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(OFCOM)  
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For the attention of:  
Mr. Stephen Unger  
Acting Chief Executive Officer

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Dear Mr Unger,

**Subject: Commission Decision concerning Case UK/2016/1849:**

- **Market for wholesale high-quality access provided at a fixed location in the United Kingdom**
- **Market for wholesale trunk segments of leased lines in the United Kingdom**
- **Market for retail leased lines in the United Kingdom**

**Comments pursuant to Article 7(3) of Directive 2002/21/EC**

## **1. PROCEDURE**

On 22 March 2016, the Commission registered a notification from the United Kingdom's national regulatory authority, the Office of Communications (OFCOM)<sup>1</sup>, concerning the markets for wholesale high-quality access provided at a fixed location<sup>2</sup>, wholesale trunk segments of leased lines<sup>3</sup>, and retail leased lines<sup>4</sup> in the United Kingdom.

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<sup>1</sup> Under Article 7 of 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 (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

<sup>2</sup> Corresponding to market 4 in Commission Recommendation 2014/710/EU of 9 October 2014 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services

The national consultations<sup>5</sup> ran from 1 April 2014 to 13 November 2015.

On 4 April 2016 a request for information<sup>6</sup> was sent to OFCOM and a response was received on 7 April 2016. Additional information was requested on 8 April 2016 and a response was received on 11 April 2016.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

## **2. DESCRIPTION OF THE DRAFT MEASURE**

### **2.1. Background**

The third round of analysis of the UK markets for terminating and trunk segments of leased lines ("BCMR 2013") was notified to and assessed by the Commission under case UK/2013/1428<sup>7</sup>.

OFCOM identified distinct product markets for terminating segments of leased lines, both at retail and wholesale level, based on the type of interface and the bandwidth provided. Moreover, OFCOM found separate geographic markets, namely 'WECLA+' (West, East and Central London plus Slough), Hull, and the UK excluding WECLA+ and Hull. Regarding wholesale trunk segments, OFCOM identified a single TI (traditional interfaces) regional trunk market at all bandwidths, the competitive conditions of which were found very different to those of national trunks.

British Telecommunications plc. ("BT") was designated as holding SMP in a number of retail and wholesale markets in the UK, while KCOM Group plc. ("KCOM") was designated as holding SMP in a number of retail and wholesale markets in Hull. OFCOM imposed a substantial set of active remedies at both wholesale and retail level (including charge controls).

The Commission issued a "comments" letter, assessing the need for the continued regulation of retail markets and asking OFCOM to strengthen its reasons for finding SMP in the AISBO<sup>8</sup> market in the WECLA+ in its final measure.

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(Recommendation on Relevant Markets), OJ L 295, 11.10.2014, p. 79.

<sup>3</sup> Corresponding to market 14 in Commission Recommendation 2003/311/EC, replaced by the Recommendation on Relevant Markets.

<sup>4</sup> Corresponding to market 7 in Commission Recommendation 2003/311/EC, replaced by the Recommendation on Relevant Markets.

<sup>5</sup> In accordance with Article 6 of the Framework Directive.

<sup>6</sup> In accordance with Article 5(2) of the Framework Directive.

<sup>7</sup> C(2013) 1824

<sup>8</sup> Alternative Interface Symmetrical Broadband Origination Market

## 2.2. Market definition

The current review covers both terminating and trunk segments of leased lines. Terminating segments consist of access and any (necessary) backhaul segments, while trunk segments are carried over aggregated links between major networks nodes. On the basis of the technologies used, OFCOM differentiates between contemporary interfaces (CI) and traditional interfaces (TI). TI leased lines include services which use legacy analogue and TDM<sup>9</sup>-based digital interfaces. CI leased lines include services which use Ethernet and WDM<sup>10</sup>.

### 2.2.1. Contemporary Interface - Terminating Segments

#### 2.2.1.1. Retail CI terminating segments in Hull

OFCOM considers that the three criteria test is satisfied for the retail market for CI services in the Hull area.

