Obligations Statement have been amended from time to time. The revocation of the substantive conditions in relation to the LTC/LTT market includes any amendment that has subsequently been made to those conditions for that market.

- (c) in relation to those conditions set out at paragraph 22(c) above, on 15 September 2010; and
- (d) in relation to those conditions set out at paragraph 22(d) above, on 31 July 2010.

24. The effect of, and Ofcom's reasons for making, the proposals to revoke SMP conditions set out in paragraphs 18 to 23 above are contained in section 18 of the consultation document accompanying this Notification.

#### **Amendment of SMP service conditions**

25. Ofcom has decided to amend Annex 2 to *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification* dated 22 July 2004 setting further SMP conditions on BT in relation to regulatory accounting in respect of various markets (as amended), by removing reference;

- (a) in paragraph 4(a)(i) to markets 3 and 8;
- (b) in paragraph 4(a)(ii) to market 2.

26. Ofcom has decided to further amend Annex 2 to *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification* dated 22 July 2004 (as amended), by amending the table, "Part 1: Wholesale Markets" of Schedule 1 to the Annex as follows:

- (a) by removing the reference to "Wholesale residential analogue exchange line services in the UK excluding the Hull Area" to be replaced with "Wholesale analogue exchange line services in the UK excluding the Hull Area" and removing the reference to "28.11.03" and replacing it with "15.09.09" (Market 1 in the 2004 Notification);
- (b) by removing the reference to "Wholesale residential ISDN2 exchange line services in the UK excluding the Hull Area" (Market 2 in the 2004 Notification);
- (c) by removing the reference to "Wholesale business analogue exchange line services in the UK excluding the Hull Area" (Market 3 in the 2004 Notification);
- (d) by removing the reference to "Wholesale business ISDN2 exchange line services in the UK excluding the Hull Area" to be replaced with "Wholesale ISDN2 exchange line services in the UK excluding the Hull Area" (Market 4 in the 2004 Notification);
- (e) by removing the reference to "Call origination on the fixed public telephone networks in the UK excluding the Hull Area" to be replaced with "Wholesale call origination on a fixed narrowband network, in the UK excluding the Hull Area" (Market 6 in the 2004 Notification);
- (f) by amending the reference to "Local-tandem conveyance and transit on fixed public telephone networks in the UK excluding the Hull Area" (Market 7 in the 2004 Notification) by adding the following text "(SMP conditions in Schedule 2 to be revoked from 31.07.10 for this market)" and entering the date "18.08.05" in the date column; and
- (g) by removing the reference to "Fixed geographic call termination provided by BT" to be replaced with "Wholesale fixed geographic call termination on each individual network provided by BT" and removing the reference to "28.11.03" and replacing it with "15.9.09" (Market 10 in the 2004 Notification).

27. Ofcom has decided to amend Annex 3 to *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification* dated 22 July 2004 setting further SMP conditions on KCOM in relation to regulatory accounting in respect of various markets (as amended), by removing reference;

- (a) in paragraph 4(a)(i) to market 3;
- (b) in paragraph 4(a)(ii) to market 2.

28. Ofcom has decided to further amend Annex 3 to *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification* dated 22 July 2004, by amending the table "Part 1: Wholesale Markets" of Schedule 1 to the Annex as follows:

- (a) by removing the reference to "Wholesale residential analogue exchange line services in the Hull Area" to be replaced with "Wholesale analogue exchange line services in the Hull Area" and removing the reference to "28.11.03" and replacing it with "15.9.09" (Market 1 in the 2004 Notification);
- (b) by removing the reference to "Wholesale residential ISDN2 exchange line services in the Hull Area" (Market 2 in the 2004 Notification);
- (c) by removing the reference to "Wholesale business analogue exchange line services in the Hull Area" (Market 3 in the 2004 Notification);
- (d) by removing the reference to "Wholesale business ISDN2 exchange line services in the Hull Area" to be replaced with "Wholesale ISDN2 exchange line services in the Hull Area" (Market 4 in the 2004 Notification);
- (e) by removing the reference to "Call origination on the fixed public telephone networks in the Hull Area" to be replaced with "Wholesale call origination on a fixed narrowband network, in Hull Area" (Market 6 in the 2004 Notification); and
- (f) by removing the reference to "Fixed geographic call termination provided by Kingston" to be replaced with "Wholesale fixed geographic call termination on each individual network provided by KCOM" and removing the reference to "28.11.03" and replacing it with "15.9.09" (Market 10 in the 2004 Notification).

29. Ofcom has decided that, in relation to the service markets set out at paragraph 12 of this Notification, by reference to the market power determinations set out at paragraph 13 of this Notification, the following SMP services conditions, as set out in the *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification* dated 22 July 2004, continue to apply:

- (a) in relation to BT, those conditions referred to at paragraph 4 of Annex 2 in relation to the wholesale markets numbered 1, 3, 4, 5, 6 and 10 (as amended), as specified in Schedule 2 to that Annex;
- (b) in relation to KCOM, those conditions referred to at paragraph 4 of Annex 3 in relation to the wholesale markets numbered 1, 4, 5, 6 and 7 (as amended), as specified in Schedule 2 to that Annex.

30. Additionally, and for the avoidance of doubt, in relation to BT the SMP service conditions referred to at paragraph 4 of Annex 2 of *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification* dated 22

July 2004 will continue to apply in relation to wholesale market number 7 (local-tandem conveyance and transit) until such time that they are revoked in accordance with paragraphs 22 and 23 above.

31. The effect of, and Ofcom's reasons for making, the proposals to amend SMP conditions set out in paragraphs 25 to 30 above are contained in Section 18 of the consultation document accompanying this Notification.

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

32. In identifying and analysing the markets referred to above, 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 a Community instrument, and relate to market identification and analysis or the determination of what constitutes significant market power.

33. Ofcom considers that the SMP conditions referred to in paragraph 15 above comply with the requirements of sections 45 to 47, 87, 88 and 90 of the Act, as appropriate and relevant to each such SMP condition.

34. In making all of the decisions referred to in paragraphs 11 to 31 of 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.

35. Copies of this Notification and the accompanying consultation document have been sent to the Secretary of State for Business, Innovation and Skills in accordance with sections 50(1)(a) and 81 of the Act, as well as the European Commission and to the regulatory authorities of every other Member State in accordance with sections 50(2) and 81 of the Act.

### **Interpretation**

36. Save as to referring to markets identified in paragraphs 8 and 12 of this Notification and except as otherwise defined in paragraph 37 of this Notification, words or expressions used shall have the same meaning as they have been ascribed in the Act.

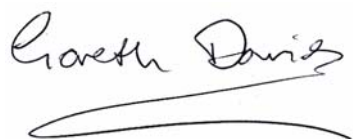
37. In this Notification:

(a) **"the Act"** means the Communications Act 2003 (c. 21);

(b) **"BT"** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

(c) **"Hull Area"** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communication (Hull) plc.

(d) **"KCOM"** 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 by section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

A handwritten signature in dark ink, reading 'Gareth Davies', with a long, sweeping horizontal line underneath.

Gareth Davies  
Competition Policy Director

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

**15 September 2009**

## SCHEDULE 1

**The SMP services conditions imposed on BT under sections 45, 87, 88 and 90 of the Communications Act 2003 as a result of the analysis of the markets set out in paragraph 12(a) of the Notification in each of which it is decided that BT has significant market power (“SMP conditions”)**

### **Part 1: Application, definitions and interpretation relating to the SMP conditions in Part 2**

1. The SMP conditions in Part 2 of this Schedule 1 shall, except insofar as it is otherwise stated therein, apply to each and all of the markets set out in paragraph 12(a)(i), 12(a)(ii) and 12(a)(iii) of the Notification and to Interconnection Circuits.
2. In this Schedule 1:
  - (a) **“Act”** means the Communications Act 2003 (c. 21);
  - (b) **“Access Charge Change Notice”** has the meaning given to it in Condition AAA6(a).2;
  - (c) **“Access Contract”** means:
    - (i) a contract for the provision by the Dominant Provider to another person of Network Access to the Dominant Provider’s Electronic Communications Network;
    - (ii) a contract under which Associated Facilities in relation to the Dominant Provider’s Public Electronic Communications Network are made available by the Dominant Provider to another person;
  - (d) **“Call Origination Services”** mean any and all of the following specific services provided by the Dominant Provider and covered by Condition AAA1(a):
    - (i) call origination (including operator assistance and emergency intermediate services); and
    - (ii) call origination (including emergency intermediate services);
  - (e) **“Carrier Pre-selection”** means a facility which allows a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network to select which Pre-selected Provider of such Services provided wholly or partly by means of that Network is the Pre-selected Provider he wishes to use to carry his calls by designating in advance the selection that is to apply on every occasion when there has been no selection of Provider by use of a Telephone Number;
  - (f) **“Carrier Selection Interconnection Facilities”** means those facilities for Interconnection which enable a provider of a Public Telephone Network to provide Indirect Access to the Subscribers of the Dominant Provider;
  - (g) **“Condition AAA4”** includes reference to any SMP services charge control condition made with the prefix AAA4, that may from time to time be in force.
  - (h) **“CSI”** means customer sited Interconnection;
  - (i) **“Directory”** means a printed document containing Directory Information on Relevant Subscribers of Publicly Available Telephone Services in the United Kingdom which is made available to members of the public;



(j) “**Directory Information**” means, in the case of a Directory, the name and address of the Relevant Subscriber and the Telephone Number assigned to the Relevant Subscriber for his use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Relevant Subscriber or information that such a Telephone Number of the Relevant Subscriber may not be supplied;

(k) “**Directory Enquiry Facility**” means Directory Information provided by means of a Public Telephone Network;

(l) “**Dominant Provider**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

(m) “**Exchange Line**” means Apparatus comprised in the Dominant Provider’s Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;

(n) “**Existing Line Transfer**” means the combination of transactions consisting of a customer (including but not limited to a customer who is a provider of a Public Electronic Communications Service) of the Dominant Provider for an Exchange Line terminating his contract (‘the customer contract’) with the Dominant Provider for the Exchange Line, and the Dominant Provider entering into a contract for that Exchange Line with a provider of a Public Electronic Communications Service (‘the Third Party contract’), except where the Third Party contract is entered into after the Dominant Provider has ceased the Exchange Line (in which case the Third Party contract shall be deemed to be a New Line Installation);

(o) “**IEC**” means Interconnection extension circuits;

(p) “**Indirect Access**” means a facility which allows a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network to select which such Service provided wholly or partly by means of that Network is the service he wishes to use by the use of a Telephone Number on each separate occasion on which a selection is made;

(q) “**Interconnection Circuits**” mean any and all of the following specific services provided by the Dominant Provider and covered by Condition AAA1(a):

- (i) standard CSI connection;
- (ii) standard CSI rental – fixed;
- (iii) standard CSI rental – per km;
- (iv) high performance CSI connection
- (v) high performance CSI rental – fixed;
- (vi) high performance CSI rental – per km;
- (vii) ISI connection;
- (viii) ISI rental per 100m;
- (ix) IEC connection;
- (x) IEC rental – fixed;
- (xi) IEC rental per km;
- (xii) intra-building circuits connection;
- (xiii) intra-building circuits rental;
- (xiv) rearrangements;

- (xv) path protection connection per 34Mbit/s;
- (xvi) path protection connection per 140Mbit/s;
- (xvii) path protection rental per 34Mbit/s; and
- (xviii) path protection rental per 140Mbit/s;

(r) “**ISDN**” means the integrated services digital network which is an Electronic Communications Network evolved from the telephony integrated digital network that provides for digital end-to-end connectivity to support a wide range of Public Electronic Communications Services, including voice and non-voice services, to which End-users have access by a limited set of standard multipurpose customer interfaces;

(s) “**ISI**” means in-span Interconnection links;

(t) “**Local Exchange**” means a telephone exchange to which Customers are connected, usually via a remote or locally sited concentrator unit, which telephone exchange supports the provision of either analogue or digital Exchange Lines;

(u) “**Net Retail Call Revenue**” means the retail revenue for calls, excluding VAT and after any applicable discounts;

(v) “**Network Component**” means, to the extent they are used in the Services Market, the network components specified in any direction given by Ofcom from time to time for the purpose of these SMP conditions.

(w) “**Network Termination and Testing Apparatus**” means an item of Apparatus comprised in an Electronic Communications Network installed in a fixed position on Served Premises which enables:

- (a) Approved Apparatus to be readily connected to, and disconnected from, the network;
- (b) the conveyance of Signals between such Approved Apparatus and the Network
- (c) the due functioning of the Network to be tested,

but the only other functions of which if any are:

- (i) to supply energy between such Approved Apparatus and the Network;
- (ii) to protect the safety or security of the operation of the Network;
- (iii) to enable other operations exclusively related to the running of the network to be performed or the due functioning of any system to which the network is or is to be connected to be tested (separately or together with the network).

(x) “**Network Termination Point**” means the physical point at which a Relevant Subscriber is provided with access to a Public Electronic Communications Network and, where it concerns Electronic Communications Networks involving switching or routing, that physical point is identified by means of a specific network address, which may be linked to the Telephone Number or name of a Relevant Subscriber. Where a Network Termination Point is provided at a fixed position on Served Premises, it shall be within an item of Network Termination and Testing Apparatus;

(y) “**New Line Installation**” means a service for the installation of an Exchange Line, where some or all external (or internal) wiring has to be provided, or brought into use, by the Dominant Provider. For purposes of this definition, “external wiring” means wiring from the distribution point to the protection box (or where one would be fitted) at the premises at which the Network Termination and Testing Apparatus is located and “internal wiring” means

wiring from the protection box up to and including the first main socket, block terminal or other Network Termination Point;

(z) “**NTS**” means number translation services;

(aa) “**NTS Calls**” means a call to a number identified in the Numbering Plan for the United Kingdom as a Special Services number or a Special Services at a Premium Rate number, or a Sexual Entertainment Services at a Premium Rate including calls to 0500 Freephone numbers and numbers identified as Special Services numbers in table 5 of the Annex to General Condition 17 but excluding calls to 0844 04 numbers for Surftime Internet access services and calls to 0808 99 numbers for FRIACO;

(bb) “**NTS Call Origination**” means originating NTS Calls and retailing those NTS Calls to the End-User on behalf of the Third Party who has requested NTS call origination;

(cc) “**NTS Retail Uplift**” means the charge for retailing NTS Calls to the End-User;

(dd) “**Numbering Plan**” means the National Telephone Numbering Plan published from time to time by the Director pursuant to sections 56 and 60 of the Act 2003;

(ee) “**Ordinary Maintenance**” means maintenance which is part of the service provided by the Dominant Provider in consideration of the charge for an Exchange Line and includes normal fault repair, as defined in the Dominant Provider's standard terms and conditions;

(ff) “**Point of Connection**” means a point at which the Dominant Provider's Electronic Communications Network and another person's Electronic Communications Network are connected;

(gg) “**Premium Rate Service**” means a service as defined in the Numbering Plan for the United Kingdom as a Special Service at a Premium Rate;

(hh) “**Pre-selected Provider**” means a provider of a Public Telephone Network who has notified the Dominant Provider that it is able and willing to provide Carrier Pre-selection to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services;

(ii) “**Public Pay Telephone**” means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or pre-payment cards, including cards for use with dialling codes;

(jj) “**Public Telephone Network**” means an Electronic Communications Network which is used to provide Publicly Available Telephone Services; it supports the transfer between Network Termination Points of speech communications, and also other forms of communication, such as facsimile and data;

(kk) “**Publicly Available Telephone Services**” means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End-users with disabilities or with special social needs and/or the provision of non-geographic services;

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

(mm) “**Relevant Calls**” means all calls which originate on the Dominant Provider’s Public Electronic Communications Network and which are of a type which are available for selection in accordance with the Carrier Pre-selection Functional Specification by a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network;

(nn) “**Relevant Subscriber**” means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such Services;

(oo) “**Services Market**” means each and all of the markets set out in paragraphs 12(a)(i), 12(a)(ii) and 12(a)(iii) of the Notification;

(pp) “**Subscriber**” means any person who is party to a contract with the provider of Publicly Available Telephone Services for the supply of such Services in the United Kingdom;

(qq) “**Tandem Exchange**” means a telephone exchange whose primary function is not to support the provision of Exchange Lines but to switch traffic between other telephone exchanges in a Public Electronic Communications Network;

(rr) “**Third Party**” means either:

- (i) a person providing a Public Electronic Communications Network; or
- (ii) a person providing a Public Electronic Communications Service;

(ss) “**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 Services Market and the use of Network Components in that Services Market;

(tt) “**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;

(uu) “**Wholesale Analogue Line Rental**” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an analogue Exchange Line;

(vv) “**Wholesale ISDN2 Line Rental**” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an ISDN2 Exchange Line ;

(xx) “**Wholesale ISDN30 Line Rental**” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an ISDN30 Exchange Line;

(yy) “**Wholesale Line Rental**” means any and all of the following provided by the Dominant Provider:

- (i) Wholesale Analogue Line Rental;
- (ii) Wholesale ISDN2 Line Rental; and

(zz) **“Wholesale Line Rental Charge”** means the annual charge levied by the Dominant Provider for Wholesale Line Rental including packages containing a line rental charge and any included levels of service sold as part of a single marketed product.

