

A6. Legal instruments

Section 1 Proposals to modify SMP services conditions and directions for BT

Notification of proposals to modify SMP services conditions and directions under sections 48A, 49A and 80A of the Communications Act 2003 to be applied to BT

Background

1. On 23 November 2017, Ofcom used its powers under sections 48A(2), 49A(2) and 80A(2) of the Communications Act 2003 (“Act”) to adopt temporary measures in the business connectivity markets in order to safeguard competition and protect the interests of consumers (“2017 BCMR Statement”).
2. At Annex 1 to the 2017 BCMR Statement, Ofcom issued a notification (“2017 BCMR Notification”) making market identifications and market power determinations and imposing SMP services conditions and directions on BT in relation to the markets set out at rows a, b, f and g of Table A of the 2017 BCMR Notification.
3. In the 2017 BCMR Statement, Ofcom explained that it did not impose SMP services conditions and directions requiring the provision of dark fibre access as part of the package of temporary measures imposed in the 2017 BCMR Statement at this stage but that the addition of such obligations would be subject to a separate consultation.

Ofcom’s proposals in relation to dark fibre access

4. In this document, Ofcom is therefore consulting on proposals to modify SMP services conditions and directions by requiring BT to provide dark fibre access in the markets set out at rows a, b, f and g of Table A of the 2017 BCMR Notification to the package of temporary measures imposed in the 2017 BCMR Statement. Ofcom is therefore proposing to modify, in relation to each of the services markets set out at rows a, b, f and g of Table A of the 2017 BCMR Notification, the SMP services conditions and directions set out in the 2017 BCMR Notification as shown in Schedules 1 and 2 of this notification.¹ These modifications are proposed:
 - a. to be applied to BT to the extent specified in Schedules 1 and 2;

¹ The proposed modifications to SMP services conditions are shown in Schedule 1 as deletions and insertions against the SMP services conditions as included in the 2017 BCMR Statement. Schedule 2 sets out the proposed modifications of the directions in the same manner.

- b. unless otherwise stated in Schedules 1 and 2, to take effect from the date of any notification under sections 48(1), 49(1) and 79(4) of the Act adopting the proposals set out in this notification.
5. As part of this consultation, Ofcom is also consulting under section 84(2) of the Act on the market identifications and market power determinations set out in the 2017 BCMR Statement. The purpose of this consultation is to carry out further analyses of the markets set out in Table A of the 2017 BCMR Notification in order to:
 - a. review the market power determinations made on the basis of the analysis presented in the 2017 BCMR Statement; and
 - b. decide whether to modify SMP services conditions and directions imposed in the 2017 BCMR Statement to add obligations requiring BT to provide dark fibre access in the markets set out at rows a, b, f and g of Table A of the 2017 BCMR Notification (as shown in Schedules 1 and 2 of this notification).
6. The effect of, and Ofcom's reasons for, making the proposals referred to in paragraphs 4 and 5 above are set out in the consultation document accompanying this notification.

Ofcom's duties and legal tests

7. Ofcom considers that:
 - a. the proposed modifications of the SMP services conditions comply with the requirements of sections 45 to 47, 87 and 88 of the Act, as appropriate and relevant to each such SMP services condition;
 - b. the proposed modifications of the directions comply with the requirements of section 49 of the Act.
8. In making the proposals referred to in this notification, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act and the six Community requirements in section 4 of the Act. In accordance with section 4A of the Act, Ofcom has also taken due account of all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive.

Making representations

9. Representations may be made to Ofcom about any of the proposals set out in this notification and the accompanying consultation document by no later than 29 December 2017.
10. Copies of this notification and the accompanying consultation document have been sent to the Secretary of State in accordance with sections 48C(1), 49C(1) and 81(1) of the Act.

Interpretation

11. For the purpose of interpreting this notification and its Schedules—
 - a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in the 2017 BCMR Statement and the 2017 BCMR Notification, and otherwise any word or expression shall have the same meaning as it has in the Act;

- b) headings and titles shall be disregarded;
- c) expressions cognate with those referred to in this notification shall be construed accordingly; and
- d) the Interpretation Act 1978 (c. 30) shall apply as if this notification were an Act of Parliament.

12. The Schedules to this notification shall form part of this notification.

Signed

A handwritten signature in blue ink, appearing to read 'D. Clarkson.', is written over a light blue rectangular background.