#### 2.2.1.2. Wholesale CISBO<sup>11</sup> terminating segments

OFCOM proposes to define a single market for all CISBO services. The CISBO market covers wholesale Ethernet and WDM at all bandwidths. It includes EFM<sup>12</sup>, as well as mobile<sup>13</sup> and LLU<sup>14</sup> backhaul provided with a CI interface. Asymmetric NGA services are not considered to be part of the relevant product market.

Contrary to its previous market review, OFCOM no longer finds a break in the chain of substitution at 1 Gbps. OFCOM bases its conclusion from the demand side on (i) functional substitutability, (ii) an anticipated growth in demand for higher bandwidths in the upcoming review period, (iii) an anticipated material migration towards Very High Bandwidth (VHB)<sup>15</sup> services in the upcoming review period, and (iv) narrowing of previous price differentials and increasing evidence of competitive interaction between 1 Gbps and VHB services. From the supply side<sup>16</sup>, OFCOM concludes that at any given

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<sup>9</sup> Time Division Multiplexing

<sup>10</sup> Wavelength Division Multiplexing

<sup>11</sup> Contemporary Interface Symmetric Broadband Origination

<sup>12</sup> Ethernet First Mile is a set of specifications that allow communication providers to run Ethernet over one copper pair or multiple bonded pairs in the access segment, in order to connect the end-user's site to the nearest node. EFM is part of the relevant market based on indirect constraints.

<sup>13</sup> Used by mobile network operators (MNOs). OFCOM considers that MNO backhaul is technically equivalent to standard leased lines, and that competitive conditions are sufficiently homogeneous for them to be included in the same market. This applies for both CISBO and TISBO markets.

<sup>14</sup> Local Loop Unbundling. OFCOM considers that LLU backhaul and the technically equivalent CISBO backhaul services are in principle substitutable.

<sup>15</sup> Bandwidth above 1 Gbps.

<sup>16</sup> According to OFCOM, the key change in the market is the decline in the cost of 10 Gbps single-service Ethernet equipment. The underlying drivers of these cost changes are likely to reflect the more

individual site, the ability of communication providers to compete using the same infrastructure is homogenous across different CISBO bandwidths due to the low incremental cost of adding bandwidth to existing services.<sup>17</sup>

In terms of geographic market definition, OFCOM places most weight on the presence and extent of rival infrastructure ('network reach analysis'). OFCOM analyses the average number of alternative providers with infrastructure within a given 'buffer distance' of businesses in a given postcode sector. Limited weight is given to market shares, pricing and profitability. OFCOM defines four separate geographic markets:

- Central London Area ("CLA"), the boundary of which is formed by postcode sectors fulfilling at least one of the two conditions of the Boundary Test:
  - businesses having on average five or more alternative providers within a 100m buffer distance; and
  - businesses having on average four or more alternative providers within a 100m buffer distance and, in addition, 90% of businesses being within 100m of at least two providers.
- London Periphery ("LP"), which does not fulfil the Boundary Test. Its outer boundary is the same as that of the WECLA<sup>18</sup> defined in the BCMR 2013. OFCOM considers that there have been limited changes in the extent of rival infrastructure since the previous review, and that retaining the boundary would provide regulatory stability.
- Rest of the UK ("RoUK")<sup>19</sup>, defined as the UK outside the CLA, the LP and the Hull area.
- Hull, where KCOM (and not BT) is the incumbent provider.

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widespread use of very high bandwidth services. Indeed, according to our discussions with stakeholders, 10 Gbps Ethernet equipment is sufficiently widespread that it is now viewed as 'mass market' or commoditised product.

<sup>17</sup> OFCOM carries out a qualitative SSNIP (Small but Significant Non-transitory Increase in Prices) test and considers that the likely level of switching to 10 Gbps in response to a SSNIP applied to 1 Gbps services would be sufficient to render it unprofitable. In forming a view on the order of magnitude of switching that would be required, OFCOM concludes that there are very low incremental costs associated with providing a CISBO service over an existing connection. These very low incremental costs mean that a SSNIP which would result in a material loss of volumes is likely to be unprofitable.

<sup>18</sup> The area covered by the WECLA is equivalent to the CLA and the LP combined.

