
Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements

Consultation and notification of proposed consent
under sections 49 and 49A of the Communications Act
2003

CONSULTATION:

Publication date: 4 June 2020

Closing date for responses: 6 July 2020

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1. Overview

Each year KCOM is required to prepare Regulatory Financial Statements (RFS). These are prepared according to a defined framework and methodology and include published statements as well as information that is submitted to Ofcom privately. KCOM is currently required to publish and deliver to Ofcom the RFS and the corresponding audit opinion by 31 July (i.e. within four months after the end of the financial year to which the RFS relate).

On 27 March 2020, KCOM wrote to Ofcom to request to change the deadline for submitting its RFS for 2019/20 and on an ongoing basis from four months after the end of the period to which they relate to nine months after. It explained that given KCOM's change in status from a company listed on the London Stock Exchange to a private limited company, KCOM is now required under the Companies Act 2006 to file its statutory accounts within nine months after its financial year end rather than four months after, as required previously under the listing rules. KCOM submitted that since the statutory accounts form the basis of its RFS, the deadline for the publication of its RFS should reflect its new status and statutory accounts filing deadline. It also noted some particular challenges in meeting the current 2019/20 deadline for publishing its RFS given that it sits within a new group for accounting purposes and that it would be the first time it has had to prepare accounts for this new group.

Although KCOM's request was in relation to the deadline for publishing its RFS on an ongoing basis, this consultation covers only the periods 2019/20 and 2020/21 given that Ofcom will soon be consulting on the future regulatory period under the Wholesale Telecoms Market Review for the Hull area.

What we are proposing

We propose to grant a consent to defer the deadline for publication of KCOM's 2019/20 and 2020/21 RFS by an additional five months. This will mean that for 2019/20 and 2020/21, based on its current financial year end date of 31 March, it must publish its RFS and any corresponding audit opinions no later than 31 December.

We will consult on any new SMP condition requiring KCOM to publish its RFS as part of the forthcoming Wholesale Telecoms Market Review for the Hull area. To change the deadline for publication of KCOM's RFS beyond 2021, we would issue, after consultation, a new SMP condition. This will be considered as part of the forthcoming Wholesale Telecoms Market Review for the Hull area.

Next steps

We invite responses to this consultation by 6 July 2020. We will publish a decision statement in July 2020.

2. Background, Consent Request and Proposal

Background

- 2.1 Since 2004, KCOM has been subject to regulatory financial reporting requirements across all of the fixed telecoms markets in which it is regulated, these currently comprise:
- wholesale local access market;
 - business connectivity markets;
 - narrowband markets; and
 - wholesale broadband access markets.
- 2.2 As part of these requirements, each year KCOM prepares Regulatory Financial Statements (RFS). These are prepared according to a defined framework and methodology and include published statements as well as information that is submitted to Ofcom privately.
- 2.3 These requirements are designed to provide us with the information that we need to make informed regulatory decisions, monitor compliance with regulatory obligations, ensure that obligations address underlying competition issues, and investigate potential breaches of obligations. They should also provide reasonable confidence to stakeholders that KCOM has complied with its SMP conditions and add credibility to the reporting regime.
- 2.4 These requirements are imposed on KCOM by way of an SMP condition set in each regulated market and a suite of directions imposed in each market pursuant to that SMP condition. The SMP condition sets out our general regulatory financial reporting requirements, including any accounting separation and cost accounting obligations. The directions then set out our detailed financial reporting requirements.
- 2.5 In all the markets in which KCOM is regulated (set out in paragraph 2.1), KCOM is currently required to publish and deliver to Ofcom the RFS and any corresponding audit opinions by 31 July (i.e. within four months after the end of the financial year to which the RFS relate).

Consent Request

- 2.6 On 27 March 2020, KCOM wrote to Ofcom to explain that the 31 July deadline for submitting its RFS for 2019/20 and subsequent financial years was impracticable given the change in KCOM's corporate status and its deadline to file its statutory financial statements. KCOM requested an extension of five months, with a new deadline of 31 December.
- 2.7 KCOM set out in its letter that the requested extension was necessary due to the acquisition of KCOM by MEIF 6 Fibre Limited on 1 August 2019.¹ KCOM explained that following on from the acquisition, it was delisted from the London Stock Exchange on 2

¹ See: <https://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/other/14095189.html>

August 2019. As a result of the delisting it was no longer subject to the listing rules requirement to file its financial statements within four months after its financial year end.