David Clarkson

Competition Policy Director, Ofcom

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

23 November 2017

Schedule 1: Proposed modifications of temporary SMP services conditions (“Conditions”) imposed on BT

1. The definitions set out in Part 2 of Schedule 1 of the 2017 BCMR Notification are proposed to be modified as follows:
 - a. insert the following new definition:

“Dark Fibre Access” means a service providing network access to one or more optical fibres suitable for the transmission of electromagnetic energy to convey signals;
 - b. modify the existing definitions as shown below:

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

“Third Party Customer” means a Third Party purchasing a Relevant Ethernet Service or Dark Fibre Access (as applicable) from the Dominant Provider.
2. For the avoidance of doubt, the remainder of the definitions set out in Part 2 of Schedule 1 of the 2017 BCMR Notification are proposed not to be modified.
3. The following Conditions set out in Part 3 of Schedule 1 of the 2017 BCMR Notification Conditions are proposed to apply to the Dominant Provider in relation to the provision of Dark Fibre Access:
 - a. Conditions 1.1 - 1.5 (inclusive);
 - b. Conditions 3.1 - 3.2 (inclusive),
 - c. Conditions 6.1 – 6.7 (inclusive);
 - d. Condition 7.1;
 - e. Conditions 8.1 – 8.5 (inclusive); and
 - f. Conditions 10.1 – 10.36 (inclusive).
4. Conditions 2, 4 and 5 set out in Part 3 of Schedule 1 of the 2017 BCMR Notification are proposed to apply to the Dominant Provider in relation to the provision of Dark Fibre Access, with the proposed modifications shown in Annexes 1, 2 and 3 to this Schedule 1 respectively.
5. Condition 9 is proposed to be modified by inserting a new Condition 9E which is proposed to apply to the Dominant Provider in relation to the pricing of Dark Fibre Access as set out in Annex 4 to this Schedule 1.

6. Any reference to Dark Fibre Access in this Schedule 1 is to Dark Fibre Access as defined in paragraph 1(a) of this Schedule 1.

Annex 1: Proposed modifications of Condition 2 - Specific forms of network access

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

(a) Ethernet Services (which do not contain a Trunk Segment) including the provision of the following services:

(a) Access Segments;

(b) Backhaul Segments;

(c) Wholesale End-to-End Segments, up to a maximum straight-line distance of 25km;

(d) Dark Fibre Access (which does not contain a Trunk Segment) up to a maximum straight-line distance of 45 km including the provision of the services corresponding to the optical fibre elements of each of the services made available pursuant to Condition 2.1(a) above.

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

(a) in accordance with the same systems and processes;

(b) in the same manner; and

(c) within the same or shorter period of time;

as applicable to the optical fibre elements of the corresponding service.

2.3 Nothing in this Condition 2 shall require the Dominant Provider to provide network access to itself under Condition 2.1(b). Where the Dominant Provider provides network access to itself under Condition 2.1(b), it shall provide to Third Parties services that use that network access as an input.

2.24 The provision of network access by the Dominant Provider in accordance with this Condition shall also include such other entitlements as Ofcom may from time to time direct.

2.35 The Dominant Provider must comply with any direction Ofcom may make from time to time under this Condition.

Annex 2: Proposed modifications of Condition 4 - Equivalence of Inputs basis

- 4.1 Subject to Condition 4.2, the Dominant Provider must provide network access in accordance with Conditions 1 and 2 (as applicable) on an Equivalence of Inputs basis.
- 4.2 The obligation in Condition 4.1 to provide network access on an Equivalence of Inputs basis shall not apply to:
- (a) Accommodation Services other than in relation to the allocation of space (to be allocated on a first-come-first-serve basis) and power in operational buildings belonging to the Dominant Provider;
 - (b) a Backhaul Segment connecting:
 - (i) the operational building of the Dominant Provider which is a Core Node and another Core Node;
 - (ii) the operational building of the Dominant Provider which is a Core Node and a Competitive Core Node; or
 - (iii) two operational buildings of the Dominant Provider within a Trunk Aggregation Node;
 - (c) network access which the Dominant Provider was providing but was not required to provide on an Equivalence of Inputs basis as at 30 April 2016; ~~or~~
 - (d) such provision of network access as Ofcom may from time to time otherwise consent in writing; or
 - (e) Dark Fibre Access provided under Condition 2.1(b) to the extent that the disapplication of the obligation in Condition 4.1 is required in order to enable the Dominant Provider to comply with the requirements in Conditions 9E.1(ii) in relation to setting charges offered or payable for Dark Fibre Access.
- 4.3 Without prejudice to the generality of Condition 4.1, the Dominant Provider must not provide (or seek to provide) network access for its own services (including for those of its retail divisions, subsidiaries or partners), unless at the same time the Dominant Provider provides and/or offers to provide such network access to Third Parties on an Equivalence of Inputs basis.
- 4.4 For the avoidance of doubt, the obligations set out in this Condition 4 shall apply in addition to the obligations set out in Condition 3.

