

A5. Draft Legal Instruments

Proposals for SMP services conditions

NOTIFICATION OF PROPOSALS UNDER SECTION 48A OF THE COMMUNICATIONS ACT 2003

Proposals for setting SMP services conditions in relation to BT under section 45 of the Communications Act 2003

Background

- A5.1 On 31 March 2017, Ofcom published a consultation entitled “*Wholesale Local Access Market Review – Volume 1: Consultation on the proposed markets, market power determinations and remedies and Wholesale Local Access Market Review – Volume 2: Consultation on proposed charge control designs and implementation*” (together the “**March 2017 WLA Consultation**”).¹ Annex 23 to the March 2017 WLA Consultation set out the notification under sections 48A and 80A of the Act in which Ofcom proposed to:
- a) identify certain markets;
 - b) make market power determinations; and
 - c) set SMP conditions
- (the “**March 2017 WLA Notification**”).
- A5.2 Among these proposals, Ofcom proposed to identify the market for the supply of copper loop-based, cable-based and fibre-based wholesale local access at a fixed location in the United Kingdom excluding the Hull Area for the purpose of considering market power determinations.
- A5.3 Ofcom proposed to determine that BT has significant market power (SMP) in relation to such market.
- A5.4 As a result of the proposed market power determination, Ofcom proposed to set a number of SMP conditions on BT and proposed that those SMP conditions shall apply to BT in respect of the above relevant market.

Proposals in this Notification

- A5.5 Ofcom is proposing to amend SMP condition 7B (VULA charge control) proposed in Schedule 1 to the March 2017 WLA Notification by replacing it with the condition 7B set

¹ Volume 1: https://www.ofcom.org.uk/data/assets/pdf_file/0033/99636/Vol1-Market-review.pdf; Volume 2: https://www.ofcom.org.uk/data/assets/pdf_file/0034/99637/Vol2-Charge-control.pdf

out in the Schedule to this Notification (changes to the previous version of SMP condition 7B are shown in underlined italics).

Ofcom's duties and legal tests

- A5.6 The effect of, and Ofcom's reasons for making, the proposals referred to in this Notification are set out in the consultation document accompanying this Notification.
- A5.7 Ofcom considers that the proposed SMP conditions comply with the requirements of sections 45 to 47, 87 and 88 of the Act, as appropriate and relevant to each such SMP condition.
- A5.8 In making all of the proposals referred to in this Notification, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act and the six Community requirements in section 4 of the Act. In accordance with section 4A of the Act, Ofcom has also taken due account of all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive. Ofcom has also, pursuant to Article 3(3) of Regulation (EC) No 1211/2009, taken the utmost account of any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by the Body of European Regulators for Electronic Communications (BEREC).

Making representations

- A5.9 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 27 September 2017.
- A5.10 Copies of this Notification and the accompanying consultation document will be sent to the Secretary of State in accordance with sections 48C(1) of the Act.

Interpretation

- A5.11 For the purpose of interpreting this Notification (which for the avoidance of doubt includes the Schedule):
- a) except in so far as the context otherwise requires, words or expressions have the meaning assigned to them in paragraph A5.12 below, and otherwise any word or expression has the same meaning as it has in the Act;
 - b) headings and titles shall be disregarded;
 - c) expressions cognate with those referred to in this Notification shall be construed accordingly; and
 - d) the Interpretation Act 1978 (c. 30) shall apply as if this Notification were an Act of Parliament.
- A5.12 In this Notification:
- a) "**March 2017 WLA Consultation**" means the consultation described in paragraph 1 above;

- b) **“March 2017 WLA Notification”** means the notification described in paragraph 1 above;
- c) **“Act”** means the Communications Act 2003 (c. 21), as amended;
- d) **“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 1159 of the Companies Act 2006;
- e) **“Framework Directive”** means Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, as amended;
- f) **“Hull Area”** means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communication (Hull) plc, (now known as KCOM);
- g) **“Ofcom”** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;
- h) **“United Kingdom”** has the meaning given to it in the Interpretation Act 1978 (1978 c30).