(aaa) **“Wholesale Line Rental Per Customer Line Set-up Costs”** means the costs incurred by the Dominant Provider in providing Wholesale Line Rental Per Customer Line Set-up Facilities;

(bbb) **“Wholesale Line Rental Per Customer Line Set-up Facilities”** means the Wholesale Line Rental facilities required from the Dominant Provider by a Third Party in order for the Third Party to be able to set up Wholesale Line Rental on the Exchange Line of a Subscriber to whom the Dominant Provider provides a Publicly Available Telephone Service by means of a Public Telephone Network;

(ccc) **“Wholesale Line Rental Per Provider On-going Costs”** means the costs incurred by the Dominant Provider in providing Wholesale Line Rental Per Provider On-going Facilities;

(ddd) **“Wholesale Line Rental Per Provider On-going Facilities”** means those Wholesale Line Rental facilities required from the Dominant Provider by any individual Third Party which enable the Third Party to continue on an on-going basis to offer Wholesale Line Rental to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as product management;

(eee) **“Wholesale Line Rental Per Provider Set-up Costs”** means the costs incurred by the Dominant Provider in providing Wholesale Line Rental Per Provider Set-up Facilities;

(fff) **“Wholesale Line Rental Per Provider Set-up Facilities”** means those Wholesale Line Rental facilities required from the Dominant Provider by any individual Third Party in order for the Third Party to be able to offer Wholesale Line Rental to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as the setting up of arrangements for the electronic transfer of customer orders;

(ggg) **“Wholesale Line Rental Services”** means any and all of the following specific services provided by the Dominant Provider:

- (i) Wholesale Analogue Line Rental (residential quality of service);
- (ii) Wholesale Analogue Line Rental (business quality of service);
- (iii) Existing Line Transfer of a single analogue Exchange Line or multiplexes thereof (residential quality of service);
- (iv) Existing Line Transfer of a single analogue Exchange Line or multiplexes thereof (business quality of service);
- (v) New Line Installation (analogue) (residential quality of service); and
- (vi) New Line Installation (analogue) (business quality of service);

(hhh) **“Wholesale Line Rental System Set-up Costs”** means the costs incurred by the Dominant Provider in developing and implementing Wholesale Line Rental System Set-up Facilities; and

(iii) **“Wholesale Line Rental System Set-up Facilities”** means those Wholesale Line Rental Facilities required by the Dominant Provider in order for the Dominant Provider to be able to provide Wholesale Line Rental facilities, such as the software and any alterations needed on the Dominant Provider's switches and the modifications required for the Dominant Provider's support systems.

3. For the purpose of interpreting the SMP conditions in Part 2:
  - (a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 of this Part above and otherwise any word or expression shall have the same meaning as it has in the Act;
  - (b) the Interpretation Act 1978 (c. 30) shall apply as if each of the SMP conditions in Part 2 were an Act of Parliament; and
  - (c) headings and titles shall be disregarded.

## **Part 2: The SMP conditions**

### **Condition AAA1(a) - Requirement to provide Network Access on reasonable request**

**AAA1(a).1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

**AAA1(a).2** The provision of Network Access in accordance with paragraph AAA1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**AAA1(a).3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA1(a).

**AAA1(a).4** The Direction made in the document 'BT's use of Cancel Other' published on 28 July 2005, shall continue to have force for the purposes of this Condition from the date that this Condition AAA1(a) enters force.

### **Condition AAA1(b) - Requests for new Network Access**

**AAA1(b).1** The Dominant Provider shall, for the purposes of transparency, publish reasonable guidelines, in relation to requests for new Network Access made to it. Such guidelines shall detail:

- (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 new Network Access; and
- (c) the time-scales in which such requests will be handled by the Dominant Provider.

**AAA1(b).2** These guidelines shall meet the following principles:

- (a) the process should 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; and
- (e) any changes to the guidelines be agreed between BT and industry.

**AAA1(b).3** The Dominant Provider shall, upon a reasonable request from a Third Party considering making a request for new Network Access, provide that Third Party with information so as to enable that Third Party to make a request for new Network Access. Such information shall be provided within a reasonable period.

**AAA1(b).4** On receipt of a written request for new Network Access, the Dominant Provider shall deal with the request in accordance with the guidelines described at paragraph AAA1(b).1 above. A modification of a request for new Network Access which has previously been submitted to the Dominant Provider, and rejected by the Dominant Provider, shall be considered as a new request.

**AAA1(b).5** The Dominant Provider is required to provide Ofcom with a description of the processes it has put in place to ensure compliance with this Condition AAA1(b). The Dominant Provider shall keep those processes under review to ensure that they remain adequate for that purpose. Where changes to the process are agreed with industry, BT should notify Ofcom of those changes.

### **Condition AAA2 - Requirement not to unduly discriminate**

**AAA2.1** The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

**AAA2.2** 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 at a competitive disadvantage persons competing with the Dominant Provider.

### **Condition AAA3 - Basis of charges**

**AAA3.1** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

**AAA3.2** For the avoidance of any doubt, where the charge offered, payable or proposed for Network Access covered by Condition AAA1(a) is for a service which is subject to a charge control under Condition AAA4, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that such a charge satisfies the requirements of paragraph AAA3.1 above.

**AAA3.3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA3.

### **Condition AAA5 - Requirement to publish a Reference Offer**

**AAA5.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.

**AAA5.2** Subject to paragraph AAA5.8 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes 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 the Network Access);
- (b) the locations of the points of Network Access;
- (c) the technical standards for Network Access (including any usage restrictions and other security issues);
- (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);



- (e) any ordering and provisioning procedures;
  - (f) relevant charges, terms of payment and billing procedures;
  - (g) details of interoperability tests;
  - (h) details of traffic and network management;
  - (i) details of maintenance and quality as follows:
    - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
    - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
    - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
    - (iv) a definition and limitation of liability and indemnity; and
    - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
  - (j) details of measures to ensure compliance with requirements for network integrity;
  - (k) details of any relevant intellectual property rights;
  - (l) a dispute resolution procedure to be used between the parties;
  - (m) details of duration and renegotiation of agreements;
  - (n) provisions regarding confidentiality of non-public parts of the agreements;
  - (o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);
  - (p) the standard terms and conditions for the provision of Network Access;
  - (q) in relation to those products and services subject to Conditions AAA3 and AAA4, the amount applied to:
    - (i) each Network Component used in providing Network Access with the relevant Usage Factors; and
    - (ii) the Transfer Charge for each Network Component or combination of Network Components described above,
- reconciled in each case to the charge payable by a Communications Provider other than the Dominant Provider.

**AAA5.3** In relation to those products and services subject to Conditions AAA3 and AAA4, 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 Third Party; or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party,

in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other 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 paragraphs AAA5.2(a) to (q) above.

**AAA5.4** The Dominant Provider shall update and publish the Reference Offer in relation to any amendments or in relation to any further Network Access provided after the date this Condition AAA5 enters into force.

**AAA5.5** Publication referred to above shall be effected by:

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

**AAA5.6** 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 which have been requested).

**AAA5.7** The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

**AAA5.8** The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.

**AAA5.9** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA5.

#### **Condition AAA6(a) - Requirement to notify charges**

**AAA6(a).1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below.

**AAA6(a).2** Except where new or amended charges are directed or determined by Ofcom or where such charges are required by a notification or an enforcement notification given by Ofcom under sections 94 or 95 of the Act, the Dominant Provider shall send to Ofcom and to every Third Party with which it has entered into an Access Contract covered by Condition AAA1(a) a written notice of any amendment to the charges on which it provides Network Access or in relation to any charges for new Network Access (an "Access Charge Change Notice"):

- (a) in the case of the market set out in paragraph 12(a)(iii) of this Notification and Interconnection Circuits, not less than 90 days before any such amendment comes into effect

(b) in the case of the markets set out in paragraphs 12(a)(i) and 12(a)(ii) of this Notification, where the proposed amendment relates to the Wholesale Line Rental Charge, not less than 90 days before any such amendment comes into effect

(c) in any other case, not less than 28 days before any such amendment comes into effect.

**AAA6(a).3** 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;

(c) the date on which or the period for which any amendments to charges will take effect (the "effective date");

(d) in relation to those products and services subject to Conditions AAA3 and AAA4, the current and proposed new charge and the relevant Usage Factors applied to each Network Component comprised in that Network Access, reconciled in each case with the current or proposed new charge;

(e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies; and

(f) in relation to those products and services subject to Conditions AAA3 and AAA4, the relevant network tariff gradient.

**AAA6(a).4** The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

**AAA6(a).5** In relation to those products and services subject to Conditions AAA3 and AAA4, 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 Third Party; or

(b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party, in a manner that differs from that detailed in an Access Charge Change Notice in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it sends to Ofcom an Access Charge Change Notice in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs AAA6(a).3(a) to (f).

### **Condition AAA6(b) - Requirement to notify technical information**

**AAA6(b).1** Save where the Director consents otherwise, where the Dominant Provider:

(a) proposes to provide Network Access covered by Condition AAA1(a), the terms and conditions for which comprise new:

- (i) technical characteristics (including information on network configuration where necessary to make effective use of the Network Access);
- (ii) locations of the points of Network Access; or
- (iii) technical standards (including any usage restrictions and other security issues), or

(b) proposes to amend an existing Access Contract covered by Condition AAA1(a) by modifying the terms and conditions listed in paragraph AAA6(b).1(a)(i) to (iii) above on which the Network Access is provided,

the Dominant Provider shall publish a written notice (the "Notice") of the new or amended terms and conditions not less than 90 days before either the Dominant Provider enters into an Access Contract to provide the new Network Access or the amended terms and conditions of the existing Access Contract come into effect. This obligation for prior notification shall not apply where new or amended terms and conditions are directed or determined by the Office of Communications ("Ofcom") or are required by a notification or an enforcement notification given by Ofcom under sections 94 or 95 of the Act."

**AAA6(b).2** 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 Reference Offer of the relevant terms and conditions;
- (c) the date on which or the period for which the Dominant Provider may enter into an Access Contract to provide the new Network Access or any amendments to the relevant terms and conditions will take effect (the "effective date").

**AAA6(b).3** The Dominant Provider shall not enter into an Access Contract 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.

**AAA6(b).4** Publication referred to in paragraph AAA6(b).1 shall be effected by:

- (a) placing a copy of the Notice on any relevant website operated or controlled by the Dominant Provider;
- (b) sending a copy of the Notice to Ofcom; and
- (c) sending a copy of the Notice to any person at that person's written request, and where the Notice identifies a modification to existing relevant terms and conditions, to every Third Party with which the Dominant Provider has entered into an Access Contract covered by Condition AAA1(a). The provision of such a copy of the Notice may be subject to a reasonable charge.

## **Condition AAA7**

### **Transparency as to quality of service**

**AAA7.1** The Dominant Provider shall publish all such information for the purposes of securing transparency as to the quality of service in relation to Network Access provided by the Dominant Provider, in such manner and form as Ofcom may from time to time direct.

**AAA7.2** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA7

### **Condition AAA8**

#### **Requirement to provide Carrier Pre-selection etc.**

**AAA8.1** The Dominant Provider shall provide Carrier Pre-selection as soon as it is reasonably practicable on reasonable terms to any of its Subscribers upon request.

**AAA8.2** Pursuant to a request under paragraph AAA8.1 above, the Dominant Provider shall provide Carrier Pre-selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms. The Dominant Provider shall also provide such Carrier Pre-selection Facilities as Ofcom may from time to time direct.

**AAA8.3** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges are based on the forward looking long-run incremental cost of providing Carrier Pre-selection Interconnection Facilities, except where the Dominant Provider and the Pre-selected Provider have agreed another basis for the charges.

**AAA8.4** The Dominant Provider should ensure that prices and other charges imposed upon Subscribers do not constitute a disincentive to the use of Carrier Pre-selection.

**AAA8.5** The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAA8.

**AAA8.6** This Condition is without prejudice to the generality of the provisions in Conditions AAA1(a) to AAA7 above.

### **Condition AAA9 - Requirement to provide Indirect Access ('Carrier Selection') etc.**

**AAA9.1** The Dominant Provider shall provide Indirect Access as soon as it is reasonably practicable on reasonable terms to any of its Subscribers upon request.

**AAA9.2** Pursuant to a request under paragraph AAA9.1 above, the Dominant Provider shall provide Carrier Selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms to a provider of a Public Telephone Network. The Dominant Provider shall also provide such Carrier Selection Interconnection Facilities as Ofcom may from time to time direct.

**AAA9.3** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges are based on the forward looking long-run incremental cost of providing Carrier Selection Interconnection Facilities, except where the Dominant Provider and the selected Provider have agreed another basis for the charges.

**AAA9.4** The Dominant Provider should ensure that prices and other charges imposed upon Subscribers do not constitute a disincentive to the use of Indirect Access.

**AAA9.5** The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAA9.

**AAA9.6** This Condition AAA9 is without prejudice to the generality of the provisions in Conditions AAA1(a) to AAA7 above.

**Condition AAA10 - Requirement to provide Wholesale Line Rental etc.**

**AAA10.1** The Dominant Provider shall provide Wholesale Line Rental as soon as is reasonably practicable, or as directed by Ofcom, on reasonable terms to every Third Party who makes a reasonable request in relation to:

- (a) wholesale analogue exchange line services; and
- (b) wholesale ISDN2 exchange line services.

**AAA10.2** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges of providing WLR services in paragraph AAA10.1 are based on the forward looking long-run incremental cost , except where the Dominant Provider and Third Party have agreed another basis for the charges.

**AAA10.3** The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAA10.

**AAA10.4** This Condition AAA10 is without prejudice to the generality of the provisions in Conditions AAA1(a) to AAA7 above.

**Condition AAA11 - Requirement to provide NTS Call Origination**

**AAA11.1** The Dominant Provider shall provide NTS Call Origination as soon as it is reasonably practicable to every Third Party who reasonably requests it in writing.

**AAA11.2** Without prejudice to paragraphs AAA11.3 and AAA11.4 below and where a request is covered by paragraph AAA11.1 above, the Dominant Provider shall provide NTS Call Origination on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**AAA11.3** The Dominant Provider shall pass the Net Retail Call Revenue to the Third Party that is purchasing the NTS Call Origination, less the charges referred to in Condition AAA11.4 below.

**AAA11.4** The Dominant Provider shall make no charges for providing NTS Call Origination covered by paragraph AAA11.1 except for:

- (a) a charge for the Call Origination Service used to originate the NTS Call;
- (b) a charge for the NTS Retail Uplift; and
- (c) a charge for bad debt relating to the retailing by the Dominant Provider of Premium Rate Services calls.

**AAA11.6** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA11.

**AAA11.7** This Condition AAA11 is without prejudice to the generality of the provisions in Conditions AAA1(a) to AAA7 above.