Annex 3: Proposed modifications of Condition 5 – Publication of a Reference Offer

- 5.1 Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider shall publish a Reference Offer in relation to the provision of network access pursuant to Conditions 1 and 2 (as applicable) and comply with the requirements set out below.
- 5.2 Subject to Condition 5.7, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of network access pursuant to Conditions 1 and 2 (as applicable) includes, where applicable, at least the following:
- (a) a description of the network access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of network access);
 - (b) the locations at which network access will be provided;
 - (c) any relevant technical standards for network access (including any usage restrictions and other security issues);
 - (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
 - (e) any ordering and provisioning procedures, including the provision of Initial Contractual Delivery Dates;
 - (f) relevant charges, terms of payment and billing procedures;
 - (g) details of interoperability tests;
 - (h) details of maintenance and quality as follows:
 - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, provision of support services (such as fault handling and repair);
 - (ii) 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;
 - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
 - (i) details of any relevant intellectual property rights;

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

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

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

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

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

(a) is the same, similar or equivalent to that provided to any Third Party; or

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

in a manner that differs from that detailed in a Reference Offer in relation to network access provided to any Third Party, the Dominant Provider shall ensure that it publishes a Reference Offer in relation to the network access that it provides to itself which includes, where relevant, at least those matters detailed in Condition 5.2.

5.45 The Dominant Provider shall:

(a) within one month of the date that this Condition enters into force, publish a Reference Offer in relation to any network access that it is providing as at the date that this Condition enters into force; and

(b) as soon as reasonably practicable, update and publish the Reference Offer in relation to any amendments or in relation to any further network access provided after the date that this Condition enters into force.

5.56 The publications referred to above shall be effected by the Dominant Provider placing a copy of the Reference Offer on any relevant publicly available website operated or controlled by the Dominant Provider.

5.67 The Dominant Provider shall send a copy of the current version of the Reference Offer to any person at that person's written request (or such parts as have been requested).

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

Annex 4: Proposed modification of Condition 9 - insertion of Condition 9E “Basis of charges obligation in relation to Dark Fibre Access”

9E.1 The Dominant Provider must secure, and must be able to demonstrate to the satisfaction of Ofcom, that at all times during the Relevant Year each and every charge offered or payable for Dark Fibre Access is reasonably derived from the charge for the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service (or such other services as Ofcom may direct from time to time), adjusted to:

- (i) subtract the long run incremental costs that are avoided by the Dominant Provider when providing that Dark Fibre Access instead of the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service, such costs to be averaged over the Prior Relevant Financial Year;
- (ii) if appropriate make a subtraction in respect of non-domestic (business) rates in accordance with the requirements set out in Condition 9E.1A; and
- (iii) reflect the long run incremental costs of any objectively justifiable differences (except any differences in circuit length) between that Dark Fibre Access and the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service, such costs to be averaged over the Prior Relevant Financial Year.

9E.1A In relation to the subtraction for non-domestic (business) rates referred to in Condition 9E.1(ii), the Dominant Provider must comply with the following requirements:

- (i) where Dark Fibre Access is provided to a Third Party whose non-domestic (business) rates are assessed on the basis of the Direct Rental Comparison Method, the Dominant Provider must make one of the following subtractions to the rental charge for a 1Gbit/s EAD Service or a 1Gbit/s EAD LA Service a Single Fibre Main Link Service or a Resilience Main Link Service as applicable:
 - a. where a service is provided corresponding to a 1Gbit/s EAD Service or 1Gbit/s EAD LA Service, an amount calculated by multiplying the non-domestic (business) rates payable per kilometre per annum for one optical fibre as set out in the VOA Table by: (i) the Rate in the Pound, and (ii) a factor of 1.9;
 - b. where a service is provided corresponding to a Single Fibre Main Link Service, an amount per metre calculated by multiplying the amount of the non-domestic (business) rates payable per kilometre per annum for one optical fibre as set out in the VOA Table by the Rate in the Pound, and dividing the resultant amount by 1,000;
 - c. where a service is provided corresponding to a Resilience Main Link Service, an amount per metre calculated by multiplying the amount of the non-domestic (business) rates payable per kilometre per annum for one optical fibre as set out in the VOA Table by the Rate in the Pound, and dividing the resultant amount by 1,000;