A5.13 The Schedule to this Notification shall form part of this Notification.

Signed

A rectangular box containing a handwritten signature in black ink. The signature is stylized and appears to read 'Brian Potterill'.

Brian Potterill

Competition Policy Director, Ofcom

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

9 August 2017

Schedule: Proposed amended SMP condition 7B (VULA charge control)

Condition 7B – VULA charge control

7B.1 The Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Year, the Percentage Change (determined in accordance with condition 7B.3) in:

(a) the charge for FTTC 40/10 Rental when that service is provided to a particular line in conjunction with an MPF rental service, except for the First Relevant Year in relation to which the charge ceiling specified in condition 7B.2(a) applies;

(aa) the charge for FTTC 40/10 Rental when that service is not provided to a particular line in conjunction with an MPF rental service, except for the First Relevant Year in relation to which the charge ceiling specified in condition 7B.2(aa) applies;

(b) the charge for FTTC 40/10 PCP Only Install Connection, except for the First Relevant Year in relation to which the charge ceiling specified in condition 7B.2(b) applies;

(c) the charge for FTTC 40/10 Start of Stopped Line Connection, except for the First Relevant Year in relation to which the charge ceiling specified in condition 7B.2(c) applies;

(d) the charge for VULA Migration, except for the First Relevant Year in relation to which the charge ceiling specified in condition 7B.2(d) applies;

(e) the charge for VULA 40/10 Bandwidth Change, except for the First Relevant Year in relation to which the charge ceiling specified in condition 7B.2(e) applies;

is not more than the Controlling Percentage (as determined in accordance with condition 7B.4).

7B.2 The Dominant Provider shall not charge more than:

(a) for FTTC 40/10 Rental when that service is provided to a particular line in conjunction with an MPF rental service, the amount of £[•] to [•] in the First Relevant Year;

(aa) for FTTC 40/10 Rental when that service is not provided to a particular line in conjunction with an MPF rental service, the amount of £[•] to [•] in the First Relevant Year;

(b) for FTTC 40/10 PCP Only Install Connection, the amount of £[42.4 to £44.7] in the First Relevant Year;

(c) for FTTC 40/10 Start of Stopped Line Connection, the amount of £[6.4 to £6.6] in the First Relevant Year;

(d) for VULA Migration, the amount of £[4.4 to £4.6] in the First Relevant Year;

(e) for VULA 40/10 Bandwidth Change, the amount of £[7.9 to £8.2] in the First Relevant Year;

(f) for FTTP 40/10 Voice and Data Connection, the amount of £[117] in each Relevant Year;

(g) for FTTP 40/10 Transition Connection, the amount of £[92] in each Relevant Year;

(h) for 1 Gbit Cablelink, the amount of £[2,000] in each Relevant Year;

(i) for 10 Gbit Cablelink, the amount of £[10,000] in each Relevant Year;

(j) for VLAN Move, the amount of £[15] in each Relevant Year;

(k) for Fibre Broadband Boost, the amount of £[159] in each Relevant Year;

(l) for Superfast Visit Assure, the amount of £[130] in each Relevant Year; and

(m) for VULA Cease, the amount of £[0] in each Relevant Year.

7B.3 The Percentage Change for the purposes of each of the services specified (each of which is referred to in this condition as a “single charge category”) in condition 7B.1 shall be calculated, for the purposes of complying with condition 7B.1, by employing the following formula:

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

Where:

C_t is the Percentage Change in charges for the specific service in the single charge category in question for the Relevant Year t ;

t is the Relevant Year;

$t-1$ is the Prior Year;

\bar{p}_t is the Relevant Year Weighted Average Charge made by the Dominant Provider for the specific service in the single charge category in question for the Relevant Year t , excluding any discounts offered by the Dominant Provider:

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

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

Where:

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

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

$w_{j,t}$ is the proportion of the Relevant Year in which each charge, $p_{j,t}$, is in effect, calculated by the number of days during which the charge is in effect and dividing:

- 1) for the First Relevant Year, by 365;
- 2) for the Second Relevant Year, by 366; and
- 3) for the Third Relevant Year, by 365.