- 2.8 As KCOM has re-registered as a private limited company it is now subject to the Companies Act 2006 requirement to file its statutory accounts within nine months of its financial year end.
- 2.9 KCOM explained in its letter that the production of the audited RFS is contingent on the production of its audited statutory financial statements. In addition, the acquisition had placed three new UK entities above KCOM, being MEIF 6 Fibre Holdings Limited, MEIF 6 Fibre Investments Limited and MEIF 6 Fibre Limited. Under the Companies Act 2006, in order to finalise the KCOM statutory accounts in any given year, they must also finalise the statutory financial statements of these legal entities above KCOM in the group structure. This additional scope also impacts the timeline to finalise KCOM's statutory accounts.

Proposal

- 2.10 We consider that the prompt publication of KCOM's RFS is important because it provides Ofcom with the information necessary to make informed regulatory decisions. It also provides transparency and reasonable confidence to stakeholders that KCOM has complied with its SMP obligations. Nevertheless, we recognise that the requirement on KCOM to publish its RFS and any corresponding audit opinions within four months after the end of the period to which they relate took account of its then current statutory deadline under the listing rules. Its statutory accounting obligations have now changed. Ofcom is minded to agree with KCOM that it would be reasonable in the circumstances to consent to a five-month deferment to the deadline for publication of its RFS for 2019/20 and 2020/21 to take account of its new statutory accounts filing deadline.
- 2.11 We propose to consent to KCOM's 2019/20 and 2020/21 RFS and any corresponding audit opinions being published and delivered to Ofcom no later than nine months after the end of the financial year to which they relate i.e. by 31 December 2020 and 2021.
- 2.12 This consent relates only to the publication deadlines for KCOM's 2019/20 and 2020/21 RFS and any corresponding audit opinions. The forthcoming Wholesale Telecoms Market Review for the Hull area would give us the opportunity to consult on KCOM's request in relation to the 2021/22 financial year and beyond, if relevant.

Consultation question

Question 1: Do you agree that Ofcom should consent to defer the publication deadline for KCOM's 2019/20 and 2020/21 regulatory financial statements and corresponding audit opinions by five months?

Legal tests

- 2.13 We have considered our proposal to grant the consent against the tests set out in section 49(2) of the Communications Act 2003 (the “Act”) and we consider that it is:
- a) objectively justifiable as it allows KCOM sufficient time in which to prepare its 2019/20 and 2020/21 RFS in the context of its new statutory accounts filing requirements and deadline;
 - b) not unduly discriminatory because BT is the only other SMP provider which has regulatory accounting obligations and, given the context of KCOM’s delisting, does not face the same statutory accounts filing considerations in preparing its 2019/20 and 2020/21 RFS;
 - c) proportionate, as it does not grant more additional time than is necessary for KCOM to prepare its 2019/20 and 2020/21 RFS; and
 - d) transparent, in that it is clear that Ofcom’s intention is to ensure that KCOM has sufficient time in which to prepare its 2019/20 and 2020/21 RFS in the context of KCOM’s statutory accounts filing obligations and KCOM’s obligations following this consent are clear.
- 2.14 We do not consider that the granting of this consent will have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which we have functions under Part 2, Chapter 1 of the Act.² We are therefore not obliged to carry out a domestic consultation, however given the request relates to multiple financial years we consider it may be appropriate to do so. We also consider that the granting of this consent is not of EU significance as in Ofcom’s opinion it would not affect trade between Member States.³

² As set out in section 49A(1)(b) of the Act.

³ The cumulative criteria that must be satisfied in order for a proposal to be of EU significance include the criterion that the proposal would, in Ofcom’s opinion, affect trade between Member States (please see section 150A(2)(d) of the Act).

A1. Notification under sections 49 and 49A of the Communications Act 2003

Notification of Proposed Consent under section 49 of the Communications Act 2003 and SMP services condition OB1 set out at Schedule 2, Annex 3 of the July 2004 Statement, SMP services condition 8.1 set out at Annex 6 of the 2018 WLA and WBA Statement and SMP services condition 7.1 set out at Schedule 4, Annex 26 of the 2019 BCMR Statement