- (ii) where Dark Fibre Access is provided to a Third Party whose non-domestic (business) rates are not assessed on the basis of the Direct Rental Comparison Method, the Dominant Provider must subtract the average of the Cumulo costs attributed to the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service in each Prior Relevant Financial Year;

9E.2 Where Dark Fibre Access is a service providing network access to more than one optical fibre, in addition to complying with the requirements set out in Condition 9E.1 (i) to (iii) and 9E.1A, the Dominant Provider must secure, and must be able to demonstrate to the satisfaction of Ofcom, that the charge does not exceed an amount calculated by:

- (i) multiplying the charge for equivalent network access to one optical fibre (calculated in accordance with Condition 9E.1) by the number of optical fibres; and
- (ii) adjusting that amount (calculated in accordance with Condition 9E.2(i)) to:
 - a. reflect any incremental cost savings of providing network access to more than one optical fibres at the same time; and
 - b. where Dark Fibre Access is provided to a Third Party whose non-domestic (business) rates are assessed on the basis of the Direct Rental Comparison Method, add the difference between (i) an amount calculated by multiplying the amount calculated under Condition 9E.1A(i)(a) by the number of optical fibres and (ii) an amount calculated by multiplying the non-domestic (business) rates payable per kilometre per annum for the relevant number of fibres as set out in the VOA Table by the Rate in the Pound and a factor of 1.9.

This Condition applies to determining the charge for all Dark Fibre Access when more than one optical fibre is provided with the exception of determining the charge for Dark Fibre Access reasonably derived from the charge for the corresponding Main Link Service, in which case Conditions 9E.1 and 9E.1A apply irrespective of the number of optical fibres provided; except that where Dark Fibre Access is provided to a Third Party whose non-domestic (business) rates are assessed on the basis of the Direct Rental Comparison Method, the subtraction under 9E.1A(i)(b) shall instead be calculated by multiplying the amount of the non-domestic (business) rates payable per kilometre per annum for the relevant number of fibres in the circuit being purchased, as set out in the VOA Table by the Rate in the Pound, and dividing the resultant amount by 1,000.

9E.3 The Dominant Provider must secure, and must be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered or payable for associated facilities which are reasonably necessary for the use of Dark Fibre Access is not greater than the amount that the Dominant Provider charges for the corresponding associated facilities reasonably necessary for the use of the 1Gbit/s EAD Service or 1Gbit/s EAD LA Service, adjusted to:

- (i) subtract any long run incremental costs that are avoided by the Dominant Provider when providing that associated facility instead of the corresponding associated facility for the use of 1Gbit/s EAD Service or 1Gbit/s EAD LA Service, such costs to be averaged over the Prior Relevant Financial Year;
- (ii) reflect the long run incremental costs of any objectively justifiable differences (except any differences in circuit length) between that associated facility reasonably necessary for the use of Dark Fibre Access and the corresponding associated facility reasonably necessary for the use of 1Gbit/s EAD Service or 1Gbit/s EAD LA Service, such costs to be averaged over the Prior Relevant Financial Year.

Associated facilities include the Accommodation Services, the Interconnection Services, the ECC Services, the Time Related Charges and the Cablelink Services.

9E.4 For the purposes of complying with Conditions 9E.1 to 9E.3 including 9E.1A(ii), the long run incremental costs and the average of the Cumulo costs that are avoided by the Dominant Provider when providing that Dark Fibre Access instead of the appropriate corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service shall be calculated by reference to the Regulatory Financial Statements, the Accounting Methodology Documents and the latest available Additional Financial Information, such calculation to be performed by the Dominant Provider as soon as reasonably practicable after the date for the provision of that Additional Financial Information under Condition 10.8 and any subsequent revision of that Additional Financial Information.

9E.4A For the purposes of complying with Condition 9E.1A(i) and 9E.2, in the event that there is a revision in either the VOA Table and/or the Rate in the Pound, the Dominant Provider shall update each and every calculation required under these Conditions as soon as reasonably practicable after publication of the relevant revision.

9E.5 The obligations set out in this Condition 9E are subject to any applicable notification requirements under Condition 6.4.

General provisions and interpretation

9E.6 Where:

- (i) the Dominant Provider makes a material change (other than to a charge) to any Dark Fibre Access which is subject to this Condition 9E;
- (ii) the Dominant Provider makes a material change (other than to a charge) to any 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service which is subject to this Condition 9E; or
- (iii) the Dominant Provider makes a change to the date on which its Financial Year ends;

Condition 9E shall have effect subject to such reasonable adjustment to take account of the change as Ofcom may direct to be appropriate in the circumstances.