$p_{j,t}$ is the charge for the specified period, j , during the Relevant Year t for the specific service in the single charge category in question;

\bar{p}_{t-1} is, for the purposes of calculating the Percentage Change for the Second Relevant Year and the Third Relevant Year, the Prior Year Weighted Average Charge made by the Dominant Provider for the specific service in the single charge category in question during the Prior Year, excluding any discounts offered by the Dominant Provider;

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

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

Where:

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

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

$w_{j,t-1}$ is the proportion of the Prior Year in which each charge, $p_{j,t-1}$, is in effect, calculated by the number of days during which the charge is in effect and dividing:

- 1) for the First Relevant Year, by 365;
- 2) for the Second Relevant Year, by 365;
- 3) for the Third Relevant Year, by 366;

$p_{j,t-1}$ is the charge for the individual period, j , during the Prior Year, $t-1$, for the specific service in the single charge category in question.

7B.4 (a) Subject to conditions 7B.4(b) to 7B.4(e) below, the Controlling Percentage in relation to any Relevant Year for each of the services specified in conditions 7B.1(a) to 7B.1(e) shall be calculated by employing the following formula:

$$CP_t = CPI_t + X_t$$

Where:

CP_t is the Controlling Percentage for Relevant Year t ;

CPI_t is CPI for the Relevant Year, t ;

X_t means:

- for the service specified in condition 7B.1(a):
 - (1) for the Second Relevant Year: [\bullet to \bullet] percentage points;²
 - (2) for the Third Relevant Year: [\bullet to \bullet] percentage points;

- for the service specified in condition 7B.1(aa):
 - (1) for the Second Relevant Year: [\bullet to \bullet] percentage points;
 - (2) for the Third Relevant Year: [\bullet to \bullet] percentage points;

- for the service specified in condition 7B.1(b):
 - (1) for the Second Relevant Year: [-9.5% to -6.9%] percentage points;
 - (2) for the Third Relevant Year: [0.4% to 2.2%] percentage points;

- for the service specified in condition 7B.1(c):
 - (1) for the Second Relevant Year: [-58.2% to -57.5%] percentage points;
 - (2) for the Third Relevant Year: [0.5% to 1.7%] percentage points;

² These figures will be defined in Ofcom's further consultation on the WLA Market Review in September.

- for the service specified in condition 7B.1(d):
 - (1) for the Second Relevant Year: [-39.0% to -38.0%] percentage points;
 - (2) for the Third Relevant Year: [0.5% to 1.7%] percentage points;

- for the service specified in condition 7B.1(e):
 - (1) for the Second Relevant Year: [-18.8% to -17.1%] percentage points;
 - (2) for the Third Relevant Year: [-3.3% to -2.3%] percentage points.

For the avoidance of doubt, the FTTC 40/10 Rental, FTTC 40/10 PCP Only Install Connection, FTTC 40/10 Start of Stopped Line Connection, VULA Migration and VULA 40/10 Bandwidth Change charges are constrained by condition 7B.2 in the First Relevant Year.

- (b) For each of the services specified in conditions 7B.1(a) to 7B.1(e), where the Percentage Change at the end of either the First Relevant Year or the Second Relevant Year is less than the Controlling Percentage (“**Deficiency**”), then the Controlling Percentage for the following Relevant Year shall be determined in accordance with condition 7B.7(d).
- (c) For each of the services specified in conditions 7B.1(a) to 7B.1(e), where the Percentage Change at the end of either the First Relevant Year or the Second Relevant Year is more than the Controlling Percentage (“**Excess**”), then the Controlling Percentage for the following Relevant Year shall be determined in accordance with condition 7B.7(d).
- (d) For each of the services specified in condition 7B.1(a) to 7B.1(e), in the case of Deficiency or Excess, the Controlling Percentage will be calculated by employing the following formula:

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

Where:

CP_t is the Controlling Percentage for the Second Relevant Year (in the case of Deficiency or Excess in the First Relevant Year) or for the Third Relevant Year (in the case of Deficiency or Excess in the Second Relevant Year);

CP_{t-1} is the Controlling Percentage for the First Relevant Year (in the case of Deficiency or Excess in the First Relevant Year) or for the Second Relevant Year (in the case of Deficiency or Excess in the Second Relevant Year).