Background

- A1.1 On 22 July 2004, Ofcom published a statement entitled “The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification – Accounting separation and cost accounting: Final Statement and notification” (“July 2004 Statement”).⁴ At Annex 3 of that statement, Ofcom imposed SMP conditions with respect to regulatory accounting (Conditions OB1 to OB33) on KCOM in markets in which KCOM had been found to have significant market power in previously concluded market reviews. SMP condition OB6 concerns the deadline for delivery of the RFS to Ofcom and its publication.
- A1.2 On 30 November 2017, Ofcom published a statement “Narrowband Market Review: Statement” (“2017 NMR Statement”).⁵ The 2017 NMR Statement found that KCOM continues to have significant market power in each of the markets covered by the review in the Hull Area. Ofcom decided to set on KCOM SMP conditions under section 45 of the Act designed to encourage greater competition for Narrowband services in the Hull Area. These included SMP condition OB6 in respect to regulatory financial reporting. Ofcom also amended, where necessary the 2004 Regulatory Financial Reporting Directions.
- A1.3 On 31 July 2018, Ofcom published a statement entitled “Wholesale Local Access and Wholesale Broadband Access Market Reviews: Review of competition in the Hull Area” (the “2018 WLA and WBA Statement”).⁶ The 2018 WLA and WBA Statement presents Ofcom’s conclusion that KCOM continues to have significant market power in each of the markets for wholesale local access and wholesale broadband access in the Hull Area. Ofcom decided to set on KCOM SMP conditions under section 45 of the Act designed to encourage greater competition in the provision of fixed telecoms services for consumers in the Hull Area. At Annex 6 of that Statement, Ofcom revoked Conditions OB1 to OB33 from the July 2004 Statement insofar as they applied to the WLA and WBA markets and in their

⁴ Ofcom, [The regulatory financial reporting obligations on BT and Kingston Communications](#), 22 July 2004.

⁵ Ofcom, [Narrowband Market Review Statement](#), 30 November 2017.

⁶ Ofcom, [Wholesale Local Access and Wholesale Broadband Access Market Reviews](#), 31 July 2018.

place imposed SMP Condition 8 with respect to regulatory accounting on KCOM in the WLA and WBA markets. This did not represent a change to the substance of the accounting separation and cost accounting conditions as set out in the July 2004 Statement but was a 'structural' change to the way in which the financial reporting obligations are imposed, aimed at clarifying KCOM's obligations.

- A1.4 On 28 June 2019, Ofcom published a statement entitled "Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets" ("2019 BCMR Statement"). The 2019 BCMR Statement found that KCOM continues to have significant market power in the market for wholesale CI Access services in the Hull Area. Ofcom decided to set on KCOM SMP conditions under section 45 of the Act designed to encourage greater competition in this market in the Hull Area. At Annex 26 of that Statement, Ofcom revoked Conditions OB1 to OB33 from the July 2004 Statement insofar as they applied to the market for wholesale CI Access services and in their place imposed SMP Condition 7 with respect to regulatory accounting on KCOM in the market for wholesale CI Access services.
- A1.5 SMP Conditions OB6 of Schedule 2, Annex 3 of the July 2004 Statement, 8.6 of Schedule 1, Annex 6 of the 2018 WLA and WBA Statement, and 7.6 of Schedule 4, Annex 26 of the 2019 BCMR Statement all require KCOM to publish its RFS and any corresponding audit opinions within four months after the end of the period to which they relate.
- A1.6 KCOM has requested that Ofcom consent to deferment of the 2019/20 and 2020/21 RFS and any corresponding audit opinions. It has requested that the RFS and any corresponding audit opinions be published and delivered to Ofcom by 31 December 2020 and 2021, a five-month deferment with respect to the existing deadline, with the pre-publication RFS sent to Ofcom by 16 December 2020 and 2021.

Proposal to grant consent

- A1.7 SMP Conditions OB1 of Schedule 2, Annex 3 of the July 2004 Statement, 8.1 of Schedule 1, Annex 6 of the 2018 WLA and WBA Statement and 7.1 of Schedule 4, Annex 26 of the 2019 BCMR Statement all provide that the regulatory financial accounting conditions shall apply except in so far as Ofcom may consent otherwise in writing.
- A1.8 Therefore, Ofcom proposes to consent to KCOM's request set out in paragraph A1.6 above. This consent shall take effect on the day it is published.
- A1.9 The effect of and reasons for proposing the consent are set out in the accompanying consultation document.

Ofcom's duties and legal tests

- A1.10 Ofcom considers that the proposed consent referred to in paragraph A1.9 complies with the requirements of section 49(2) of the Communications Act 2003 (the "Act") as set out in the accompanying consultation document.