For the purposes of this Condition 9E.6, a material change to any Dark Fibre Access or to any 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service (each of which is subject to this Condition 9E) includes (but is not limited to) the introduction of a new product or service (as applicable) wholly or substantially in substitution for that existing product or service (as applicable) which is subject to this Condition 9E or a change to the billing practice for any product or service which is subject to this Condition 9E.

9E.7 The Dominant Provider must record, maintain and supply to Ofcom in an electronic format (including in any such presentational form or arrangement (including as to the level of disaggregation) as Ofcom may direct from time to time), no later than three months after the end of each Relevant Year, the data necessary for Ofcom to monitor compliance of the Dominant Provider with Conditions 9E.1 to 9E.3 including 9E.1A in respect of Dark Fibre Access. This data must include for each and every Dark Fibre Access:

- (i) the published charge for that Dark Fibre Access and the published charge for the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service;
- (ii) unit average Cumulo costs attributed to the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service;
- (iii) unit long run incremental costs that have been avoided by the Dominant Provider when providing that Dark Fibre Access instead of the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service;
- (iv) unit long run incremental costs of any objectively justifiable differences between that Dark Fibre Access and the corresponding 1Gbit/s EAD Service or 1Gbit/s EAD LA Service or Main Link Service;
- (v) unit incremental cost savings of providing network access to more than one optical fibre at the same time;
- (vi) all relevant data and methodology used by the Dominant Provider for deriving the charge for that Dark Fibre Access; and
- (vii) such data as Ofcom may direct from time to time.

9E.8 Ofcom may direct that Conditions 9E.1 to 9E.7 shall not apply to the extent specified in any such direction.

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

9E.10 In this Condition 9E:

“1Gbit/s EAD Service” means each and every service with bandwidth of 1Gbit/s described as “Ethernet Access Direct” falling within the Ethernet Services Basket;

“1Gbit/s EAD LA Service” means each and every service with bandwidth of 1Gbit/s described as “Ethernet Access Direct Local Access” falling within the Ethernet Services Basket;

“Accommodation Services” means each and every service which is subject to Condition 9B and which is reasonably necessary for the use of Dark Fibre Access;

“Accounting Methodology Documents” has the same meaning as in Condition 10;

“Additional Financial Information” means the information required to be provided by BT pursuant to paragraph 5 of the Direction contained in Schedule 11 of the 2017 BCMR Notification;

“Cablelink Service” means each and every service which is reasonably necessary for the use of Dark Fibre Access and is described as “Cablelink” in the Ethernet Interconnection Sub-basket;

“Cumulo costs” means the non-domestic (business) rates that BT pays on its Cumulo Rateable Assets within the United Kingdom;

“Cumulo Rateable Assets” means the assets that make up BT’s Cumulo non domestic rating assessments in the United Kingdom as defined for England in The Central Rating List (England) Regulations 2005 (SI 2005/551), as amended by The Central Rating List (Amendment) (England) Regulations 2006 (SI 2006/495) and The Central Rating List (Amendment) (England) Regulations 2008 (SI 2008/429), and the analogous legislation that define these assets in Wales, Scotland and Northern Ireland;

“Direct Rental Comparison Method” means a method of assessing rateable values for non-domestic (business) rates on individual sections of route within telecommunication fibre networks with reference to a scale that varies with the total route length of the network and the number of lit fibres on the route;²

“ECC Services” means each and every service which is subject to Condition 9C and which is reasonably necessary for the use of Dark Fibre Access;

“Financial Year” has the same meaning as in Condition 10;

“Main Link Service” means each and every service described as “Main Link” falling within the Ethernet Services Basket;

² The VOA currently publishes such a scale within Annex 1 of “Section 871: Practice note: 2017: Telecommunications fibre optic networks” which is available at:
<http://app.voa.gov.uk/corporate/publications/Manuals/RatingManual/RatingManualVolume5/sect871/PN%202017%20Appendix%201%20Fibre%20Rent%20Tone.xls>

“Prior Relevant Financial Year” means the Financial Year to which the latest available Additional Financial Information relates;

“Regulatory Financial Statement” has the same meaning as in Condition 10;

“Rate in the Pound” means the non-domestic rating multiplier in pence for the Financial Year divided by 100 as notified by the Department for Communities and Local Government to Chief Finance Officers of English Billing Authorities.³;