C_{t-1} is the Percentage Change in the Charge for the services specified in condition 7B.1(a) to 7B.1(e) during the First Relevant Year (in the case of Deficiency or Excess in the First Relevant Year) or for the Second Relevant Year (in the case of Deficiency or Excess in the Second Relevant Year), calculated in accordance with the formula for C_t set out in condition 7B.3;

X_t is as set out in condition 7B.4(a); and

CPI has the meaning ascribed to it in Part 2 of the Schedule to this Notification.

- (e) For each of the services specified in condition 7B.1(a) to 7B.1(e), where the Percentage Change in any Relevant Year is more than the Controlling Percentage, the Dominant Provider shall, to the extent reasonably possible, and as soon as reasonably practicable, repay the Relevant Excess Revenue to the relevant Affected Communications Provider.

7B.5 The Dominant Provider shall secure that during each Relevant Year:

- (a) the charge made by it for FTTP 40/10 Voice and Data Rental is the same as the charge made by it for the sum of FTTC 40/10 Rental (determined in accordance with condition 7B.1(a) or 7B.2(a), as applicable) and MPF SML1 Rental; and

(b) the charge made by it for FTTP 40/10 Transition Rental is the same as:

(i) the charge made by it for FTTC 40/10 Rental when that service is provided to a particular line in conjunction with an MPF rental service (determined in accordance with condition 7B.1(a) or 7B.2(a), as applicable);

(ii) the charge made by it for FTTC 40/10 Rental when that service is not provided to a particular line in conjunction with an MPF rental service (determined in accordance with condition 7B.1(aa) or 7B.2(aa), as applicable).

7B.6 Where:

(a) the Dominant Provider makes a material change (other than to a Charge) to any Charge Controlled Service for which a Charge is charged;

(b) the Dominant Provider makes a change to the date on which its financial year ends; or

(c) there is a material change in the basis of the Consumer Prices Index,

conditions 7B.1 to 7B.5 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 7B.6, a material change to the Charge Controlled Service includes (but is not limited to) the introduction of a new product and/or service wholly or substantially in substitution for that existing Charge Controlled Service or a change as to the billing practice for the Charge Controlled Service.

7B.7 The Dominant Provider must record, maintain and supply to OFCOM in an electronic format, no later than three months after the end of each Relevant Year, the data necessary for OFCOM to monitor compliance of the Dominant Provider with this condition 7B. The data must include:

(a) pursuant to condition 7B.3, the calculated Percentage Change relating to each service listed in conditions 7B.1(a) through to 7B.1(e);

- (b) all relevant data the Dominant Provider used in the calculation of the Percentage Change as set out in condition 7B.3, including for each specific service;
- (c) all charges, excluding any discounts, published by the Dominant Provider from time to time during the Relevant Year and the Prior Year, including the dates and time periods during which they were in force;
- (d) the Relevant Year Weighted Average Charges and the Prior Year Weighted Average Charges for all of the services for which condition 7B.3 applies and calculations thereof;
- (e) other data necessary for monitoring compliance with the charge control; and
- (f) such data as OFCOM may from time to time direct.

7B.8 Conditions 7B.1 to 7B.7 shall not apply to such extent as OFCOM may direct.

7B.9 The Dominant Provider shall comply with any direction OFCOM may make from time to time under this condition 7B.