## SCHEDULE 2

**The SMP services conditions imposed on KCOM under sections 45, 87, 88 and 90 of the Communications Act 2003 as a result of the analysis of the markets set out in paragraph 12(b) of the Notification in each of which it is decided that KCOM has significant market power (“SMP conditions”)**

### **Part 1: Application, definitions and interpretation relating to the SMP conditions in Part 2**

1. The SMP conditions in Part 2 of this Schedule 1 shall, except insofar as it is otherwise stated therein, apply to each and all of the markets set out in paragraph 12(b) of the Notification.
2. In this Schedule 1:
  - (a) **“Act”** means the Communications Act 2003 (c. 21);
  - (b) **“Access Charge Change Notice”** has the meaning given to it in Condition AAB5(a).2;
  - (c) **“Access Contract”** means:
    - (i) a contract for the provision by the Dominant Provider to another person of Network Access to the Dominant Provider’s Electronic Communications Network;
    - (ii) a contract under which Associated Facilities in relation to the Dominant Provider’s Public Electronic Communications Network are made available by the Dominant Provider to another person;
  - (d) **“Carrier Pre-selection”** means a facility which allows a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network to select which Pre-selected Provider of such Services provided wholly or partly by means of that Network is the Pre-selected Provider he wishes to use to carry his calls by designating in advance the selection that is to apply on every occasion when there has been no selection of Provider by use of a Telephone Number;
  - (e) **“Carrier Pre-selection Facilities”** means those facilities which enable the Pre-selected Provider to provide Carrier Pre-selection to Subscribers to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network, including (without limitation to the generality of the foregoing):
    - (i) Carrier Pre-selection Per Customer Line Set-up Facilities;
    - (ii) Carrier Pre-selection Per Provider Set-up Facilities;
    - (iii) Carrier Pre-selection Per Provider On-going Facilities; and
    - (iv) Carrier Pre-selection System Set-up Facilities;
  - (f) **“Carrier Pre-selection Interconnection Facilities”** means those facilities for Interconnection which enable the Pre-selected Provider to provide Carrier Pre-selection to the Subscribers of the Dominant Provider, including (without limitation to the generality of the foregoing):
    - (i) Carrier Pre-selection Per Customer Line Set-up Facilities;
    - (ii) Carrier Pre-selection Per Provider Set-up Facilities; and
    - (iii) Carrier Pre-selection Per Provider On-going Facilities;

but excluding Carrier Pre-selection System Set-up Facilities.

(g) “**Carrier Pre-selection Per Customer Line Set-up Costs**” means the costs incurred by the Dominant Provider in providing Carrier Pre-selection Per Customer Line Set-up Facilities;

(h) “**Carrier Pre-selection Per Customer Line Set-up Facilities**” means those Carrier Pre-selection Facilities required from the Dominant Provider by a Pre-selected Provider in order for the Preselected Provider to be able to set up Carrier Pre-selection on the Exchange Line of a Subscriber to whom the Dominant Provider provides a Publicly Available Telephone Service by means of a Public Telephone Network;

(i) “**Carrier Pre-selection Per Provider On-going Costs**” means the costs incurred by the Dominant Provider in providing Carrier Pre-selection Per Provider On-going Facilities;

(j) “**Carrier Pre-selection Per Provider On-going Facilities**” means those Carrier Pre-selection Facilities required from the Dominant Provider by any individual Pre-selected Provider which enable the Pre-selected Provider to continue on an on-going basis to offer Carrier Pre-selection to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as product management;

(k) “**Carrier Pre-selection Per Provider Set-up Costs**” means the costs incurred by the Dominant Provider in providing Carrier Pre-selection Per Provider Set-up Facilities;

(l) “**Carrier Pre-selection Per Provider Set-up Facilities**” means those Carrier Pre-selection Facilities required from the Dominant Provider by any individual Pre-selected Provider in order for the Pre-selected Provider to be able to offer Carrier Pre-selection to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as data management amendments and the setting up of arrangements for the electronic transfer of customer orders;

(m) “**Carrier Pre-selection System Set-up Costs**” means the costs incurred by the Dominant Provider in developing and implementing Carrier Pre-selection System Set-up Facilities, and, for the purposes of cost recovery only, the costs to the Dominant Provider for the provision of Carrier Pre-selection by means of Autodiallers in the period April 2000 to December 2001 (regardless of when the costs were incurred) until such time as those costs have been fully recovered by the Dominant Provider;

(n) “**Carrier Pre-selection System Set-up Facilities**” means those Carrier Pre-selection Facilities required by the Dominant Provider in order for the Dominant Provider to be able to provide Carrier Pre-selection Facilities, such as the software and any alterations needed on the Dominant Provider’s switches and the modifications required for the Dominant Provider’s support systems;

(o) “**Carrier Selection Interconnection Facilities**” means those facilities for Interconnection which enable a provider of a Public Telephone Network to provide Indirect Access to the Subscribers of the Dominant Provider;

(p) “**Directory**” means a printed document containing Directory Information on Relevant Subscribers of Publicly Available Telephone Services in the United Kingdom which is made available to members of the public;



(q) “**Directory Information**” means, in the case of a Directory, the name and address of the Relevant Subscriber and the Telephone Number assigned to the Relevant Subscriber for his use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Relevant Subscriber or information that such a Telephone Number of the Relevant Subscriber may not be supplied;

(r) “**Directory Enquiry Facility**” means Directory Information provided by means of a Public Telephone Network;

(s) “**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 by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

(t) “**Exchange Line**” means Apparatus comprised in the Dominant Provider’s Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;

(u) “**Indirect Access**” means a facility which allows a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network to select which such Service provided wholly or partly by means of that Network is the service he wishes to use by the use of a Telephone Number on each separate occasion on which a selection is made;

(v) “**Local Exchange**” means a telephone exchange to which Customers are connected, usually via a remote or locally sited concentrator unit, which telephone exchange supports the provision of either analogue or digital Exchange Lines;

(w) “**Network Component**” means, to the extent they are used in the Services Market, the network components specified in any direction given by Ofcom from time to time for the purpose of these SMP conditions.

(x) “**Network Termination and Testing Apparatus**” means an item of Apparatus comprised in an Electronic Communications Network installed in a fixed position on Served Premises which enables:

- (a) Approved Apparatus to be readily connected to, and disconnected from, the network;
- (b) the conveyance of Signals between such Approved Apparatus and the Network;
- (c) the due functioning of the Network to be tested,

but the only other functions of which if any are:

- (i) to supply energy between such Approved Apparatus and the Network;
- (ii) to protect the safety or security of the operation of the Network;
- (iii) to enable other operations exclusively related to the running of the network to be performed or the due functioning of any system to which the network is or is to be connected to be tested (separately or together with the network).

(y) “**Network Termination Point**” means the physical point at which a Relevant Subscriber is provided with access to a Public Electronic Communications Network and, where it concerns Electronic Communications Networks involving switching or routing, that physical point is identified by means of a specific network address, which may be linked to the Telephone Number or name of a Relevant Subscriber. Where a Network Termination Point is provided at a fixed position on Served Premises, it shall be within an item of Network Termination and Testing Apparatus;

(z) “**Pre-selected Provider**” means a provider of a Public Telephone Network who has notified the Dominant Provider that it is able and willing to provide Carrier Pre-selection to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services;

(aa) “**Public Pay Telephone**” means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or pre-payment cards, including cards for use with dialling codes;

(bb) “**Public Telephone Network**” means an Electronic Communications Network which is used to provide Publicly Available Telephone Services; it supports the transfer between Network Termination Points of speech communications, and also other forms of communication, such as facsimile and data;

(cc) “**Publicly Available Telephone Services**” means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for Endusers with disabilities or with special social needs and/or the provision of non-geographic services;

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

(ee) “**Relevant Calls**” means all calls which originate on the Dominant Provider’s Public Electronic Communications Network and which are of a type which are available for selection in accordance with the Carrier Pre-selection Functional Specification by a Subscriber to whom a Publicly Available Telephone Service is provided by means of a Public Telephone Network;

(ff) “**Relevant Subscriber**” means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such Services;

(gg) “**Served Premises**” means a single set of premises in single occupation where Apparatus has been installed for the purpose of the provision of Electronic Communications Services by means of an Electronic Communications Network at those premises;

(hh) “**Services Market**” means each of the markets sets out in paragraph 12(b) of the Notification;

(ii) “**Subscriber**” means any person who is party to a contract with the provider of Publicly Available Telephone Services for the supply of such Services in the United Kingdom;

(jj) “**Tandem Exchange**” means a telephone exchange whose primary function is not to support the provision of Exchange Lines but to switch traffic between other telephone exchanges in a Public Electronic Communications Network;

(kk) “**Third Party**” means either:

- (i) a person providing a Public Electronic Communications Network; or
- (ii) a person providing a Public Electronic Communications Service;

(ll) “**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 Services Market and the use of Network Components in that Services Market; and

(mm) “**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.

(nn) “**Wholesale Line Rental Charge**” means the annual charge levied by the Dominant Provider for Wholesale Line Rental including packages containing a line rental charge and any included levels of service sold as part of a single marketed product.

3. For the purpose of interpreting the SMP conditions in Part 2:

(a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 of this Part above and otherwise any word or expression shall have the same meaning as it has in the Act;

(b) the Interpretation Act 1978 (c. 30) shall apply as if each of the SMP conditions in Part 2 were an Act of Parliament; and

(c) headings and titles shall be disregarded.

## **Part 2: The SMP conditions**

### **Condition AAB1 - Requirement to provide Network Access on reasonable request**

**AAB1.1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

**AAB1.2** The provision of Network Access in accordance with paragraph AAB1.1 shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**AAB1.3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAB1.

### **Condition AAB2 - Requirement not to unduly discriminate**

**AAB2.1** The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

**AAB2.2** 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 at a competitive disadvantage persons competing with the Dominant Provider.

### **Condition AAB3 - Basis of charges**

**AAB3.1** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAB1 is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

**AAB3.2** The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition AAB3.

### **Condition AAB4 - Requirement to publish a Reference Offer**

**AAB4.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.

**AAB4.2** Subject to paragraph AAB4.8 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes 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 the Network Access);

(b) the locations of the points of Network Access;

- (c) the technical standards for Network Access (including any usage restrictions and other security issues);
- (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- (e) any ordering and provisioning procedures;
- (f) relevant charges, terms of payment and billing procedures;
- (g) details of interoperability tests;
- (h) details of traffic and network management;
- (i) details of maintenance and quality as follows:
  - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- (j) details of measures to ensure compliance with requirements for network integrity;
- (k) details of any relevant intellectual property rights;
- (l) a dispute resolution procedure to be used between the parties;
- (m) details of duration and renegotiation of agreements;
- (n) provisions regarding confidentiality of non-public parts of the agreements;
- (o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts); and
- (p) the standard terms and conditions for the provision of Network Access; and
- (q) the amount applied to:
  - (i) each Network Component used in providing Network Access with the relevant Usage Factors; and
  - (ii) the Transfer Charge for each Network Component or combination of Network Components described above, reconciled in each case to the

charge payable by a Communications Provider other than the Dominant Provider.

**AAB4.3** 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 Third Party; or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party, in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other 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 paragraphs AAB4.2(a) to (q) above.

**AAB4.4** The Dominant Provider shall update and publish the Reference Offer in relation to any amendments or in relation to any further Network Access provided after the date this Condition AAB4 enters into force.

**AAB4.5** Publication referred to above shall be effected by:

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

**AAB4.6** 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 which have been requested).

**AAB4.7** The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

**AAB4.8** The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.

**AAB4.9** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAB4.

#### **Condition AAB5(a) - Requirement to notify charges**

**AAB5(a).1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below.

**AAB5(a).2** The Dominant Provider shall send to Ofcom and to every Third Party with which it has entered into an Access Contract covered by Condition AAB1 a written notice of any amendment to the charges on which it provides Network Access or in relation to any charges for new Network Access (an "Access Charge Change Notice"):

- (a) in the case of the market set out in paragraph 12(b)(iii) of this Notification and Interconnection Circuits, not less than 90 days before any such amendment comes into effect
- (b) in the case of the markets set out in paragraphs 12(b)(i) and 12(b)(ii) of this Notification, where the proposed amendment relates to the Wholesale Line

Rental Charge, not less than 90 days before any such amendment comes into effect

- (c) in any other case, not less than 28 days before any such amendment comes into effect.

**AAB5(a).3** 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 or the period for which any amendments to charges will take effect (the "effective date").
- (d) in relation to those products and services subject to Condition AAB3, the current and proposed new charge and the relevant Usage Factors applied to each Network Component comprised in that Network Access, reconciled in each case with the current or proposed new charge;
- (e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies; and
- (f) in relation to those products and services subject to Condition AAB3, the relevant network tariff gradient.

**AAB5(a).4** The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

**AAB5(a).5** In relation to those products and services subject to Condition AAB3, 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 Third Party; or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party, in a manner that differs from that detailed in an Access Charge Change Notice in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it sends to Ofcom an Access Charge Change Notice in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs AAB5(a).3(a) to (f).

#### **Condition AAB5(b) - Requirement to notify technical information**

**AAB5(b).1** Save where Ofcom consents otherwise, where the Dominant Provider:

- (a) proposes to provide Network Access covered by Condition AAB1, the terms and conditions for which comprise new:
  - (i) technical characteristics (including information on network configuration where necessary to make effective use of the Network Access);
  - (ii) locations of the points of Network Access; or

(iii) technical standards (including any usage restrictions and other security issues),

or

(b) proposes to amend an existing Access Contract covered by Condition AAB1 by modifying the terms and conditions listed in paragraph AAB5(b).1(a)(i) to (iii) above on which the Network Access is provided, the Dominant Provider shall publish a written notice (the "Notice") of the new or amended terms and conditions not less than 90 days before either the Dominant Provider enters into an Access Contract to provide the new Network Access or the amended terms and conditions of the existing Access Contract come into effect.

**AAB5(b).2** 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 Reference Offer of the relevant terms and conditions;
- (c) the date on which or the period for which the Dominant Provider may enter into an Access Contract to provide the new Network Access or any amendments to the relevant terms and conditions will take effect (the "effective date").

**AAB5(b).3** The Dominant Provider shall not enter into an Access Contract 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.

**AAB5(b).4** Publication referred to in paragraph AAB5(b).1 shall be effected by:

- (a) placing a copy of the Notice on any relevant website operated or controlled by the Dominant Provider;
- (b) sending a copy of the Notice to Ofcom; and
- (c) sending a copy of the Notice to any person at that person's written request, and where the Notice identifies a modification to existing relevant terms and conditions, to every Third Party with which the Dominant Provider has entered into an Access Contract covered by Condition AAB1. The provision of such a copy of the Notice may be subject to a reasonable charge.

**Condition AAB6 - Requirement to provide Carrier Pre-selection etc.**

**AAB6.1** The Dominant Provider shall provide Carrier Pre-selection as soon as it is reasonably practicable on reasonable terms to any of its Subscribers upon request.

**AAB6.2** Pursuant to a request under paragraph AAB6.1 above, the Dominant Provider shall provide Carrier Pre-selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms. The Dominant Provider shall also provide such Carrier Pre-selection Facilities as Ofcom may from time to time direct.

**AAB6.3** The Dominant Provider shall ensure that prices and other charges imposed upon Subscribers do not constitute a disincentive to the use of Carrier Pre-selection.



**AAB6.4** The Dominant Provider shall ensure that charges for the provision of the respective facilities mentioned below shall be made by the Dominant Provider as follows:

(a) subject always to the requirement of reasonableness, charges shall be based on the forward looking long-run incremental costs of providing Carrier Pre-selection Facilities unless:

(i) the Dominant Provider and the Pre-selected Provider have agreed another basis for the charges; or

(ii) any other basis for such charges be used as directed by Ofcom from time to time;

(b) the Dominant Provider shall categorise its costs as falling within one of the following categories:

(i) Carrier Pre-selection Per Provider Set-up Costs;

(ii) Carrier Pre-selection Per Provider On-going Costs;

(iii) Carrier Pre-selection Per Customer Line Set-up Costs; or

(iv) Carrier Pre-selection System Set-up Costs,

and, where the Dominant Provider either fails to categorise its costs in such a manner or Ofcom considers that any individual item of cost cannot reasonably be categorised in the manner in which the Dominant Provider has made the categorisation, the cost in question shall fall within one of the categories in sub-paragraphs (i) to (iv) above or, as the case may be, in any new category of cost, as Ofcom may direct;

(c) the Dominant Provider shall recover the costs for any new category of cost that Ofcom has directed under sub-paragraph (b) above in the manner in which Ofcom may direct;

(d) the Dominant Provider shall recover the costs incurred in providing Carrier Pre-selection Per Provider Set-up Facilities, Carrier Pre-selection Per Provider On-going Facilities and Carrier Pre-selection Per Customer Line Set-up Facilities by means of direct charges to Pre-selected Providers;

(e) the Dominant Provider shall recover the costs incurred in providing Carrier Pre-selection System Set-up Facilities by means of a separate surcharge on all Relevant Calls; and

(f) the Dominant Provider shall modify any of its charges for the provision of Carrier Pre-selection Facilities in the manner in which Ofcom may direct.