“Relevant Year” means a period beginning on 1 April 2018 and ending on 31 March 2019;

“Resilience Main Link Service” means each and every service described as “Resilience Main Link” falling within the Ethernet Services Basket;;

“Single Fibre Main Link Service” means each and every service described as “Main Link” consisting of one optical fibre and falling within the Ethernet Services Basket;

“Time Related Charges” means each and every service which is subject to Condition 9D and which is reasonably necessary for the use of Dark Fibre Access; and

“VOA Table” means the content of the row within the spreadsheet entitled “Fibre Rent Scale (Excluding London MAN)” which relates to “Total Network Route Km” over 1,000.⁴

³ For 2017/18 this notification is available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/598276/BRIL__3-2017__Multiplier.pdf. For the avoidance of doubt the relevant multiplier is not the small business non-domestic rating multiplier

⁴ The current version of the Fibre Rent Scale (Excluding London MAN) is available at <http://app.voa.gov.uk/corporate/publications/Manuals/RatingManual/RatingManualVolume5/sect871/PN%202017%20Appendix%201%20Fibre%20Rent%20Tone.xls>

Schedule 2: Proposed modifications of temporary directions (“Directions”) imposed on BT

1. The minimum quality of service requirements set out in the Directions contained in Schedules 2 and 3 of the 2017 BCMR Notification⁵ are proposed to be modified by inserting additional minimum quality of service obligations requiring BT to provide and publish Key Performance Indicators in the provision of the Dark Fibre Access, such obligations to be contained in a new direction set out in Annex 1 to this Schedule 2.
2. The following Directions set out in Schedules 5 – 10 (inclusive) and 12 of the 2017 BCMR Notification are proposed to apply to the Dominant Provider in relation to the provision of Dark Fibre Access:
 - a. Direction under sections 49 and 49A(2) of the Act and Condition 11.4 specifying the Regulatory Accounting Principles;
 - b. Direction under section 49 and 49A(2) of the Act and Condition 11.4 specifying the requirements in relation to consistency with regulatory decisions and regulatory asset value;
 - c. Direction under section 49 and 49A of the Act and Condition 11.4 specifying the transparency requirements for the purposes of preparing and maintaining the accounting records, the Accounting Methodology Documents and the Regulatory Financial Statements;
 - d. Direction under section 49 and 49A(2) of the Act and Condition 11.4 setting the requirements in relation to audit, form of the FPIA opinion and form of PPIA opinion for Regulatory Financial Statements;
 - e. Direction under section 49 and 49A(2) of the Act and Condition 11.4 setting the requirements in relation to reconciliation report and accompanying audit opinion;
 - f. Direction under section 49 and 49A(2) of the Act and Condition 11.4 specifying the requirements in relation to additional reporting of information relating to BT’s adjusted financial performance; and
 - g. Direction under section 49 and 49A(2) of the Act and Condition 11.4 specifying network components.
3. The Direction contained in Schedule 11 of the 2017 BCMR Notification⁶ is proposed to apply to the Dominant Provider in relation to the provision of Dark Fibre Access with the proposed modifications shown in Annex 2 to this Schedule 2.

⁵ Direction under section 49 and 49A(2) of Act and Condition 7 setting minimum performance standards in the provision of the Relevant Ethernet Services and Direction under section 49 and 49A(2) of the Act and Condition 7 setting requirements in relation to the provision and publication of Key Performance Indicators in respect of the Relevant Ethernet Services.

⁶ Direction under section 49 and 49A(2) of the Act and Condition 11.4 setting the requirements in relation to preparation, delivery, publication, form and content of the Regulatory Financial Statements.

4. Any reference to Dark Fibre Access in this Schedule 2 is to Dark Fibre Access as defined in paragraph 1(a) of Schedule 1 of this notification.

Annex 1: Proposed modifications of the minimum quality of service requirements – insertion of Direction under section 49 and 49A(2) of the Act and Condition 7 setting requirements in relation to the provision and publication of Key Performance Indicators in respect of the Dark Fibre Access

Part 1: Definitions and Interpretation

1. For the purposes of interpreting Schedule 1, the following definitions shall apply:

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

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

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

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

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

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

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

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

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

“Initial Contractual Delivery Period” means the total number of Working Days from the date on which an Order becomes an Accepted Order to the Initial Contractual Delivery Date, but excluding Working Days attributable to Customer Caused Delay which occurred before the Initial Contractual Delivery Date was issued;

“KPI” means a key performance indicator; KPIs (i) to (xix) are set out below: _____