7B.10 In this condition 7B:

- (a) “**1Gbit Cablelink**” shall be construed as having the same meaning as ‘1 Gigabit GEA Cablelink (provides access to the Fibre-enabled customer base)’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC and GEA – FTTP products;
- (b) “**10Gbit Cablelink**” shall be construed as having the same meaning as ‘10 Gigabit GEA Cablelink (provides access to the Fibre-enabled customer base)’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC and GEA – FTTP products;

- (c) **“Affected Communications Provider”** means each communications provider to whom the Dominant Provider has provided any of the services and/or products listed in conditions 7B.1(a) to 7B.1(e) during the Relevant Year;
- (d) **“Charge Controlled Service”** means: a service and/or product listed in condition 7B.1(a) to 7B.1(e);
- (e) **“Controlling Percentage”** is to be determined in accordance with condition 7B.4;
- (f) **“Excess Revenue”** means the difference between (a) the revenue which the Dominant Provider earned in the Relevant Year from providing the services and/or products listed in conditions 7B.1(a) to 7B.1(e), and (b) the revenue the Dominant Provider would have earned in the Relevant Year from providing the services and/or products listed in conditions 7B.1(a) to 7B.1(e) if it had complied with condition 7B.1;
- (g) **“Fibre Broadband Boost”** [shall be construed as having the same meaning as [‘Broadband Boost’] as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC and GEA – FTTP products];
- (h) **“FTTC 40/10 Rental”** shall be construed as having the same meaning as ‘Up to 40Mbit/s downstream and up to 10Mbit/s upstream (including Simultaneous Provide)’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC products;
- (i) **“FTTC 40/10 PCP Only Install Connection”** shall be construed as having the same meaning as ‘PCP Only Install’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC products where the connection is to allow the Third Party to access a bandwidth of up to 40Mbit/s downstream and up to 10Mbit/s downstream;

- (j) **“FTTC 40/10 Start of Stopped Line Connection”** shall be construed as having the same meaning as ‘Start of Stopped Line’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC products where the connection is to allow the Third Party to access a bandwidth of up to 40Mbit/s downstream and up to 10Mbit/s downstream;
- (k) **“FTTP 40/10 Transition Connection”** shall be construed as having the same meaning as the connection charge for ‘Up to 40Mbit/s / 10Mbit/s "Transition product" (including Simultaneous Provide)’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTP products;
- (l) **“FTTP 40/10 Transition Rental”** shall be construed as having the same meaning as the annual rental charge for ‘Up to 40Mbit/s / 10Mbit/s "Transition product" (including Simultaneous Provide)’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTP products;
- (m) **“FTTP 40/10 Voice and Data Connection”** shall be construed as having the same meaning as the connection charge for ‘Fibre Voice Access Combination with Generic Ethernet Access up to 40Mbit/s/10Mbit/s’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTP products;
- (n) **“FTTP 40/10 Voice and Data Rental”** shall be construed as having the same meaning as the annual rental charge for ‘Fibre Voice Access Combination with Generic Ethernet Access up to 40Mbit/s/10Mbit/s’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTP products;
- (o) **“Percentage Change”** has the meaning given to it in condition 7B.3;
- (p) **“Prior Year Weighted Average Charge”** is to be determined in accordance with the relevant formula in condition 7B.3;
- (q) **“Relevant Year Weighted Average Charge”** is to be determined in accordance with the relevant formula in condition 7B.3;

- (r) **“Superfast Visit Assure”** shall be construed as having the same meaning as ‘Visit Assure – Visit to customer premises’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC and GEA – FTTP products;
- (s) **“VLAN Move”** shall be construed as having the same meaning as ‘VLAN moves applied to GEA Cablelink Modify transactions’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC and GEA – FTTP products;
- (t) **“VULA 40/10 Bandwidth Change”** shall be construed as having the same meaning as:
- i. in the case of GEA – FTTC, ‘Bandwidth Modify Charge’;
 - ii. in the case of GEA – FTTP, ‘Charge to change the product bandwidth between any of the products’,
- where the bandwidth change is to allow the Third Party to access a bandwidth of up to 40Mbit/s downstream and up to 10Mbit/s downstream;
- (u) **“VULA Cease”** shall be construed as having the same meaning as ‘Service cessation (any product variant)’ as provided by the Dominant Provider on its website for definitions and explanations of its GEA – FTTC and GEA – FTTP products; and
- (v) **“VULA Migration”** means the transfer of control of a Virtual Unbundled Local Access service between Third Parties purchasing Virtual Unbundled Local Access from the Dominant Provider.