**AAB6.5** The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAB6.

**AAB6.6** This Condition AAB6 is without prejudice to the generality of the provisions in Conditions AAB1 to AAB5 above.

**Condition AAB7 - Requirement to provide Indirect Access ('Carrier Selection') etc.**

**AAB7.1** The Dominant Provider shall provide Indirect Access as soon as it is reasonably practicable on reasonable terms to any of its Subscribers upon request.

**AAB7.2** Pursuant to a request under paragraph AAB7.1 above, the Dominant Provider shall provide Carrier Selection Interconnection Facilities as soon as it is reasonably practicable on reasonable terms to a provider of a Public Telephone Network. The Dominant Provider shall also provide such Carrier Selection Interconnection Facilities as Ofcom may from time to time direct.

**AAB7.3** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges are based on the forward looking long-run incremental cost of providing Carrier Selection Interconnection Facilities, except where the Dominant Provider and selected Provider have agreed another basis for the charges.

**AAB7.4** The Dominant Provider shall ensure that prices and other charges imposed upon Subscribers do not constitute a disincentive to the use of Indirect Access.

**AAB7.5** The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAB7.

**AAB7.6** This Condition AAB7 is without prejudice to the generality of the provisions in Conditions AAB1 to AAB5 above.

### SCHEDULE 3

The SMP services conditions imposed on BT, KCOM and all persons listed at Annex A under sections 45, 87, 88 and 90 of the Communications Act 2003 as a result of the analysis of the market set out in paragraph 12(c) of the Notification in which BT, KCOM and all persons listed in Annex A have significant market power (“SMP conditions”)

#### Part 1: Application, definitions and interpretation relating to the SMP conditions in Part 2

1. The SMP conditions in Part 2 of this Schedule 3 shall only apply to the following dominant providers;
  - (a) SMP Conditions BA1, BA2, BA3, BA5 and BA6 to BT only;
  - (b) SMP Conditions BB1, BB2, BB3, BB4 and BB5 to KCOM only;
  - (c) SMP Conditions BC1 to those persons listed at Annex A only.
2. The SMP conditions in Part 2 of this Schedule 3 shall apply to the market set out at paragraph 12(c) of the Notification.
3. In this Schedule 3:
  - (a) “**Act**” means the Communications Act 2003 (c. 21);
  - (b) “**Access Charge Change Notice**” has the meaning given to it in Condition BA6.2 and BB5.2 for BT and KCOM respectively;
  - (c) “**Dominant Provider**” means, in relation to:
    - (i) SMP Conditions BA1, BA2, BA3, BA5 and BA6; British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
    - (ii) SMP Conditions BB1, BB2, BB3, BB4 and BB5; 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 by section 736 of the Companies Act 1985, as amended by the Companies Act 1989; and
    - (iii) SMP Conditions BC1 any person listed at Annex A to this Schedule.
  - (e) “**Exchange Line**” means Apparatus comprised in the Dominant Provider’s Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;
  - (d) “**Fixed Call Termination Wholesale Service**” means an Electronic Communications Service provided by the Dominant Provider from (and over) the local exchange to (but not including the conveyance of Signals over) an Exchange Line.
  - (e) “**Network Component**” means, to the extent they are used in the Service Market, the network components specified in any direction given by the Director from time to time for the purpose of these conditions;

(f) **“Network Termination Point”** means the physical point at which a Subscriber is provided with access to a Public Electronic Communications Network and, where it concerns Electronic Communications Networks involving switching or routing, that physical point is identified by means of a specific network address, which may be linked to the Telephone Number or name of a Subscriber. Where a Network Termination Point is provided at a fixed position on Served Premises it shall be within an item of Network Termination and Testing Apparatus;

(g) **“Network Termination and Testing Apparatus”** means an item of apparatus comprised in an Electronic Communications Network installed in a fixed position on Served Premises which enables:

- (a) Approved Apparatus to be readily connected to, and disconnected from, the network;
- (b) the conveyance of Signals between such Approved Apparatus and the Network;
- (c) the due functioning of the Network to be tested,

but the only other functions of which if any are:

- (i) to supply energy between such Approved Apparatus and the Network;
- (ii) to protect the safety or security of the operation of the Network;
- (iii) to enable other operations exclusively related to the running of the network to be performed or the due functioning of any system to which the network is or is to be connected to be tested (separately or together with the network).

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

(i) **“The Hull Area”** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communication (Hull) plc.

(j) **“Third Party”** means either:

- (i) a person providing a Public Electronic Communications Network; or
- (ii) a person providing a Public Electronic Communications Service;

(k) **“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 Services Market and the use of Network Components in that Services Market;

(l) **“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;

(m) **“Wholesale Service”** means any services related to Network Access used by or offered to any Communications Provider (including the Dominant Provider)

4. For the purpose of interpreting the SMP conditions in Part 2:

- (a) except in so far as the context otherwise requires, words or

expressions shall have the meaning assigned to them in paragraph 2 of this Part above and otherwise any word or expression shall have the same meaning as it has in the Act;

(b) the Interpretation Act 1978 (c. 30) shall apply as if each of the SMP conditions in Part 2 were an Act of Parliament; and

(c) headings and titles shall be disregarded.

## **Part 2: The SMP conditions**

### **SMP Conditions relating to BT**

#### **Condition BA1 - Requirement to provide Network Access on reasonable request**

**BA1.1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

**BA1.2** The provision of Network Access in accordance with paragraph BA1.1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**BA1.3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition BA1.

#### **Condition BA2 - Requirement not to unduly discriminate**

**BA2.1** The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

**BA2.2** 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 at a competitive disadvantage persons competing with the Dominant Provider.

#### **Condition BA3 - Basis of charges**

**BA3.1** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition BA1 is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

**BA3.2** For the avoidance of any doubt, where the charge offered, payable or proposed for Network Access covered by Condition BA1 is for a service which is subject to a charge control under Condition BA4, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that such a charge satisfies the requirements of paragraph BA3.1 above.

**BA3.3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition BA3.

#### **Condition BA5 - Requirement to publish a Reference Offer**

**BA5.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.

**BA5.2** Subject to paragraph BA5.8 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes 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 the Network Access);
- (b) the locations of the points of Network Access;
- (c) the technical standards for Network Access (including any usage restrictions and other security issues);
- (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- (e) any ordering and provisioning procedures;
- (f) relevant charges, terms of payment and billing procedures;
- (g) details of interoperability tests;
- (h) details of traffic and network management;
- (i) details of maintenance and quality as follows:
  - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- (j) details of measures to ensure compliance with requirements for network integrity;
- (k) details of any relevant intellectual property rights;
- (l) a dispute resolution procedure to be used between the parties;
- (m) details of duration and renegotiation of agreements;
- (n) provisions regarding confidentiality of non-public parts of the agreements;
- (o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);

(p) the standard terms and conditions for the provision of Network Access;

(q) the amount applied to:

(i) each Network Component used in providing Network Access with the relevant Usage Factors; and

(ii) the Transfer Charge for each Network Component or combination of Network Components described above,

reconciled in each case to the charge payable by a Communications Provider other than the Dominant Provider.

**BA5.3** 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 Third Party; or

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

in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other 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 paragraphs BA5.2(a) to (q) above.

**BA5.5** The Dominant Provider shall update and publish the Reference Offer in relation to any amendments or in relation to any further Network Access provided after the date this Condition BA5 enters into force.

**BA5.6** Publication referred to above shall be effected by:

(a) placing a copy of the Reference Offer on any relevant website operated or controlled by the Dominant Provider; and

(b) sending a copy of the Reference Offer to Ofcom.

**BA5.7** 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 which have been requested).

**BA5.8** The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

**BA5.9** The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.

**BA5.10** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition BA5.



## **Condition BA6 - Requirement to notify charges**

**BA6.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below.

**BA6.2** The Dominant Provider shall send to Ofcom and to every Third Party with which it has entered into an Access Contract covered by Condition BA1 a written notice of any amendment to the charges on which it provides Network Access or in relation to any charges for new Network Access (an "Access Charge Change Notice") not less than 90 days before any such amendment comes into effect

**BA6.3** 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;
- (c) the date on which or the period for which any amendments to charges will take effect (the "effective date");
- (d) the current and proposed new charge and the relevant Usage Factors applied to each Network Component comprised in that Network Access, reconciled in each case with the current or proposed new charge;
- (e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies; and
- (f) the relevant network tariff gradient.

**BA6.4** The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

**BA6.5** 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 Third Party; or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party,

in a manner that differs from that detailed in an Access Charge Change Notice in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it sends to Ofcom an Access Charge Change Notice in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs BA6.3(a) to (f).

## **SMP Conditions relating to KCOM**

### **Condition BB1 - Requirement to provide Network Access on reasonable request**

**BB1.1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

**BB1.2** The provision of Network Access in accordance with paragraph BB1.1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**BB1.3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition BA1.

### **Condition BB2 - Requirement not to unduly discriminate in the Hull Area**

**BB2.1** The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

**BB2.2** 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 at a competitive disadvantage persons competing with the Dominant Provider.

### **Condition BB3 - Basis of charges in the Hull Area**

**BB3.1** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition BB1 is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

**BA3.2** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition BA3.

### **Condition BB4 - Requirement to publish a Reference Offer for the Hull Area**

**BB4.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer in relation to the provision of Network Access in the Hull Area and act in the manner set out below.

**BB4.2** Subject to paragraph BB4.8 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes 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 the Network Access);
- (b) the locations of the points of Network Access;

- (c) the technical standards for Network Access (including any usage restrictions and other security issues);
- (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- (e) any ordering and provisioning procedures;
- (f) relevant charges, terms of payment and billing procedures;
- (g) details of interoperability tests;
- (h) details of traffic and network management;
- (i) details of maintenance and quality as follows:
  - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- (j) details of measures to ensure compliance with requirements for network integrity;
- (k) details of any relevant intellectual property rights;
- (l) a dispute resolution procedure to be used between the parties;
- (m) details of duration and renegotiation of agreements;
- (n) provisions regarding confidentiality of non-public parts of the agreements;
- (o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);
- (p) the standard terms and conditions for the provision of Network Access;
- (q) the amount applied to:
  - (i) each Network Component used in providing Network Access with the relevant Usage Factors; and
  - (ii) the Transfer Charge for each Network Component or combination of Network Components described above,

reconciled in each case to the charge payable by a Communications Provider other than the Dominant Provider.

**BB4.3** 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 Third Party; or

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

in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other 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 paragraphs BB4.2(a) to (q) above.

**BB4.5** The Dominant Provider shall update and publish the Reference Offer in relation to any amendments or in relation to any further Network Access provided after the date this Condition BB4 enters into force.

**BB4.6** Publication referred to above shall be effected by:

(a) placing a copy of the Reference Offer on any relevant website operated or controlled by the Dominant Provider; and

(b) sending a copy of the Reference Offer to Ofcom.

**BB4.7** 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 which have been requested).

**BB4.8** The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

**BB4.9** The Dominant Provider shall provide Network Access in the Hull Area at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.

**BB4.10** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AA5.

#### **Condition BB5 - Requirement to notify charges in respect of Network Access provided in the Hull Area**

**BB5.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below.

BB5.2 The Dominant Provider shall send to Ofcom and to every Third Party with which it has entered into an Access Contract covered by Condition BB1 a written notice of any amendment to the charges on which it provides Network Access or in relation to any charges for new Network Access (an "Access Charge Change Notice") not less than 90 days before any such amendment comes into effect.

**BB5.3** 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;
- (c) the date on which or the period for which any amendments to charges will take effect (the "effective date");
- (d) the current and proposed new charge and the relevant Usage Factors applied to each Network Component comprised in that Network Access, reconciled in each case with the current or proposed new charge;
- (e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies; and
- (f) the relevant network tariff gradient.

**BB5.4** The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

**BB5.5** To the extent that the Dominant Provider provides to itself Network Access in the Hull Area that:

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

in a manner that differs from that detailed in an Access Charge Change Notice in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it sends to Ofcom an Access Charge Change Notice in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs BB5.3(a) to (f).

## **SMP Condition relating to Communication Providers listed at Annex A**

### **Condition BC1 – Requirement to provide Network Access on reasonable request**

**BC1.1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide Network Access as Ofcom may from time to time direct.

**BC1.2** The provision of Network Access in accordance with paragraph BC1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**BC1.3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

**Annex A to Schedule 3 (List of Dominant Providers for the purpose of Schedule 3)**

1. 118 Limited whose registered company number is 03951948, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
2. 24 Seven Communications Limited whose registered company number is 04468566, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
3. 4D Interactive Ltd whose registered company number is 02676756, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
4. Aggregated Telecom Ltd whose registered company number is 03882936, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
5. Atlas Interactive Group Ltd whose registered company number is 03249486, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
6. BSKYB whose registered company number is 05349163, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
7. C3 Europe Ltd whose registered company number is 04188942, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
8. Cable & Wireless UK whose registered company number is 01541957, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
9. Callagenix Ltd whose registered company number is 03963819, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
10. Collouquium Limited whose registered company number is SC142248, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
11. COLT Telecommunications whose registered company number is 02452736, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding

company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

12. Connect Telecom Ltd whose registered company number is 06298460, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

13. Digitech Solutions whose registered company number is 04546657, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

14. Edge Telecom Ltd whose registered company number is 03101247, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

15. Eircom (UK) Limited whose registered company number is 03478971, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

16. Elephant Talk Communications PRS UK Limited whose registered company number is 05890632, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

17. ETC Telecom Ltd whose registered company number is 06295193, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

18. Evoxus Limited whose registered company number is 03798888, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

19. Flextel Limited whose registered company number is 02772380, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

20. Gamma Telecom Ltd whose registered company number is 04340834, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

21. Global Crossing (UK) Telecommunications Limited whose registered company number is 02495998, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

22. Global One Communications Holding Limited whose registered company number is 02082327, and any subsidiary or holding company of it, or any subsidiary of it, or any



subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

23. I Communicate Services whose registered company number is 06212287, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

24. IDT Global Ltd whose registered company number is 03322447, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

25. Inclarity plc whose registered company number is 02673204, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

26. "Intouch Communication" Services Limited whose registered company number is 03606467, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

27. IV Response Ltd whose registered company number is 04318927, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

28. KDDI Europe Limited whose registered company number is 02407242, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

29. Kingston Communications Limited whose registered company number is 03317871, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

30. Magrathea Telecommunications Limited whose registered company number is 04260485, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

31. Mars Telecom Ltd whose registered company number is 04713626, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

32. Medius Networks Limited whose registered company number is 04157875, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

33. Net Solutions Europe Limited whose registered company number is 03203624, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding

company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

34. Nexus Telecommunications Ltd whose registered company number is 03895766, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

35. NPLUSONE Limited whose registered company number is SC236129, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

36. N T L Glasgow registered company number is SC075177, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

37. O-Bit Telecom Limited whose registered company number is 04365519, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

38. Optics Telecom Limited whose registered company number is 04874092, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

39. Orange Limited whose registered company number is 03110666, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

40. Oxygen8 Communications UK Limited whose registered company number is 03383285, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

41. PNC Telecom plc whose registered company number is 02709891, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

42. Premier Voicemail Limited whose registered company number is 03172426, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

43. Primus Telecom Ltd whose registered company number is 02937312, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

44. QICOMM Limited whose registered company number is 05422551, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company,

all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

45. QX Telecom Limited whose registered company number is 03820728, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

46. Ringmaster Ltd whose registered company number is 03450577, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

47. Sala Trading Ltd whose registered company number is 03617973, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

48. SingTel (Europe) Ltd whose registered company number is 03426947, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

49. Skycom Limited whose registered company number is 04101655, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

50. Skytel Limited whose registered company number is 04227994, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

51. Spacetel whose registered company number is 06184554, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

52. Spitfire Network Services whose registered company number is 02657590, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

53. Starcomm Ltd whose registered company number is 02830288, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

54. Stardex (UK) Limited whose registered company number is SC192625, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