<sup>19</sup> OFCOM has analysed, in particular, the situation of Birmingham, Bristol, Glasgow, Leeds and Manchester (the so called "Central Business Districts", CBDs), where network reach and business density were higher than in other parts of the RoUK. OFCOM considers that, although LP and CBDs are very similar in terms of rival infrastructure, there are some differences in current and prospective competitive conditions which speak in favour of CBDs not being a separated market, nor being eligible for a lighter set of remedies.

### 2.2.2. Contemporary Interface - Trunk Segments

OFCOM proposes to expand the market definition by including 18 additional trunk aggregation nodes and 63 data centres in the so-called CI core.

### 2.2.3. Traditional Interface - Terminating Segments

#### 2.2.3.1. Retail TI markets

OFCOM identifies the retail market for low bandwidth TI services at bandwidths up to and including 8 Mbps in the Hull area.

Regarding the previously defined retail market for very low bandwidth TI services (at bandwidths below 2 Mbps) in the UK excluding Hull, OFCOM concludes that the three criteria test is no longer fulfilled<sup>20</sup>. Therefore regulation imposed under the BCMR 2013 will be withdrawn. .

#### 2.2.3.1. Wholesale TISBO terminating segments

OFCOM proposes to define one single product market covering services at bandwidths up to and including 8 Mbps. Mobile backhaul links consuming TI services are part of the relevant product market. Moreover, OFCOM considers regional TI trunk segments up to and including 8 Mbps to be part of the TISBO terminating segments market, in view of their similar competitive conditions.

OFCOM considers that none of the previously defined TISBO markets at bandwidths above 8 Mbps fulfil the three criteria test since they tend towards effective competition in the absence of *ex ante* regulation. The same applies to TI trunk segments above 8 Mbps.<sup>21</sup>

In terms of geographic scope, OFCOM finds two relevant geographic markets: Hull and UK excluding Hull.

### 2.2.4. Traditional Interface - Trunk Segments

The TI trunk product market is now limited to national trunks (and excludes regional trunks). According to OFCOM an expansion of the relevant market is not justified since alternative operators are not expanding their coverage. .

## 2.3. Three criteria test

OFCOM identifies two markets that are no longer listed by the Commission as susceptible to *ex ante* regulation: (i) retail market for low bandwidth TI services in Hull, and (ii) retail market for CI services in Hull. OFCOM has carried out the three criteria test for each of those markets and considers that all criteria are met.

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<sup>20</sup> This follows BT's decision to stop new supply by 1 September 2016 and to withdraw the remaining existing services by 31 March 2020.

<sup>21</sup> OFCOM estimates that regional TI trunk circuits above 8 Mbps represent 4% of regional TI trunk (all bandwidths included).

## 2.4. Finding of significant market power

### 2.4.1. Contemporary Interface - Terminating Segments

#### 2.4.1.1. Retail CI terminating segments in Hull

OFCOM finds that KCOM, despite the availability of its own wholesale products on regulated terms, has SMP in the retail market for CI services in the Hull area, in view of (i) KCOM's very high shares in these markets; (ii) the limited presence of rival infrastructure; (iii) KCOM's economies of scale and scope; and (iv) the existence of significant barriers to entry and expansion.

#### 2.4.1.2. Wholesale CISBO terminating segments

OFCOM finds the CLA to be effectively competitive<sup>22</sup>, even though according to OFCOM BT's share in volume in the CISBO market in the area is at a level consistent with single firm dominance<sup>23</sup>. OFCOM places greater weight on the extent of rival infrastructure supporting competition for CISBO services at any bandwidth in concluding that BT does not have SMP in the CLA<sup>24</sup>.

OFCOM finds BT to hold SMP in LP and RoUK due to, among others, (i) its network ubiquity and economies of scale and scope, (ii) its high market shares, (iii) much lower presence and density of rival infrastructure, and (iv) evidence on pricing and profitability.

OFCOM finds KCOM to hold SMP in Hull due to (i) its control of infrastructure not easily duplicated, (ii) its high market shares, (iii) barriers to entry and expansion, and (iv) its advantages derived from economies of scale and scope.