KPI (i) - Mean time to provide

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

KPI (ii) - Fault repair performance

The percentage of Faults during the relevant month that achieved a Restored Service within 5 hours of being registered on the Dominant Provider's operational support system;

KPI (iii) - Delivery date certainty

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

KPI (iv) - Time to provide lower percentile limit

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

KPI (v) - Monitoring the time to provide lower percentile performance

In relation to all Orders that became Completed Orders in the relevant month, the average Time To Provide of those Completed Orders whose Time To Provide was 29 Working Days or less;

KPI (vi) - Time to provide upper percentile limit

In relation to all Orders that became Completed Orders in the relevant month, the percentage of Completed Orders in respect of which the Time To Provide was 118 Working Days or more;

KPI (vii) - Mean initial contractual delivery period

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

KPI (viii) - Monitoring the tail

In relation to all Orders that became Completed Orders in the relevant month, the average Time To Provide of those Completed Orders whose Time To Provide was 118 Working Days or more;

KPI (ix) - Order validation

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

KPI (x) - Performance in issuing initial contractual delivery dates

In relation to all Orders that became Completed Orders in the relevant month, the percentage for which the Initial Contractual Delivery Date was issued within the timescales set out in the applicable service level agreement set out in the Dominant Provider's Reference Offer;

KPI (xi) - Performance against the final contractual delivery date

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

KPI (xii) - Changes to contractual delivery dates

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

KPI (xiii) - Average number of changes to contractual delivery dates

In relation to all Orders that became Completed Orders in the relevant month and which were subject to one or more changes in the Contractual Delivery Date that were not attributable to Customer Caused Delay, the average number of such changes to the Contractual Delivery Date for each Completed Order;

KPI (xiv) - Average delay due to contractual delivery date changes

In relation to the average number of changes to the Contractual Delivery Date for each Completed Order, as detailed in KPI (xiii), the average number of Working Days incurred for each Completed Order as a result of such changes;

KPI (xv) - Mean customer caused delay

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

KPI (xvi) - New orders

The total number of Accepted Orders during the relevant month;

KPI (xvii) - Orders completed

The total number of Completed Orders during the relevant month;

KPI (xviii) - Volume of faults

The total number of Faults during the relevant month;

KPI (xix) - Size of the installed base of dark fibre access

The total number of Dark Fibre Access for which the Dominant Provider is charging Third Parties, at the end of the relevant month.

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

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

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

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

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

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

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

“United Kingdom” means the wholesale markets for Lower Bandwidth CISBO Services identified at rows a, b, f and g of Table A of the 2017 BCMR Notification; and

“Working Day” means any day other than Saturdays, Sundays, public holidays or bank holidays in the United Kingdom.

Part 2: Direction

1. The Dominant Provider must provide to Ofcom each month:
 - a. the information relating to the Dark Fibre Access required in KPIs (i) to (xix) below:
 - (i) KPIs (i) to (xix) for the United Kingdom;
 - (ii) KPI (xvii) split by reference to each of the Provision Categories;
 - b. in relation to each of the requirements concerning each of KPIs (i) to (xv):
 - (i) the denominator representing the volume of the applicable Dark Fibre Access over which the average or the percentage (as applicable) is calculated; and
 - (ii) the numerator representing the value corresponding to the denominator from which the average or the percentage (as applicable) is calculated.
2. Provision of information to Ofcom under paragraph 1 above shall be effected by sending email to a person designated by Ofcom in the form notified by Ofcom from time to time within 15

Working Days after the end of the relevant month to which the information referred to in paragraph 1 relates.

3. The Dominant Provider must make available where requested by a Third Party Customer, on a confidential basis, within 15 Working Days after the end of the relevant month to which the information relates the information relating to the Dark Fibre Access required in KPIs (i) to (iv), (vi), (vii) and (ix) to (xv) below:
 - a. KPIs (i) to (iv), (vi) and (vii) and (ix) to (xv) for the United Kingdom;
 - b. KPIs (i), (iii), (vii) and (xiii) to (xv) split by reference to each of the Provision Categories.