55. Subhan Universal Limited whose registered company number is 05642502, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding

company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

56. Swiftnet Ltd whose registered company number is 02469394, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

57. Switch Services Limited whose registered company number is 04968578, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

58. Syntec Limited whose registered company number is 03529985, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

59. Teamphone.com whose registered company number is 01403177, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

60. Telco Global Networks Limited whose registered company number is 04214792, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

61. Teledesign plc whose registered company number is 03254784, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

62. Telephony Services Ltd whose registered company number is 05134355, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

63. Telsis Systems Limited whose registered company number is 02312314, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

64. Telstra Ltd whose registered company number is 03830643, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

65. Telswitch Ltd whose registered company number is 06127089, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

66. Telxl Limited whose registered company number is 04249562, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all

as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

67. T-Mobile whose registered company number is 02382161, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

68. Tweedwind (Two) Limited whose registered company number is 04392360, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

69. United Connect Ltd whose registered company number is 03204967, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

70. Vectone Network Limited whose registered company number is 05445235, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

71. Verizon UK Limited whose registered company number is 02776038, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

72. Virgin Media Limited whose registered company number is 02591237, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

73. Virtual Universe Ltd whose registered company number is 03064568, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

74. Vital Phone Limited whose registered company number is 04203630, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

75. Vodafone Ltd whose registered company number is 01471587, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

76. VTL (UK) Ltd whose registered company number is 04287100, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

77. Wavecrest (UK) Ltd whose registered company number is 03042254, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company,

all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

78. Wire9 Telecom plc whose registered company number is 04210403, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

79. XTEC Communications Limited whose registered company number is 03673661, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

## Annex 8

# Legal Instruments: Direction

**Direction under section 49 of the Communications Act 2003 and Condition AAA7 as a result of the analysis of the wholesale access markets in the United Kingdom, excluding the Hull Area) in the *Review of the fixed narrowband services wholesale markets***

## Background

1. On 15 September 2009 Ofcom concluded its *Review of the fixed narrowband services wholesale markets* in which it identified markets, made market power determinations and set appropriate SMP conditions as set out in the Notification at Annex 7 to the review and explained in the accompanying explanatory statement.
2. Ofcom determined in the review referred to in paragraph 1, above, that BT, as a Dominant Provider, has significant market power in, amongst others, the following markets in the United Kingdom, excluding the Hull Area:
  - i. wholesale analogue exchange line services; and
  - ii. wholesale ISDN2 exchange line services.
3. SMP service Condition AAA7 (Transparency as to quality of service) was set in relation to, amongst others, the markets referred to in paragraph 2.
4. This Direction concerns matters to which Condition AAA7 relates.
5. For the reasons set out in Section 11 of the explanatory statement accompanying this Direction Ofcom is satisfied that, in accordance with section 49(2) of the Act, this Direction is:
  - i. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - ii. not such as to discriminate unduly against particular persons or against a particular description of persons;
  - iii. proportionate to what it is intended to achieve; and
  - iv. in relation to what it is intended to achieve, transparent.
6. For the reasons set out in Section 3 of the explanatory statement accompanying this Direction, Ofcom is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act.
7. As set out in Section 11 of the explanatory statement accompanying this Direction, Ofcom has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

## Direction

8. Ofcom hereby, pursuant to section 49 of the Act and proposed Condition AAA7 in Schedule 1 to the Notification, directs the Dominant Provider to act as prescribed in paragraphs 9 to 14 below:
9. The Dominant Provider shall publish the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Wholesale Line Rental, as required in paragraph 12 below.
10. The Dominant Provider shall provide to individual Third Parties the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Wholesale Line Rental, as required in paragraph 12 below.
11. The Dominant Provider shall provide to Ofcom, by means of electronic mail to such person in Ofcom as notified from time to time, the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Wholesale Line Rental, as required in paragraph 12 below.
12. The information required by paragraphs 9, 10 and 11 above shall be published and provided as required by the Dominant Provider within 14 Working Days of the last Working Day of every month in respect of that month.
13. Annex A to this Direction forms part of the Direction.
14. Nothing in this Direction shall require the Dominant Provider to publish confidential information relating to its business or that of a Third Party.
15. For the purpose of interpreting this Direction the following definitions shall apply:

“Act” means the Communications Act 2003;

“Committed Order” means an Order which has passed validation and has been registered on the Dominant Provider’s operational support system and a Contract Delivery Date has been confirmed;

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

“Contract Delivery Date” means the date agreed between the Dominant Provider and a Third Party for an Order to become a Completed Order;

“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 by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

“Exchange Line” means Apparatus comprised in the Dominant Provider’s Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;



“Fault” means a degradation or problem or with Wholesale Line Rental which is identified by the Dominant Provider or a Third Party and which is registered on the Dominant Provider’s operational support system;

“Hull Area” means the area defined as the ‘Licensed Area’ in the license granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

“Installed Base” means the average number of Wholesale Line Rental lines that are in use during the Reporting Period;

“ISDN” means the integrated services digital network which is an Electronic Communications Network evolved from the telephony integrated digital network that provides for digital end-to-end connectivity to support a wide range of Public Electronic Communications Services, including voice and non-voice service to which End Users have access by a limited set of standard multi-purpose customer interfaces;

“KPI” means key performance indicator;

“Level 1 Care” means the level of care provided by the Dominant Provider which provides the standard level of response to a Fault on an Exchange Line, provided as part of the basic line rental;

“Level 2 Care” means the level of care provided by the Dominant Provider which provides an enhanced level of response to a Fault on an Exchange Line, guaranteeing a response within a specified time;

“Level 3 Care” means the level of care provided by the Dominant Provider which provides an enhanced level of response to a Fault on an Exchange Line, guaranteeing a response within a specified time and providing cover 24 hours per day, seven days a week including public and bank holidays;

“Newly Provisioned Lines” means an Order where any Wholesale Line Rental product/Exchange Line Service is not being provided by the Dominant Provider to the Third Party at the time of order;

“Notification” means the Notification referred to in paragraph 1 of this Direction above, as published on 15 September 2009;

“Order” means a request for Wholesale Line Rental submitted to the Dominant Provider by a Third Party;

“Pending Order” means an Order which has been approved by the Dominant Provider and is awaiting a Contractual Delivery Date;

“Rejected Order” means an Order which cannot be placed by the Dominant Provider on its operational support system;

“Reporting Period” means the month in respect of which the Dominant Provider is required to publish or provide to Ofcom as required the Wholesale Line Rental KPIs;

“Restored Service” means the point at which the Wholesale Line Rental in relation to which a Fault was registered becomes available again for use by the Third Party;

“Scheduled Outages” means the defined periods of time whereby the Dominant Provider’s operational support system is not available for use by Third Parties in order for the Dominant Provider to perform certain tasks including, but not limited to, routine maintenance, changing configurations, software upgrades and updating facilities and may include specific maintenance activities whereby the Dominant Provider must have given as much notice as reasonably practicable and in any event not less than seven calendar days;

“Third Party” means either:

- i. a person providing a Public Electronic Communications Network; or
- ii. a person providing a Public Electronic Communications Service;

“Transferred Lines” means an Order where Wholesale Line Rental is being provided to the Third Party by another Third Party (including those provided by the Dominant Provider) at the time of order;

“Wholesale Analogue Line Rental” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an analogue Exchange Line;

“Wholesale ISDN2 Line Rental” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an ISDN2 Exchange Line;

“Wholesale Line Rental” means each of the following provided by the Dominant Provider:

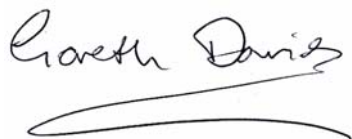
- i. Wholesale Analogue Line Rental provided to Third Parties’ End Users;
- ii. Wholesale ISDN2 Line Rental;

and, for the avoidance of doubt, any requirement to publish or provide to Ofcom as required the Wholesale Line Rental KPIs shall be a requirement to publish or provide that information separately in relation to each of the above;

“WLR line rental package” includes a package containing a line rental charge and any included levels of service sold as part of a single marketed product.

“Working Day” means any day other than Saturdays, Sundays, public holidays or bank holidays in the United Kingdom.

16. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act, or if it has no meaning there, in Part 1 of Schedule 1 to the Notification.
17. For the purpose of interpreting this Direction:
  - i. headings and titles shall be disregarded; and
  - ii. the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.
18. This Direction shall take effect on the day it is published.

A handwritten signature in dark ink, reading 'Gareth Davies'. The signature is fluid and cursive, with a long horizontal flourish extending from the end of the name.

Gareth Davies  
Competition Policy Director

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

**15 September 2009**

## **Annex A**

### **Wholesale Line Rental KPIs**

#### **Part 1: Indicators**

1. The Dominant Provider shall publish the information required in KPIs (i) to (viii) below in relation to the provision of Wholesale Line Rental, in at least the detail outlined below:

a) an industry average (for the avoidance of doubt this includes provision by the Dominant Provider to itself where it does so).

2. The Dominant Provider shall also publish the information required in KPIs (ii) to (vi) below in relation to the provision of Wholesale Line Rental to itself.

3. In relation to KPIs (ii) to (vi), the Dominant Provider should publish separate KPI results where options exist for third parties to purchase different WLR line rental packages.

4. The Dominant Provider shall provide to Ofcom KPIs (i) to (viii) as described in paragraphs 1, 2 and 3 above by electronic mail to the designated person.

5. The Dominant Provider shall also provide to Ofcom data relating to specific third parties upon request.

6. The Dominant Provider shall provide to each third party, on a confidential basis, the information required in KPIs (i) to (viii) below for that third party.

7. Where the Dominant Provider does not provide Wholesale Line Rental to itself, it shall instead publish or provide as required the information required in relation to the equivalent implicit wholesale product provided by the Dominant Provider to itself in order for it to provide downstream services to End Users.

#### **KPI(i) - Percentage of orders rejected**

the percentage of Committed Orders that became Rejected Orders during the Reporting Period;

#### **KPI(ii) - Percentage of orders provisioned on time**

the percentage of Completed Orders that were completed by the Contract Delivery Date during the Reporting Period in relation to each of:

- (a) Newly Provisioned Lines; and
- (b) Transferred Lines;

#### **KPI(iii) - Percentage of new provisions reported as faulty**

the percentage of Completed Orders that were reported as having a Fault during the Reporting Period whereby that Fault was reported within 30 calendar days of the date that it became a Completed Order;

#### **KPI(iv) - Percentage of Installed Base reported as faulty**

the number of network faults at the end of the Reporting Period, measured as a percentage of the mean of the Installed Base;

#### **KPI(v) - Average time to restore service**

the average time (in working hours) during the Reporting Period for the Dominant provider to achieve Restored Service after a Fault has been registered in relation to each of:

- (a) Level 1 Care;
- (b) Level 2 Care; and

- (c) Level 3 Care;

**KPI(vi) - Percentage of repeat faults**

the percentage of Faults that were reported as having a further Fault during the Reporting Period whereby the further Fault was registered within 30 calendar days of the Dominant Provider achieving Restored Service of the previous Fault;

**KPI(vii) - Gateway availability**

the percentage of actual availability of the Dominant Provider's ordering gateway during the Reporting Period compared to the potential availability during the same period as published by the Dominant Provider, excluding any Scheduled Outages;  
(viii) the percentage of actual availability of the Dominant Provider's ordering gateway during the Reporting Period compared to the potential availability during the same period as published by the Dominant Provider, including any Scheduled Outages.

**Part 2: Volumes**

1. The Dominant Provider shall publish the information required in KPIs (i) to (iv) below in relation to the provision of Wholesale Line Rental to all Third Parties (as an aggregate figure which, for the avoidance of doubt includes provision by the Dominant Provider of Wholesale Line Rental to itself);
2. The Dominant Provider shall provide to Ofcom by electronic mail the information required in KPIs (i) to (iv) below in relation to the provision of End User Access to itself. BT shall also provide to Ofcom data relating to specific third parties upon request.
3. Where the Dominant Provider does not provide End User Access to itself, it shall instead publish or provide as required the information required in relation to the equivalent implicit wholesale product provided by the Dominant Provider to itself in order for it to provide downstream services to End Users.

**KPI(i) - Volume of orders submitted**

the total number of Orders that became Pending Orders during the Reporting Period;

**KPI(ii) - Volume of orders completed**

the total number of Committed Orders that became Completed Orders during the Reporting Period in relation to each of:

- (a) Newly Provisioned Lines; and
- (b) Transferred Lines;

**KPI(iii) - Volume of Installed Base**

the Installed Base during the Reporting Period;

**KPI(iv) - Volume of faults reported**

the number of Faults where the Dominant Provider subsequently achieves Restored Service during the Reporting Period in relation to each of:

- (a) Level 1 Care;
- (b) Level 2 Care; and
- (c) Level 3 Care.

## Annex 9

## Legal Instruments: Direction

**Direction under section 49 of the Communications Act 2003 and Condition AAA7 as a result of the analysis of the wholesale Call Origination markets in the United Kingdom, excluding the Hull Area) in the *Review of the fixed narrowband services wholesale markets***

## Background

1. On 15 September 2009 Ofcom concluded its *Review of the fixed narrowband services wholesale markets* in which it identified markets, made market power determinations and set appropriate SMP conditions as set out in the Notification at Annex 7 to the review, and explained in the accompanying explanatory statement.
2. Ofcom determined in the review referred to in paragraph 1, above, that BT, as a Dominant Provider, has significant market power in, amongst others, the market for wholesale call origination on a fixed narrowband network in the United Kingdom, excluding the Hull Area ('the Call Origination market').
3. SMP service Condition AAA7 (Transparency as to quality of service) was set in relation to, amongst others, the Call Origination market.
4. This Direction concerns matters to which Condition AAA7 relates.
5. For the reasons set out in Section 11 of the explanatory statement accompanying this Direction Ofcom is satisfied that, in accordance with section 49(2) of the Act, this Direction is:
  - i. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - ii. not such as to discriminate unduly against particular persons or against a particular description of persons;
  - iii. proportionate to what it is intended to achieve; and
  - iv. in relation to what it is intended to achieve, transparent.
6. For the reasons set out in Section 3 of the explanatory statement accompanying this Direction, Ofcom is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act.
7. As set out in Section 11 of the explanatory statement accompanying this Direction, Ofcom has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

## Direction

8. Ofcom hereby, pursuant to section 49 of the Act and proposed Condition AAA7 in Schedule 1 to the Notification, directs the Dominant Provider to act as prescribed in paragraphs 9 to 14 below:
9. The Dominant Provider shall publish, as required by paragraph 12 below, the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Interconnection Circuits ("the Interconnection Circuits KPIs").
10. The Dominant Provider shall provide to individual Third Parties, the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Interconnection Circuits, as required in paragraph 12 below.
11. The Dominant Provider shall provide to Ofcom the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Interconnection Circuits ("the Interconnection Circuits KPIs"), as required by paragraph 12 below.
12. The information required by paragraphs 9, 10 and 11 above shall be published and provided as required by the Dominant Provider within 14 Working Days of the last Working Day of the Reporting Period in respect of that Reporting Period.
13. Annex A to this Direction forms part of the Direction.
14. Nothing in this Direction shall require the Dominant Provider to publish confidential information relating to its business or that of a Third Party.
15. For the purpose of interpreting this Direction the following definitions shall apply:

"Act" means the Communications Act 2003;

"Augmented Route" means an Order where any Interconnection Circuit is being provided to the Third Party by another Third Party (including those provided by the Dominant Provider) at the time of order and the effect of that order is to modify the capacity of the route;

"Committed Order" means an Order for which a Contract Delivery Date has been confirmed;

"Completed Order" means an Order which has been provisioned and for which all other related work has been carried out;

"Contract Delivery Date" means the date agreed between the Dominant Provider and a Third Party for an Order to become a Completed Order;

"CSI" means customer sited Interconnection links;

"DMA" (Data Management Amendments) means the routing amendment which a Third Party requests the Dominant Provider to make in order to modify the way in which calls are routed both at the Digital Local Exchange and at the tandem switches;

"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 by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

“Fault” means a degradation or problem or with Interconnection Circuits which is identified by the Dominant Provider or a Third Party and which is registered on the Dominant Provider’s operational support system;

“Hull Area” means the area defined as the ‘Licensed Area’ in the license granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

“IEC” means Interconnection extension circuits;

“Installed Base” means the average number of Interconnection Circuits lines that are in use during the Reporting Period;

“Interconnection Circuits” mean any and all of the following specific services provided by the Dominant Provider:

- i. CSI;
- ii. ISI;
- iii. IEC;

“ISI” means in-span Interconnection links;

“KPI” means key performance indicator;

“New Route” means an Order where any Interconnection Circuits are not being provided by the Dominant Provider to the Third Party at the time of order;

“Notification” means the Notification referred to in paragraph 1 of this Direction above, as published on 15 September 2009;

“Order” means a request for Interconnection Circuits submitted to the Dominant Provider by a Third Party;

“Reporting Period” means the period of three calendar months in respect of which the Dominant Provider is required to publish or provide to Ofcom as required the Interconnection Circuit KPIs;

“Restored Service” means the point at which the Interconnection Circuit in relation to which a Fault was registered becomes available again for use by the Third Party;

“Third Party” means either:

- i. a person providing a Public Electronic Communications Network; or
- ii. a person providing a Public Electronic Communications Service;

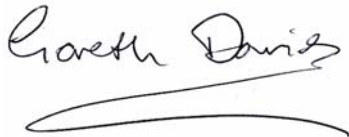
“Working Day” means any day other than Saturdays, Sundays, public holidays or bank holidays in the United Kingdom.

16. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the



same meaning as it has in the Act, or if it has no meaning there, in Part 1 of Schedule 1 to the Notification.

17. For the purpose of interpreting this Direction:
  - i. headings and titles shall be disregarded; and
  - ii. the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.
18. This Direction shall take effect on the day it is published.

A handwritten signature in dark ink, appearing to read 'Gareth Davies', with a long, sweeping horizontal line underneath it.

Gareth Davies  
Competition Policy Director

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

**15 September 2009**

## **Annex A**

### **Interconnection Circuit KPIs**

#### **Part 1: Indicators**

1. The Dominant Provider shall publish the information required in KPIs (i) to (iii) below in relation to the provision of Interconnection Circuits to:

a) all Third Parties (as an aggregate figure);

2. The Dominant Provider shall publish the information required in KPI (iii) below in relation to the provision of Data Management Amendments to itself.

3. The Dominant Provider shall provide to Ofcom the information required in KPIs (i) to (iii) in relation to the provision of Interconnection Circuits to all Third Parties.

#### **KPI (i) - Percentage of orders provisioned on time**

the percentage of Completed Orders that were completed by the Contract Delivery Date during the Reporting Period;

#### **KPI(ii) - Average time to restore service**

the average time (in hours) during the Reporting Period for the Dominant Provider to achieve Restored Service after a Fault has been registered;

#### **KPI(iii) - Data Management Amendments**

the percentage of Data Management Amendments for new numbers that become Completed Orders during the Reporting Period whereby they are completed within 30 Working Days of the Order becoming a Committed Order excluding any Data Management Amendments where the standard 30 Working Day lead time has not been requested.

#### **Part 2: Volumes**

1. The Dominant Provider shall publish the information required in KPIs (i) to (iii) below in relation to the provision of Interconnection Circuits to all Third Parties (as an aggregate figure);

2. The Dominant Provider shall provide to Ofcom the information required in KPI (iii) below in relation to the provision of Data Management Amendments to itself.

#### **KPI(i) - Volume of orders provisioned**

the total number of Committed Orders that became Completed Orders during the Reporting Period;

#### **KPI(ii) - Volume of faults reported**

the number of Faults where the Dominant Provider subsequently achieves Restored Service during the Reporting Period;

#### **KPI(iii) - Volume of Data Management Amendments**

the total number of Data Management Amendments for new number ranges that became Completed Orders during the Reporting Period.

## Annex 10

# Legal Instrument: Withdrawal of Direction

### **Withdrawal of a Direction: Local-tandem transit and inter-tandem transit for Indirect Access traffic**

**Withdrawal of a Direction dated 27 November 2003 relating to Local-tandem transit and inter-tandem transit for Indirect Access traffic imposed on BT as a result of a market power determination made by the Director on 27 November 2003 that BT had significant market power in the market for local-tandem conveyance and transit on fixed public narrowband networks in the United Kingdom, but not including the Hull Area.**

### **Background**

1. On 27 November 2003 the Director published the *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets* ("the 2003 review"), in which BT were determined to have SMP in relation to, amongst other markets, the local-tandem conveyance and local-tandem transit market.
2. At Annex D to the 2003 review, the Director published the Direction Local-tandem transit and inter-tandem transit for Indirect Access traffic (the 'IA Direction').
3. On 19 March 2009, Ofcom published a document entitled '*Review of the fixed narrowband services wholesale markets*' ('the 2009 consultation') which made proposals for the identification of markets, market power determinations and the setting appropriate SMP conditions.
4. Additionally it was proposed in the 2009 consultation that the IA Direction should be withdrawn. This was discussed in section 18 of the 2009 consultation and Annex 10 contained a Notification under sections 49(4) of the Act setting out Ofcom's proposal to withdraw the IA Direction.
5. Copies of the 2009 consultation, including the Notification published in its Annex 10 about that proposed withdrawal, were sent to the Secretary of State in accordance with section 50(1)(b) of the Act, as well as to the European Commission and to the regulatory authorities of every other member State in accordance with section 50(4) of the Act.
6. By virtue of section 49(9) of the Act, Ofcom may give effect, with or without modifications, to a proposal with respect to which Ofcom has published a notification under section 49(4) of the Act only if:
  - (a) Ofcom has considered every representation about the proposal that is made to it within the period specified in the notification; and
  - (b) Ofcom has had regard to every international obligation of the United Kingdom (if any) which has been notified to it for this purpose by the Secretary of State.
7. As set out in Section 18 of the explanatory statement accompanying this withdrawal, Ofcom has considered every representation about the proposed withdrawal duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

## Decision

8. Ofcom hereby withdraws, in accordance with section 49 of the Act, the IA Direction as described in paragraph 2 above.

9. The effect of, and the reasons for making the withdrawal are set out at Section 18 of the accompanying consultation document.

## Ofcom's Duties

10. In withdrawing the Direction as set out in this Notification, Ofcom has considered and acted in accordance with its general duties in Section 3 of the Act and the six Community requirements in section 4 of the Act.

11. Ofcom is satisfied that the tests set out at section 49(2) of the Act are satisfied, as explained in Section 18 of the accompanying consultation document.

12. Copies of this Withdrawal instrument and the accompanying explanatory statement have been sent to the Secretary of State in accordance with section 50(1)(d) of the Act and to the European Commission in accordance with section 50(2)(c) of the Act.

## Interpretation

13. Except for references made to the identified services market in this Notification and subject to paragraph 14 below, words or expressions used in this Notification shall have the same meaning as they have been ascribed in the Act.

14. In this Notification—

(a) “**Act**” means the Communications Act 2003 (c.21);

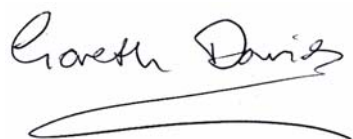
(b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

(c) “**Hull Area**” means the area defined as the ‘Licensed Area’ in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

10. For the purpose of interpreting this Notification—

(a) headings and titles shall be disregarded; and

(b) the Interpretation Act 1978 (c. 30) shall apply as if this Notification were an Act of Parliament.

A handwritten signature in dark ink, appearing to read 'Gareth Davies', with a long, sweeping horizontal line underneath it.

Gareth Davies  
Competition Policy Director

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

**15 September 2009**

## Annex 11

# Legal Instrument: Withdrawal of Direction

## Withdrawal of a Direction: Credit Vetting Direction

**Withdrawal of a Direction dated 27 November 2003 relating to BT's Credit Vetting Supplemental Agreement imposed on BT as a result of a market power determination made by the Director on 27 November 2003 that BT had significant market power in markets for call origination on fixed public telephone networks, local-tandem conveyance and transit on fixed public narrowband networks, inter-tandem conveyance and transit on fixed public narrowband networks and single transit on fixed public narrowband networks in the United Kingdom, but not including the Hull Area.**

### Background

1. On 27 November 2003 the Director published the *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets* ("the 2003 review"), in which BT were determined to have SMP in relation to, amongst others, the following markets in the United Kingdom, but not including the Hull Area:
  - (a) call origination on fixed public telephone networks;
  - (b) local-tandem conveyance and transit on fixed public narrowband networks;
  - (c) inter-tandem conveyance and transit on fixed public narrowband networks; and
  - (d) single transit on fixed public narrowband networks.
2. At Annex F to the 2003 review, the Director published the Direction *BT's Credit Vetting Supplemental Agreement* ('the Credit Vetting Direction').
3. On 19 March 2009, Ofcom published a document entitled '*Review of the fixed narrowband services wholesale markets*' ('the 2009 consultation') which made proposals for the identification of markets, market power determinations and the setting appropriate SMP conditions.
4. Additionally it was proposed in the 2009 consultation that the Credit Vetting Direction should be withdrawn. This was discussed in section 18 of the 2009 consultation and Annex 11 contained a Notification under sections 49(4) of the Act setting out Ofcom's proposal to withdraw the Credit Vetting Direction.
5. Copies of the 2009 consultation, including the Notification published in its Annex 11 about that proposed withdrawal, were sent to the Secretary of State in accordance with section 50(1)(b) of the Act, as well as to the European Commission and to the regulatory authorities of every other member State in accordance with section 50(4) of the Act.
6. By virtue of section 49(9) of the Act, Ofcom may give effect, with or without modifications, to a proposal with respect to which Ofcom has published a notification under section 49(4) of the Act only if—
  - (a) Ofcom has considered every representation about the proposal that is made to it within the period specified in the notification; and
  - (b) Ofcom has had regard to every international obligation of the United Kingdom (if any) which has been notified to it for this purpose by the Secretary of State.

7. As set out in Section 18 of the explanatory statement accompanying this withdrawal, Ofcom has considered every representation about the proposed withdrawal duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

## **Decision**

8. Ofcom hereby withdraws, in accordance with section 49 of the Act, the Credit Vetting Direction as described in paragraph 2 above.

9. The effect of, and the reasons for making the withdrawal are set out at Section 18 of the accompanying consultation document.

## **Ofcom's Duties**

10. In withdrawing the Direction as set out in this Notification, Ofcom has considered and acted in accordance with its general duties in Section 3 of the Act and the six Community requirements in section 4 of the Act.

11. Ofcom is satisfied that the tests set out at section 49(2) of the Act are satisfied, as explained in Section 18 of the accompanying consultation document.

12. Copies of this Withdrawal instrument and the accompanying explanatory statement have been sent to the Secretary of State in accordance with section 50(1)(d) of the Act and to the European Commission in accordance with section 50(2)(c) of the Act.

## **Interpretation**

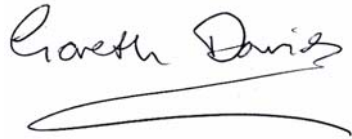
13. Except for references made to the identified services market in this Notification and subject to paragraph 14 below, words or expressions used in this Notification shall have the same meaning as they have been ascribed in the Act.

14. In this Notification—

(a) “**Act**” means the Communications Act 2003 (c.21);

(b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

(c) “**Hull Area**” means the area defined as the ‘Licensed Area’ in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

A handwritten signature in dark ink, appearing to read 'Gareth Davies', with a long, sweeping horizontal line underneath it.

Gareth Davies  
Competition Policy Director

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

**15 September 2009**



## Annex 12

# Legal Instrument: Withdrawal of Direction

### Withdrawal of Directions: KPI Directions

**Withdrawal of two Directions dated 23 September 2004 “*Directions under the Quality of Service Condition (AA7) in the Fixed Narrowband Review*” published as Annex 2 to the statement “*Requirement on BT to publish Key Performance Indicators*”**

### Background

1. On 27 November 2003 the Director published the *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets* (“the 2003 review”), in which BT were determined to have SMP in relation to, amongst others, the following markets in the United Kingdom, but not including the Hull Area:
  - i. wholesale analogue exchange line services
  - ii. wholesale ISDN2 exchange line services
  - iii. wholesale ISDN30 exchange line services
  - iv. call origination on fixed public telephone networks
  - v. local-tandem conveyance and transit on fixed public narrowband networks;
  - vi. inter-tandem conveyance and transit on fixed public narrowband networks; and
  - vii. single transit on fixed public narrowband networks.
2. SMP Service condition AA7 – Transparency as to quality of service required, at paragraph AA7.2, the Dominant Provider to comply with any direction made by Ofcom under that condition.
3. On 23 September 2004 Ofcom published the *Requirement on BT to publish Key Performance Indicators* giving amongst others, two directions under SMP Service condition AA7, *Directions under the Quality of Service Condition (AA7) in the Fixed Narrowband Review*, as set out at Annex 2 to the statement, which related to the publication of Key Performance Indicators (‘KPIs’) in relation to the provisions of Wholesale Line Rental and Interconnection Circuits.
4. The two directions (‘the two KPI Directions’) were:
  - (a) Direction under the Quality of Service Condition (AA7) in the Fixed Narrowband Review (relating to Wholesale Line Rental KPIs); and
  - (b) Direction under the Quality of Service Condition (AA7) in the Fixed Narrowband Review (relating to Interconnection Circuits KPIs).
5. This withdrawal does not affect any other Direction made under the statement and only relates to the two KPI Directions.
6. On 19 March 2009, Ofcom published a document entitled ‘*Review of the fixed narrowband services wholesale markets*’ (‘the 2009 consultation’) which made proposals for the identification of markets, market power determinations and the setting appropriate SMP conditions.

7. Additionally it was proposed in the 2009 consultation that the two KPI Directions should be withdrawn. This was discussed in section 11 of the 2009 consultation and Annex 12 contained a Notification under sections 49(4) of the Act setting out Ofcom's proposal to withdraw the two KPI Directions.

8. Copies of the 2009 consultation, including the Notification published in its Annex 12 about that proposed withdrawal, were sent to the Secretary of State in accordance with section 50(1)(b) of the Act, as well as to the European Commission and to the regulatory authorities of every other member State in accordance with section 50(4) of the Act.

9. By virtue of section 49(9) of the Act, Ofcom may give effect, with or without modifications, to a proposal with respect to which Ofcom has published a notification under section 49(4) of the Act only if—

(a) Ofcom has considered every representation about the proposal that is made to it within the period specified in the notification; and

(b) Ofcom has had regard to every international obligation of the United Kingdom (if any) which has been notified to it for this purpose by the Secretary of State.

10. As set out in Sections 11 and 18 of the explanatory statement accompanying this withdrawal, Ofcom has considered every representation about its proposals regarding KPI directions duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

## **Decision**

11. Ofcom hereby withdraws, in accordance with section 49 of the Act, the two KPI Directions as described in paragraph 4 above.

12. The effect of, and the reasons for making the withdrawal are set out at Sections 11 and 18 of the accompanying consultation document.

## **Ofcom's Duties**

13. In withdrawing the Direction as set out in this Notification, Ofcom has considered and acted in accordance with its general duties in Section 3 of the Act and the six Community requirements in section 4 of the Act.

14. Ofcom is satisfied that the tests set out at section 49(2) of the Act are satisfied, as explained in Sections 11 and 18 of the accompanying consultation document.

15. Copies of this Withdrawal instrument and the accompanying explanatory statement have been sent to the Secretary of State in accordance with section 50(1)(d) of the Act and to the European Commission in accordance with section 50(2)(c) of the Act.

## **Interpretation**

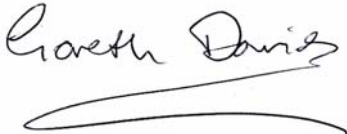
16. Except for references made to the identified services market in this Notification and subject to paragraph 17 below, words or expressions used in this Notification shall have the same meaning as they have been ascribed in the Act.

18. In this Notification—

(a) “**Act**” means the Communications Act 2003 (c.21);

(b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

(c) “**Hull Area**” means the area defined as the ‘Licensed Area’ in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

A handwritten signature in dark ink, appearing to read 'Gareth Davies', with a long, sweeping horizontal line underneath.