A1.11 In proposing the consent referred to in paragraph A1.8, 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. Pursuant to Article 3(3) of Regulation (EC) No 1211/2009, Ofcom has also taken the utmost account of any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by BEREC. Ofcom has also had regard to the Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services designated by the Secretary of State for Digital, Culture, Media and Sport for the purposes of section 2A of the Communications Act 2003 on 29 October 2019 in making the proposals referred to in this notification.

Making Representations

- A1.12 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 6 July 2020.
- A1.13 Copies of this notification and the accompanying consultation have been sent to the Secretary of State in accordance with section 49C of the Communications Act 2003.

Interpretation

A1.14 Except as otherwise defined, words or expressions used shall have the same meaning as they have been ascribed in the SMP services conditions set out in Annex 3 of the 2004 Statement, Annex 6 of the 2018 WLA and WBA Statement and Annex 26 of the 2019 BCMR Statement. Otherwise any word or expression shall have the same meaning as it has in the Act.



David Brown

Director of Regulatory Finance, Ofcom

A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

4 June 2020

A2. Responding to this consultation

How to respond

- A2.1 Ofcom would like to receive views and comments on the issues raised in this document, by 5pm on 6 July 2020.
- A2.2 You can download a response form from <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/regulatory-financial-reporting>. You can return this by email to reporting@ofcom.org.uk.
- A2.3 If your response is a large file, or has supporting charts, tables or other data, please email it to reporting@ofcom.org.uk, as an attachment in Microsoft Word format, together with the [cover sheet](#). This email address is for this consultation only, and will not be valid after 6 July 2020.
- A2.4 We welcome responses in formats other than print, for example an audio recording or a British Sign Language video. To respond in BSL:
- Send us a recording of you signing your response. This should be no longer than 5 minutes. Suitable file formats are DVDs, wmv or QuickTime files. Or
 - Upload a video of you signing your response directly to YouTube (or another hosting site) and send us the link.
- A2.5 We will publish a transcript of any audio or video responses we receive (unless your response is confidential)
- A2.6 We do not need a paper copy of your response as well as an electronic version. We will acknowledge receipt if your response is submitted via the online web form, but not otherwise.
- A2.7 You do not have to answer all the questions in the consultation if you do not have a view; a short response on just one point is fine. We also welcome joint responses.
- A2.8 It would be helpful if your response could include direct answers to the questions asked in the consultation document. The question is listed at Annex 5. It would also help if you could explain why you hold your views, and what you think the effect of Ofcom's proposals would be.
- A2.9 If you want to discuss the issues and questions raised in this consultation, please contact Gary Carey on 0207 783 4393, or by email to reporting@ofcom.org.uk.

Confidentiality

- A2.10 Consultations are more effective if we publish the responses before the consultation period closes. In particular, this can help people and organisations with limited resources or familiarity with the issues to respond in a more informed way. So, in the interests of transparency and good regulatory practice, and because we believe it is important that

everyone who is interested in an issue can see other respondents' views, we usually publish all responses on [the Ofcom website](#) as soon as we receive them.

- A2.11 If you think your response should be kept confidential, please specify which part(s) this applies to, and explain why. Please send any confidential sections as a separate annex. If you want your name, address, other contact details or job title to remain confidential, please provide them only in the cover sheet, so that we don't have to edit your response.
- A2.12 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and try to respect it. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A2.13 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's intellectual property rights are explained further in our [Terms of Use](#).

Next steps

- A2.14 Following this consultation period, Ofcom plans to publish a statement in July 2020.
- A2.15 If you wish, you can [register to receive mail updates](#) alerting you to new Ofcom publications.

Ofcom's consultation processes

- A2.16 Ofcom aims to make responding to a consultation as easy as possible. For more information, please see our consultation principles in Annex 3.
- A2.17 If you have any comments or suggestions on how we manage our consultations, please email us at consult@ofcom.org.uk. We particularly welcome ideas on how Ofcom could more effectively seek the views of groups or individuals, such as small businesses and residential consumers, who are less likely to give their opinions through a formal consultation.
- A2.18 If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact the corporation secretary by email: corporationsecretary@ofcom.org.uk

A3. Ofcom's consultation principles

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

Before the consultation

- A3.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

During the consultation

- A3.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A3.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A3.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A3.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A3.6 If we are not able to follow any of these seven principles, we will explain why.

After the consultation

- A3.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

A4. Consultation coversheet

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)

A5. Consultation question

Proposed Consent for KCOM to defer publication of its RFS in 2020 and 2021

Question 1: Do you agree that Ofcom should consent to defer the publication deadline for KCOM's 2019/20 and 2020/21 regulatory financial statements and corresponding audit opinions by five months?