### 2.4.2. Contemporary Interface - Trunk Segments

OFCOM finds no SMP in this market since several alternative operators have their own core network infrastructure.

### 2.4.3. Traditional Interface - Terminating Segments

#### 2.4.3.1. Retail TI terminating segments in Hull

OFCOM finds that KCOM, despite the availability of KCOM's wholesale products on regulated terms, has SMP in the retail market for TI services in the Hull area, in view of (i) KCOM's very high shares in these markets; (ii) the limited presence of rival infrastructure; (iii) KCOM's economies of scale and scope; and (iv) the existence of significant barriers to entry and expansion.

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<sup>22</sup> OFCOM considers that an area is unlikely to be effectively competitive unless it satisfies the more stringent criteria used to define the CLA boundary.

<sup>23</sup> According to OFCOM, BT's CISBO revenue share is 38%, and 45% in volume.

<sup>24</sup> Across the CLA, the average number of alternative providers other than BT within 100m of a business site is 6.2. Virtually all businesses have at least five alternative providers other than BT within 200m (98%) and at least four alternative providers other than BT within 100m (93%). Indeed, the four closest alternative providers to a business site are on average less than 50m away.

### 2.4.3.2. Wholesale TISBO terminating segments

OFCOM finds BT to hold SMP in the provision of low bandwidth TI services in the UK excluding Hull based on (i) its high and persistent market shares, (ii) its high profitability, (iii) lack of prospects for potential competition, (iv) limited effect of price differences on migration trends, and (v) barriers to switching.

OFCOM finds KCOM to hold SMP in the provision of low bandwidth TI services in Hull based on (i) its control of infrastructure not easily duplicated<sup>25</sup>, (ii) its high market shares, (iii) barriers to entry and expansion, and (iv) its advantages derived from economies of scale and scope.

### 2.4.4. Traditional Interface - Trunk Segments

OFCOM finds the national TI trunk market to be effectively competitive as in its previous market review.

Table 1: Summary of the SMP assessment

Interface technology	Bandwidth (Mbps)	Retail services		Wholesale terminating segments			
		Hull	Rest of UK	Central London Area	London Periphery	Rest of UK	Hull
Traditional (TI)	Low <=8	KCOM	NO SMP	BT			KCOM
Contemporary (CI)	All bandwidths	KCOM	NO SMP	NO SMP	BT	BT	KCOM

## 2.5. Regulatory remedies

### 2.5.1. Changes in regulation

OFCOM's new market definition and SMP findings imply that the regulatory landscape is modified compared to the 2013 market analysis. A number of markets are being deregulated:

- retail very low bandwidth TI services ( below 2 Mbps) in the UK excluding the Hull area;
- wholesale medium and high bandwidth TISBO services (between 8 Mbps and 115 Mbps) in the RoUK;
- wholesale medium, high and very high bandwidth TISBO services in the Hull area (between 8 Mbps and 622 Mbps);
- wholesale CISBO services up to and including 1 Gbps in the CLA;

<sup>25</sup> OFCOM is of the view that alternative operators do not have the ability or incentive to duplicate KCOM's network infrastructure in the Hull area. The costs of developing such an extensive network infrastructure would be very significant, and with KCOM already having developed its infrastructure and having largely sunk the costs of doing so, alternative operators would be unlikely to be able to recover their investment costs.

- wholesale regional TISBO trunk segments above 8 Mbps in the UK.

In parallel, following the split of the former West, East and Central London Area (WECLA) into 'CLA' and 'LP', wholesale CISBO services at very high bandwidths (above 1 Gbps) are being re-regulated in the LP<sup>26</sup>.