Gareth Davies  
Competition Policy Director

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

**15 September 2009**

## Annex 13

# Legal Instrument: Revised Proposals

## NOTIFICATION OF PROPOSALS UNDER SECTIONS 48(2) AND 80 OF THE COMMUNICATIONS ACT 2003

### Proposals for identifying markets, making market power determinations and the setting of SMP services conditions in relation to BT, KCOM and specified Communication Providers providing termination services under section 45 of the Communications Act 2003

#### Background

1. On 28 November 2003, the Director General of Telecommunications ("The Director") published a *Review of the fixed narrowband line, call origination, conveyance and transit markets*<sup>90</sup> ('the 2003 Statement'), and a *Review of fixed geographic call termination markets*<sup>91</sup>.
2. On 29 December 2003, Ofcom took over the functions and responsibilities under the Communications Act 2003 relating to the EC Communications directives from The Director.
3. On 18 August 2005, Ofcom published a *Review of BT's Network Charge Controls*<sup>92</sup> which reviewed the markets for local-tandem conveyance / transit and inter-tandem conveyance / transit. The review found the market for inter-tandem conveyance / transit to be competitive; determined that BT no longer had SMP in this market and SMP conditions relating to that market were revoked.
4. On 19 March 2009 Ofcom published a *Review of the wholesale fixed narrowband markets*<sup>93</sup> consultation ('the 2009 consultation') on proposals reviewing market definition, market analysis and, where appropriate, the setting of SMP service conditions.
5. The 2009 consultation proposed a single Wholesale Transit market combining the markets defined in 2003 as single transit and inter-tandem conveyance / transit.
6. On 4 June 2009, the consultation for the 2009 consultation period closed. Ofcom has given careful consideration to every representation about the proposal that has been made.
7. On 15 September 2009 Ofcom published the *Review of the wholesale fixed narrowband markets* with various Notifications, including:

<sup>90</sup> *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, 28 Nov 2003 ([http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/nwe/](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/))

<sup>91</sup> *Review of fixed geographic call termination markets*, 28 Nov 2003, ([http://www.ofcom.org.uk/consult/condocs/narrowband\\_mkt\\_rvw/Eureviewfinala1.pdf](http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/Eureviewfinala1.pdf))

<sup>92</sup> *Review of BT's Network Charge Controls*, 18 Aug 2005 (<http://www.ofcom.org.uk/consult/condocs/charge/statement/>)

<sup>93</sup> [http://www.ofcom.org.uk/consult/condocs/review\\_wholesale/fnwm.pdf](http://www.ofcom.org.uk/consult/condocs/review_wholesale/fnwm.pdf)

- (a) At Annex 7, a Notification (“the September 2009 Notification”) defining markets including the call termination market, making market power determinations and setting SMP services conditions. No decisions were made in relation to the previously proposed Wholesale Transit market; and
  - (b) At Annex 13, this Notification
8. This Notification makes further proposals in relation to:
- a. market definition, market power assessment and the setting of appropriate SMP conditions for separate single tandem and inter-tandem conveyance / transit markets;
  - b. the withdrawal of SMP services conditions presently applying to the single tandem market; and
  - c. the setting of an additional SMP services condition in the call termination market.

## Proposals

### *Proposals relating to market definition and market power analysis*

9. Ofcom hereby makes, in accordance with sections 48(2) and 80 of the Communications Act 2003 (“the Act”), the following proposals for identifying markets, making market power determinations and the setting of SMP services conditions by reference to such determinations (“SMP conditions”).

10. Ofcom is proposing to identify the following markets for the purpose of making market power determinations:

In the geographic market of the United Kingdom, except the Hull Area:

- (a) Single transit on fixed public narrowband networks; and
- (b) Inter-tandem conveyance and transit on fixed public narrowband networks.

11. Ofcom is proposing to make a market power determination that BT has significant market power in relation to the market set out in paragraph 10(a) above.

12. Ofcom proposes that the market set out in paragraph 10(b) above remains effectively competitive and, therefore, that no person holds significant market power in relation to that market.

13. The effect of, and Ofcom’s reasons for, making the proposals to identify markets and making market power determinations as set out in paragraphs 10 to 12, above, are contained in Section 19 of the document accompanying this Notification.

### *Proposals to set SMP service conditions : Single Transit Market*

14. In relation to the service market identified at paragraph 10(a) of this Notification Ofcom is proposing to set SMP conditions on BT as set out in Schedule 1 to this Notification.

### *Proposals to withdraw existing SMP service conditions : Single Transit Market*

15. Ofcom propose to revoke the existing SMP Service Conditions currently applied to the market for Single transit on fixed public narrowband networks as defined in the 2003 Statement.

16. The conditions (as modified)<sup>94</sup> described in paragraph 15 above are set out at Annex A of the Notification to the *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, published by the Director on 28 November 2003.

*Proposal to amend SMP services conditions : Single Transit Market*

17. Ofcom proposes to amend Annex 2 to *The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification* dated 22 July 2004 (as amended) ('the financial reporting statement') which sets SMP conditions on BT in relation to regulatory accounting in respect of various markets, by amending the table, "Part 1: Wholesale Markets" of Schedule 1 to the Annex so that entry number 9 of that table reads as follows:

9. Single Transit on fixed public narrowband networks in the UK excluding the Hull Area	[date of final statement]
---	---------------------------

18. Ofcom further proposes that, in relation to the proposed market set out at paragraph 10(a) of this Notification and, by reference to the proposed market power determination set out at paragraph 11 of this Notification, SMP services conditions, as set out in the financial reporting statement, should continue to apply to market 9 as defined in the table "Part 1: Wholesale Markets" of Schedule 1 to the Annex to the financial reporting statement.

*Proposal to set SMP services conditions : Call Termination Market*

19. In relation to the services markets identified at paragraph 12(c)(i) of the September 2009 Notification Ofcom is proposing to set SMP conditions as set out in Schedule 2 to this Notification.

*Effect and reasons for proposals to set SMP conditions*

20. The effect of, and Ofcom's reasons for making the proposals to set the proposed SMP conditions set out in Schedules 1 and 2 to this Notification are contained in Section 19 of the document accompanying this Notification.

**Ofcom's duties and legal tests**

21. In identifying and analysing the markets referred to in paragraph 10 above, 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 a Community instrument, and relate to market identification and analysis or the determination of what constitutes significant market power.

22. Ofcom consider that the proposed new SMP services conditions referred to in paragraphs 14 and 15 of this Notification comply with the requirements of sections 45 to 47, 87 and 88 of the 2003 Act as appropriate and relevant to each of those SMP services conditions.

23. In making all of the proposals referred to in paragraphs 9 to 19 of 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.

<sup>94</sup> The SMP conditions set in the 2003 Statement, have been amended from time to time. The revocation of the substantive conditions includes any amendment that has subsequently been made to those conditions.

## **Making representations**

24. Representations may be made to Ofcom about any of the proposals set out in this Notification and the accompanying explanatory statement by no later than 16 October 2009.

25. Copies of this Notification and the accompanying explanatory statement have been sent to the Secretary of State for Business, Innovation and Skills in accordance with section 50(1)(a) of the Act, as well as the European Commission and to the regulatory authorities of every other member State in accordance with section 50(3) of the Act.

## **Interpretation**

26. Save for the purposes of paragraph 10 of this Notification and except as otherwise defined in paragraph 26 of this Notification, words or expressions used shall have the same meaning as they have been ascribed in the Act.

27. In this Notification:

(a) “**Act**” means the Communications Act 2003 (c. 21)

(b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

## SCHEDULE 1

**[DRAFT] Setting of SMP services conditions as a result of the market power determination [made] by Ofcom in the [final statement Review of the fixed narrowband services wholesale markets: Single Transit Market consultation] in respect of the services market for single transit services on fixed public narrowband networks in the United Kingdom but excluding the Hull Area in which it has been proposed that BT is a person having significant market power.**

### **Part 1: Application, definitions and interpretation relating to the SMP conditions in Part 2**

1. The SMP conditions in Part 2 of this Schedule 1 shall, except insofar as it is otherwise stated therein, apply to the markets set out in paragraph 10(a) of this Notification.
2. In this Schedule 1:
  - (a) “**Act**” means the Communications Act 2003 (c. 21);
  - (b) “**Access Charge Change Notice**” has the meaning given to it in Condition AAA6(a).2;
  - (c) “**Access Contract**” means:
    - (i) a contract for the provision by the Dominant Provider to another person of Network Access to the Dominant Provider’s Electronic Communications Network;
    - (ii) a contract under which Associated Facilities in relation to the Dominant Provider’s Public Electronic Communications Network are made available by the Dominant Provider to another person;
  - (d) “**CSI**” means customer sited Interconnection;
  - (e) “**Dominant Provider**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
  - (f) “**IEC**” means Interconnection extension circuits;
  - (g) “**ISI**” means in-span Interconnection links;
  - (h) “**Network Component**” means, to the extent they are used in the Services Market, the network components specified in any direction given by Ofcom from time to time for the purpose of these SMP conditions.
  - (i) “**Network Termination and Testing Apparatus**” means an item of Apparatus comprised in an Electronic Communications Network installed in a fixed position on Served Premises which enables:
    - (a) Approved Apparatus to be readily connected to, and disconnected from, the network;
    - (b) the conveyance of Signals between such Approved Apparatus and the Network;
    - (c) the due functioning of the Network to be tested,



but the only other functions of which if any are:

- (i) to supply energy between such Approved Apparatus and the Network;
- (ii) to protect the safety or security of the operation of the Network;
- (iii) to enable other operations exclusively related to the running of the network to be performed or the due functioning of any system to which the network is or is to be connected to be tested (separately or together with the network).

(i) **“Network Termination Point”** means the physical point at which a Relevant Subscriber is provided with access to a Public Electronic Communications Network and, where it concerns Electronic Communications Networks involving switching or routing, that physical point is identified by means of a specific network address, which may be linked to the Telephone Number or name of a Relevant Subscriber. Where a Network Termination Point is provided at a fixed position on Served Premises, it shall be within an item of Network Termination and Testing Apparatus;

(j) **“NTS”** means number translation services;

(k) **“NTS Calls”** means a call to a number identified in the Numbering Plan for the United Kingdom as a Special Services number or a Special Services at a Premium Rate number, or a Sexual Entertainment Services at a Premium Rate including calls to 0500 Freephone numbers and numbers identified as Special Services numbers in table 5 of the Annex to General Condition 17, but excluding calls to 0844 04 numbers for Surftime Internet access services and calls to 0808 99 numbers for FRIACO;

(l) **“Numbering Plan”** means the National Telephone Numbering Plan published from time to time by the Director pursuant to sections 56 and 60 of the Act 2003;

(m) **“Point of Connection”** means a point at which the Dominant Provider’s Electronic Communications Network and another person’s Electronic Communications Network are connected;

(n) **“Premium Rate Service”** means a service as defined in the Numbering Plan for the United Kingdom as a Special Service at a Premium Rate;

(o) **“Public Telephone Network”** means an Electronic Communications Network which is used to provide Publicly Available Telephone Services; it supports the transfer between Network Termination Points of speech communications, and also other forms of communication, such as facsimile and data;

(p) **“Publicly Available Telephone Services”** means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End-users with disabilities or with special social needs and/or the provision of non-geographic services;

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

(r) “**Services Market**” means the markets set out in paragraphs 10(a) of the Notification;

(s) “**Tandem Exchange**” means a telephone exchange whose primary function is not to support the provision of Exchange Lines but to switch traffic between other telephone exchanges in a Public Electronic Communications Network;

(t) “**Third Party**” means either:

- (i) a person providing a Public Electronic Communications Network; or
- (ii) a person providing a Public Electronic Communications Service;

(u) “**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 Services Market and the use of Network Components in that Services Market;

(v) “**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;

## **Part 2: The SMP conditions**

### **Condition AA(ST)1(a) - Requirement to provide Network Access on reasonable request**

**AA(ST)1(a).1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

**AA(ST)1(a).2** The provision of Network Access in accordance with paragraph AA(ST)1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**AA(ST)1(a).3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AA(ST)1(a).

### **Condition AA(ST)1(b) - Requests for new Network Access**

**AA(ST)1(b).1** The Dominant Provider shall, for the purposes of transparency, publish reasonable guidelines, in relation to requests for new Network Access made to it. Such guidelines shall detail:

- (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 new Network Access; and
- (c) the time-scales in which such requests will be handled by the Dominant Provider.

**AA(ST)1(b).2** These guidelines shall meet the following principles:

- (a) the process should 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; and
- (e) any changes to the guidelines be agreed between BT and industry.

**AA(ST)1(b).3** The Dominant Provider shall, upon a reasonable request from a Third Party considering making a request for new Network Access, provide that Third Party with information so as to enable that Third Party to make a request for new Network Access. Such information shall be provided within a reasonable period.

**AA(ST)1(b).4** On receipt of a written request for new Network Access, the Dominant Provider shall deal with the request in accordance with the guidelines described at paragraph AA(ST)1(b).1 above. A modification of a request for new Network Access which has previously been submitted to the Dominant Provider, and rejected by the Dominant Provider, shall be considered as a new request.

**AA(ST)1(b).5** The Dominant Provider is required to provide Ofcom with a description of the processes it has put in place to ensure compliance with this Condition AA(ST)1(b). The Dominant Provider shall keep those processes under review to ensure that they remain adequate for that purpose. Where changes to the process are agreed with industry, BT should notify Ofcom of those changes.

### **Condition AA(ST)2 - Requirement not to unduly discriminate**

**AA(ST)2.1** The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

### **Condition AA(ST)3 - Basis of charges**

**AA(ST)3.1** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AA(ST)1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

**AA(ST)3.2** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AA(ST)3.

### **Condition AA(ST)5 - Requirement to publish a Reference Offer**

**AA(ST)5.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.

**AA(ST)5.2** Subject to paragraph AA(ST)5.8 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes 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 the Network Access);
- (b) the locations of the points of Network Access;
- (c) the technical standards for Network Access (including any usage restrictions and other security issues);
- (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- (e) any ordering and provisioning procedures;
- (f) relevant charges, terms of payment and billing procedures;
- (g) details of interoperability tests;
- (h) details of traffic and network management;
- (i) details of maintenance and quality as follows:

- (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- (j) details of measures to ensure compliance with requirements for network integrity;
  - (k) details of any relevant intellectual property rights;
  - (l) a dispute resolution procedure to be used between the parties;
  - (m) details of duration and renegotiation of agreements;
  - (n) provisions regarding confidentiality of non-public parts of the agreements;
  - (o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);
  - (p) the standard terms and conditions for the provision of Network Access;
  - (q) the amount applied to:
    - (i) each Network Component used in providing Network Access with the relevant Usage Factors; and
    - (ii) the Transfer Charge for each Network Component or combination of Network Components described above,reconciled in each case to the charge payable by a Communications Provider other than the Dominant Provider.

**AA(ST)5.3** The Dominant Provider shall update and publish the Reference Offer in relation to any amendments or in relation to any further Network Access provided after the date this Condition AA(ST)5 enters into force.

**AA(ST)5.4** Publication referred to above shall be effected by:

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

**AA(ST)5.5** 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 which have been requested).

**AA(ST)5.6** The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

**AA(ST)5.7** The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.

**AA(ST)5.8** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AA(ST)5.

#### **Condition AA(ST)6(a) - Requirement to notify charges**

**AA(ST)6(a).1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below.

**AA(ST)6(a).2** Except where new or amended charges are directed or determined by Ofcom or where such charges are required by a notification or an enforcement notification given by Ofcom under sections 94 or 95 of the Act, the Dominant Provider shall send to Ofcom and to every Third Party with which it has entered into an Access Contract covered by Condition AA(ST)1(a) a written notice of any amendment to the charges on which it provides Network Access or in relation to any charges for new Network Access (an "Access Charge Change Notice") not less than 90 days before any such amendment comes into effect.

**AA(ST)6(a).3** 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;
- (c) the date on which or the period for which any amendments to charges will take effect (the "effective date");
- (d) in relation to those products and services subject to Conditions AA(ST)3, the current and proposed new charge and the relevant Usage Factors applied to each Network Component comprised in that Network Access, reconciled in each case with the current or proposed new charge;
- (e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies; and
- (f) the relevant network tariff gradient.