General

4. Subject to Ofcom agreeing otherwise, this Schedule shall take effect 4 months from the date of its publication.

Annex 2: Proposed modifications of Direction under section 49 and 49A(2) of the Act and Condition 10.4 setting the requirements in relation to preparation, delivery, publication, form and content of the Regulatory Financial Statements

1. The Direction contained in Schedule 11 of the 2017 BCMR Notification is proposed to be modified by inserting additional obligations requiring BT to prepare the Regulatory Financial Statements in accordance with the following form and content requirements:
 - 1.1. BT shall prepare, deliver to Ofcom and publish a statement entitled “Dark Fibre Access (Non Confidential Statement)” which must set out the following:
 - a. fully allocated unit costs for each of the following: 1Gbit/s EAD Service, 1Gbit/s EAD LA Service and Main Link Service as defined in proposed Condition 9E;
 - b. the total volumes, average prices and revenues for each Dark Fibre Access non-LA variant, Dark Fibre Access LA variant and Dark Fibre Access Main Link variant.
 - 1.2. In relation to the market summary for each of the following wholesale markets: (i) the Combined Geographic Business Connectivity Markets (comprising the Lower Bandwidth CISBO Services in the London Periphery and the CBDs of Bristol and Manchester), (ii) the Lower Bandwidth CISBO Services in the Rest of UK, BT shall disclose the revenue, volume, average price and fully allocated costs of all Dark Fibre Access in aggregate.
 - 1.3. BT shall prepare and deliver to Ofcom the following additional financial information under paragraph 5 of the Direction contained in Schedule 11 of the 2017 BCMR Notification under in respect of (i) the Combined Geographic Business Connectivity Markets (comprising the Lower Bandwidth CISBO Services in the London Periphery and the CBDs of Bristol and Manchester), (ii) the Lower Bandwidth CISBO Services in the Rest of UK:
 - a. a statement entitled “Dark Fibre Access Revenues and Costs”, which must set out how the charge for each Dark Fibre Access non-LA variant, Dark Fibre Access LA variant and Dark Fibre Access Main Link variant has been determined in accordance with proposed Condition 9E.

Section 2 Consent under section 49 of the Communications Act 2003 and SMP services condition 6.1

Background

1. Today Ofcom is publishing a consultation entitled "Dark Fibre Consultation, Consultation on adding dark fibre to the remedies for business connectivity markets" ("2017 Dark Fibre Consultation"). At Annex 6 of the 2017 Dark Fibre Consultation, Ofcom proposes to modify SMP services conditions and directions by adding obligations requiring BT to provide dark fibre access to the package of temporary measures imposed in a statement entitled "Business Connectivity Markets, Temporary SMP conditions in relation to business connectivity services" published on 23 November 2017 ("2017 BCMR Statement").
2. Ofcom proposes, among other things, that SMP services condition 6 imposed on BT in the 2017 BCMR Statement should apply to BT's provision of dark fibre access:
 - a. Under SMP services condition 6.4(b) BT must send an Access Charge Change Notice in relation to an Access Charge Change relating solely to a reduction in the price of existing network access (including, for the avoidance of doubt, a Special Offer) not less than 28 days before any such amendment comes into effect.
 - b. Under SMP services condition 6.1 BT shall publish charges, terms and conditions and comply with the requirements set out in SMP services condition 6.4 except in so far as Ofcom may from time to time otherwise consent in writing.

Decision to grant consent

3. Ofcom proposes to consent to waive the requirement in SMP services condition 6(4)(b) as set out in paragraph 2 above for the period of 1 April 2017 until 30 April 2017 (inclusive). This consent is proposed to take effect from the date of any notification under section 49 of the Communications Act 2003 ("Act") adopting the proposal set out in this notification. For the avoidance of doubt, Ofcom has not proposed to waive the requirement in SMP services condition 6(4)(c) which applies to any Access Charge Change involving existing network access which is not referred to under SMP services condition 6(4)(b) and which requires BT to send an Access Charge Change Notice not less than 90 days before any such amendment comes into effect.
4. The effect of and reasons for making this proposal are set out in section 3 of the 2017 Dark Fibre Consultation.

Ofcom's duties and legal tests

5. Ofcom considers that the proposed consent referred to in paragraph 3 complies with the requirements of section 49(2) of the Act.

6. In making the proposal in this notification, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act, the six community requirements in section 4 of the Act and the duty to take account of all applicable recommendations for harmonisation issued by the European Union in section 4A of the Act.
7. In accordance with section 49C(1)(a) of the Act, a copy of the notification has been sent to the Secretary of State.

Interpretation

8. Except as otherwise defined, words or expressions used shall have the same meaning as they have been ascribed in the SMP services conditions imposed in the 2017 BCMR Statement. Otherwise any word or expression shall have the same meaning as it has in the Act.

Signed

A handwritten signature in blue ink that reads "D. Clarkson." The signature is written in a cursive style.

David Clarkson

Competition Policy Director, Ofcom

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

23 November 2017