**AA(ST)6(a).4** The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

#### **Condition AA(ST)6(b) - Requirement to notify technical information**

**AA(ST)6(b).1** Save where the Director consents otherwise, where the Dominant Provider:

(a) proposes to provide Network Access covered by Condition AA(ST)1(a), the terms and conditions for which comprise new:

- (i) technical characteristics (including information on network configuration where necessary to make effective use of the Network Access);
- (ii) locations of the points of Network Access; or
- (iii) technical standards (including any usage restrictions and other security issues), or

(b) proposes to amend an existing Access Contract covered by Condition AA(ST)1(a) by modifying the terms and conditions listed in paragraph AA(ST)6(b).1(a)(i) to (iii) above on which the Network Access is provided,

the Dominant Provider shall publish a written notice (the "Notice") of the new or amended terms and conditions not less than 90 days before either the Dominant Provider enters into an Access Contract to provide the new Network Access or the amended terms and conditions of the existing Access Contract come into effect. This obligation for prior notification shall not apply where new or amended terms and conditions are directed or determined by the Office of Communications ("Ofcom") or are required by a notification or an enforcement notification given by Ofcom under sections 94 or 95 of the Act.

**AA(ST)6(b).2** 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 Reference Offer of the relevant terms and conditions;
- (c) the date on which or the period for which the Dominant Provider may enter into an Access Contract to provide the new Network Access or any amendments to the relevant terms and conditions will take effect (the "effective date").

**AA(ST)6(b).3** The Dominant Provider shall not enter into an Access Contract 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.

**AA(ST)6(b).4** Publication referred to in paragraph AA(ST)6(b).1 shall be effected by:

- (a) placing a copy of the Notice on any relevant website operated or controlled by the Dominant Provider;
- (b) sending a copy of the Notice to Ofcom; and
- (c) sending a copy of the Notice to any person at that person's written request, and where the Notice identifies a modification to existing relevant terms and conditions, to every Third Party with which the Dominant Provider has entered into an Access Contract covered by Condition AA(ST)1(a). The provision of such a copy of the Notice may be subject to a reasonable charge.

## SCHEDULE 2

**[DRAFT] Setting of SMP services conditions BC2 as a result of the market power determination by Ofcom in the [final statement Review of the fixed narrowband services wholesale markets] in respect of the services market for Wholesale fixed geographic call termination in which it has been found that specified Communication Providers are person having significant market power.**

1. In Schedule 3 to Annex 7 of the final statement *Review of the fixed narrowband services wholesale markets* dated 15 September 2009, there shall be set the following SMP services condition BC2, inserting it after Condition BC1.

2. The SMP condition BC2 shall only apply to those persons listed at Annex A to Schedule 3 of the Notification to the final statement *Review of the fixed narrowband services wholesale markets* dated 15 September 2009, being persons found to have significant market power in the wholesale fixed geographic call termination market. For ease of reference, Annex A has been reproduced below.

### **Condition BC2 – Requirement to notify charges**

**BC2.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges in the manner set out below.

**BC2.2** Charges shall be published on or before the day on which the charges come into effect.

**BC2.3** If charges are published before they come into effect, the Dominant Provider shall also publish the date that the charges are due to come into effect.

**BC2.4** Publication of charges on a publicly accessible website operated by the Dominant Provider shall be sufficient to comply with Condition BC2.1 above.



## **Annex A to Schedule 2 (List of Dominant Providers for the purpose of Schedule 2)**

1. 118 Limited whose registered company number is 03951948, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
2. 24 Seven Communications Limited whose registered company number is 04468566, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
3. 4D Interactive Ltd whose registered company number is 02676756, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
4. Aggregated Telecom Ltd whose registered company number is 03882936, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
5. Atlas Interactive Group Ltd whose registered company number is 03249486, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
6. BSKYB whose registered company number is 05349163, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
7. C3 Europe Ltd whose registered company number is 04188942, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
8. Cable & Wireless UK whose registered company number is 01541957, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
9. Callagenix Ltd whose registered company number is 03963819, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
10. Collouquium Limited whose registered company number is SC142248, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.
11. COLT Telecommunications whose registered company number is 02452736, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding

company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

12. Connect Telecom Ltd whose registered company number is 06298460, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

13. Digitech Solutions whose registered company number is 04546657, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

14. Edge Telecom Ltd whose registered company number is 03101247, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

15. Eircom (UK) Limited whose registered company number is 03478971, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

16. Elephant Talk Communications PRS UK Limited whose registered company number is 05890632, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

17. ETC Telecom Ltd whose registered company number is 06295193, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

18. Evoxus Limited whose registered company number is 03798888, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

19. Flextel Limited whose registered company number is 02772380, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

20. Gamma Telecom Ltd whose registered company number is 04340834, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

21. Global Crossing (UK) Telecommunications Limited whose registered company number is 02495998, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

22. Global One Communications Holding Limited whose registered company number is 02082327, and any subsidiary or holding company of it, or any subsidiary of it, or any

subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

23. I Communicate Services whose registered company number is 06212287, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

24. IDT Global Ltd whose registered company number is 03322447, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

25. Inclarity plc whose registered company number is 02673204, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

26. "Intouch Communication" Services Limited whose registered company number is 03606467, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

27. IV Response Ltd whose registered company number is 04318927, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

28. KDDI Europe Limited whose registered company number is 02407242, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

29. Kingston Communications Limited whose registered company number is 03317871, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

30. Magrathea Telecommunications Limited whose registered company number is 04260485, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

31. Mars Telecom Ltd whose registered company number is 04713626, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

32. Medius Networks Limited whose registered company number is 04157875, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

33. Net Solutions Europe Limited whose registered company number is 03203624, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding

company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

34. Nexus Telecommunications Ltd whose registered company number is 03895766, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

35. NPLUSONE Limited whose registered company number is SC236129, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

36. N T L Glasgow registered company number is SC075177, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

37. O-Bit Telecom Limited whose registered company number is 04365519, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

38. Optics Telecom Limited whose registered company number is 04874092, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

39. Orange Limited whose registered company number is 03110666, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

40. Oxygen8 Communications UK Limited whose registered company number is 03383285, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

41. PNC Telecom plc whose registered company number is 02709891, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

42. Premier Voicemail Limited whose registered company number is 03172426, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

43. Primus Telecom Ltd whose registered company number is 02937312, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

44. QICOMM Limited whose registered company number is 05422551, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company,

all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

45. QX Telecom Limited whose registered company number is 03820728, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

46. Ringmaster Ltd whose registered company number is 03450577, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

47. Sala Trading Ltd whose registered company number is 03617973, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

48. SingTel (Europe) Ltd whose registered company number is 03426947, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

49. Skycom Limited whose registered company number is 04101655, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

50. Skytel Limited whose registered company number is 04227994, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

51. Spacetel whose registered company number is 06184554, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

52. Spitfire Network Services whose registered company number is 02657590, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

53. Starcomm Ltd whose registered company number is 02830288, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

54. Stardex (UK) Limited whose registered company number is SC192625, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

55. Subhan Universal Limited whose registered company number is 05642502, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding

company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

56. Swiftnet Ltd whose registered company number is 02469394, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

57. Switch Services Limited whose registered company number is 04968578, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

58. Syntec Limited whose registered company number is 03529985, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

59. Teamphone.com whose registered company number is 01403177, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

60. Telco Global Networks Limited whose registered company number is 04214792, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

61. Teledesign plc whose registered company number is 03254784, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

62. Telephony Services Ltd whose registered company number is 05134355, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

63. Telsis Systems Limited whose registered company number is 02312314, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

64. Telstra Ltd whose registered company number is 03830643, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

65. Telswitch Ltd whose registered company number is 06127089, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

66. Telxl Limited whose registered company number is 04249562, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all

as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

67. T-Mobile whose registered company number is 02382161, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

68. Tweedwind (Two) Limited whose registered company number is 04392360, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

69. United Connect Ltd whose registered company number is 03204967, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

70. Vectone Network Limited whose registered company number is 05445235, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

71. Verizon UK Limited whose registered company number is 02776038, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

72. Virgin Media Limited whose registered company number is 02591237, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

73. Virtual Universe Ltd whose registered company number is 03064568, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

74. Vital Phone Limited whose registered company number is 04203630, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

75. Vodafone Ltd whose registered company number is 01471587, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

76. VTL (UK) Ltd whose registered company number is 04287100, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

77. Wavecrest (UK) Ltd whose registered company number is 03042254, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company,

all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

78. Wire9 Telecom plc whose registered company number is 04210403, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

79. XTEC Communications Limited whose registered company number is 03673661, and any subsidiary or holding company of it, or any subsidiary of it, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.



## Annex 14

# Guidance on interpretation of cost orientation

- A14.1 This annex provides guidance in interpretation of the basis of charges obligations we have imposed on BT and KCOM in several markets in Sections 11 and 12 of this statement.
- A14.2 The basis of charges condition states that charges must be on the basis of long run incremental costs plus an appropriate mark-up for costs which are common across products, and for recovery of the cost of capital. The general guidance on the interpretation of the basis of charges condition is as given by Oftel in Annex B of the NCC Guidelines.<sup>95</sup> We have also discussed these issues in an economic annex to a recent draft decision on PPC charges<sup>96</sup>. In principle, a first order test of whether a charge on an individual service satisfies the basis of charges condition is whether it is below a floor based on long-run incremental costs or above a ceiling based on stand-alone cost. In practice, the first order test will check if the charge is between DLRIC and DSAC<sup>97</sup> (where such cost information is available and sufficiently robust).
- A14.3 Below we distinguish three different cases where a basis of charges condition is imposed in this statement.<sup>98</sup> We briefly discuss these different cases and how Ofcom considers it would be most appropriate to interpret them. Ofcom's general approach will be to interpret the basis of charges obligation as relating to the first order test of the charges being between DLRIC and DSAC unless we explicitly set out how we would interpret the obligation in a particular case.

### Charge controls and cost orientation as complementary conditions

- A14.4 When products are subject to a charge control condition, a basis of charges condition plays a complementary role by setting some constraints (DLRIC floors and DSAC ceilings) on the price of individual services (e.g., rental charges, connection charges or termination charges)<sup>99</sup> to prevent the company with SMP from taking advantage of its pricing flexibility to recover common costs in a way that might be regarded as inappropriate or indeed anti-competitive. It is also important to note that adherence to the charge control in this case does not necessarily mean that each and every one of the regulated firm's charges satisfy the basis of charges condition. Equally, adherence to the basis of charges condition does not necessarily imply that the firm's charges are consistent with the charge control. For example, if a firm prices all services at a level that is marginally below the DSAC for each of the services, on the basis of the first order test, each charge may be considered cost

<sup>95</sup> See the "Guidelines on the Operation of the Network Charge Controls from October 2001 to 7 December 2001" available at [http://www.ofcom.org.uk/static/archive/oftel/publications/ind\\_guidelines/pcr1201.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/pcr1201.htm)

<sup>96</sup> See Annex 13, "Economic theory of cost orientation", in *Draft Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and COLT and BT regarding Bt's charges for partial private circuits* [http://www.ofcom.org.uk/consult/condocs/draft\\_deter\\_ppc/main.pdf](http://www.ofcom.org.uk/consult/condocs/draft_deter_ppc/main.pdf)

<sup>97</sup> See paragraphs B.3-B.5 and B.14-B.19 of the NCC Guidelines.

<sup>98</sup> We include the cases that are relevant to this Statement, but this is not intended to be an exhaustive list. Other cases may be relevant to other markets.

<sup>99</sup> See the definition of "service" in this Statement in the discussion of remedies in Section 13.

orientated, but it is highly unlikely that the overall set of charges would be compliant with a charge control. The role of the basis of charges condition is therefore not to deny the incumbent firm any opportunity to earn returns in excess of its cost of capital, but rather to restrict its ability to attempt to stifle competition or otherwise act to the detriment of consumers by setting charges on the basis of an anti-competitive allocation of common costs between services.

Cost orientation as a form of regulation in the case where a charge control is deemed a disproportionate response

A14.5 There are instances in this statement (e.g., KCOM's supply of wholesale products or BT's supply of ISDN2) where there is persistent SMP and a charge control would usually be appropriate, but imposing a charge control would not seem proportionate as either there is limited or no actual demand for the products (e.g., KCOM's products) or the current prices seem broadly in line with costs (e.g., ISDN2). In these cases we believe it would not be the best use of Ofcom's resources to calculate and impose an explicit charge control condition and we will rely on the basis of charges condition to control prices. Therefore, we will need to interpret the condition in a way which is appropriate to these circumstances and approximates, as far as possible, to how a price control would work. In the event of a dispute in relation to the prices charged for these products we would interpret the basis of charges condition consistently with the approach we would normally take to setting a charge control, i.e. we would expect the appropriate cost benchmark to be long-run incremental costs plus an equal proportionate contribution to common costs ("LRIC+") during the period (or CCA fully allocated cost as a reasonable proxy). In applying such an interpretation we would not seek to impose more stringent conditions than we would impose if we were to apply a charge control condition. Therefore, we would not expect to interpret a basis of charges condition as being more restrictive than our usual approach to charge controls, which is to impose a glide path to ensure that prices converge to LRIC+ towards the end of the charge control period rather than regulating the rate of return.<sup>100</sup>

Cost Orientation condition for new products

A14.6 There are instances when we expect new products to be introduced during the period covered by this review in SMP markets where a charge control condition applies to the current set of products (e.g., new 21CN products in the call origination and call termination markets). We do not impose a charge control condition on these new products, recognising the importance of incentives to innovate and invest, and because their characteristics and costs are not yet known (and product life cycle issues make simple cost comparisons very difficult). We are aware that the new products will likely relate to the existing 20CN products that are subject to price controls (so called "anchor products"). As a first order test we would therefore expect the 21CN products to be charged in relation to the cost-oriented prices of the anchor products when the relative functionality can be compared (e.g., we would expect the new 21CN products to be priced at or below the price of the corresponding anchor products if their voice functionality is the same and the anchor product is withdrawn from the market or would not constitute a close substitute for a number of customers). Moreover, if the current set of products

<sup>100</sup> The other difference to note is that when we impose charge controls we impose a set of charges at the beginning of the period on the basis of the *expected* costs during the period. On the other hand actual costs may diverge substantially from the expected costs. Since the actual costs can be higher (or lower) than the expected costs, we do not believe this implies that a basis of charges condition would *necessarily* be more stringent *ex ante* than a charge control.

remain in the market and continue to represent a viable option for the customers, we would expect the charge controlled price of the existing product(s) to constrain the price charged for the new product.

Markets where the cost orientation condition is applied

A14.7 The following guidance indicates the approach Ofcom will take to interpreting the basis of charges obligation in the different markets in relation to BT:

- Call origination and Call termination – we are setting a charge control and a basis of charges condition. The latter is imposed to satisfy two objectives: (a) control the charges that would apply to any new 21CN products introduced during the NCC period (as discussed in the Consultation) and (b) ensure that the charges for individual services (e.g., call origination for directory assisted calls) satisfy the DLRIC floors and DSAC ceilings.
- Wholesale Analogue Exchange Line Services - There are three different reasons why we set a cost orientation condition: (a) it would cover the charges for some individual services if cost orientation is imposed on service components where a charge control is not imposed, (b) it would cover the charges for any new 21CN products belonging to this product market as the SMP condition is technology-neutral, and (c) it might cover the charges for value added products incorporating enhanced features.<sup>101</sup>
- Interconnection circuits – these charges are also subject to a basis of charges condition and a charge control. The basis of charges obligation relates to (a) the charges for the individual services (while the charge control applies to a weighted average) and (b) to the charges for any new products that are introduced during the charge control period.
- ISDN2 – Since the imposition of this obligation, the evidence suggests the pricing has stayed within acceptable levels and so imposition of a charge control may be disproportionate even in the presence of persistent SMP, as discussed above.

A14.8 We are not imposing a basis of charges condition on PPP, as PPP is the charge for a single product so there is no need for such an obligation to be imposed in addition to the charge control.

A14.9 In relation to KCOM, the rationale for the basis of charges obligation is that, despite persistent SMP, we do not consider it would be proportionate to impose a charge control as there is limited demand for the different wholesale products as discussed in the Consultation document. However, a level of certainty that charges will be based on costs such that competitors can purchase products that enable them to compete with KCOM is required and therefore a basis of charges condition is appropriate with the interpretation described in paragraph A14.5 above.

---

<sup>101</sup> Although we have decided that the imposition of the condition should apply to the Wholesale Analogue Exchange Line Services market (and, therefore, all products within the market), a further decision as to whether all or any value added products will be removed from the obligation will be made in the forthcoming WLR Charge Control Consultation statement.