### 2.5.2. *Geographic segmentation of CISBO remedies*

OFCOM considered that BT faces higher competitive constraints from alternative providers in the LP compared to the RoUK.<sup>27</sup> Therefore, it concluded that a lighter set of remedies is justified in this area.<sup>28</sup>

OFCOM also considered whether the competitive conditions in the Central Business Districts (CBDs) of five major UK cities<sup>29</sup> justify the imposition of lighter remedies compared to the RoUK. The average number of networks other than BT's and the depth of network reach of alternative providers in the CBDs are comparable to - and even slightly higher than - those present in the LP.<sup>30</sup> However, OFCOM points out that the number of businesses and of active circuits in CBDs is much lower compared to the LP<sup>31</sup> and that the LP enjoys higher prospective competitive advantages due to the proximity of the competitive CLA. Given these differences, OFCOM decides not to apply lighter remedies in the CBDs, which remain therefore regulated in the same way as the RoUK.

### 2.5.3. *Overview of remedies*

OFCOM is imposing a wide range of obligations upon BT, including (i) network access, (ii) ancillary services such as interconnection and accommodation that facilitate the use

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<sup>26</sup> OFCOM estimates that the VHB (above 1 Gbps) CISBO segment in the LP consists of around 115 out of 23,000 postcode sectors in the LP, representing 6% of the CISBO services in the LP.

<sup>27</sup> OFCOM found that alternative providers have invested in networks to supply high value sites in this area, but that rival infrastructure is patchy, reflecting the much sparser distribution of high value sites in the LP relative to the CLA. Therefore, although OFCOM expects migration from 1 Gbps to very-high-bandwidth (VHB) services during the market review period, it does not expect these migrations to attract new infrastructure build in the LP by rival alternative providers. Migrating customers continue to have limited alternatives to BT and regulation is consequently still needed, OFCOM says.

<sup>28</sup> Concretely, the main difference in remedies applied to the LP is the absence of a safeguard cap for wholesale CISBO services with bandwidths above 1 Gbps, which instead are subject to a safeguard cap in the RoUK.

<sup>29</sup> Birmingham, Bristol, Glasgow, Leeds and Manchester.

<sup>30</sup> OFCOM's data shows that, in the LP, there are on average 2.4 networks other than BT's within 100m of businesses (4.1 within 200m), while on average in the CBDs there are 2.8 other networks within 100m (4.4 within 200m). In the LP, 40% (78%) of businesses have at least 3 alternative providers other than BT within 100m (200m), while on average businesses in the CBDs have 55% within 100m (84% within 200m).

<sup>31</sup> According to OFCOM's data, there are around 3,400 businesses in the LP and around 890, on average, in the CBDs. As for the number of leased lines circuits, there are around 11,700 CI circuits <=1Gbps and 760 CI circuits >1Gbps in the LP, while the average in CBDs is around 2,750 and 50, respectively.



of network access, (iii) non-discrimination (in all markets) and Equivalence of Inputs<sup>32</sup> ("EoI", in CISBO markets only), (iv) transparency<sup>33</sup>, (v) price control, (vi) accounting separation and cost accounting, (vii) increased quality of service<sup>34</sup> and (viii) provision of dark fibre.

OFCOM is also imposing a number of remedies on KCOM in the four markets in which it was found to have SMP.

Table 2: Overview of main remedies applied in this market review

	Wholesale TI market (UK except Hull area)	Wholesale CI services in the London Periphery (LP)	Wholesale CI services in the Rest of the UK (RoUK)	Retail low bandwidth TI and CI services in the Hull area	Wholesale low bandwidth TI and CI services in the Hull area
Requirement to provide network access on reasonable request	X	X <sup>35</sup>	X <sup>36</sup>		X
Requirements relating to requests for new forms of network access	X	X	X		
Non-discrimination	X	X	X	X	X
Equivalence of Inputs (EoI)		X	X		
Provision of accommodation and interconnection services	X	X	X		
Publication of reference offer	X	X	X	X	X
Notification of changes to prices, terms and conditions	X	X	X		X
Notification of changes to technical information	X	X	X		X
Produce a pricing transparency report				X	X
Cost accounting obligation	X	X	X	X	
Accounting separation obligation	X	X	X		X
Charge controls	X	X <sup>37</sup>	X		

<sup>32</sup> Equivalence of Inputs is a strict form of non-discrimination which results in the SMP operator providing exactly the same products and services to all alternative providers (including its own downstream divisions) on the same timescales, terms and conditions (including price and service levels), by means of the same systems and processes and by providing the same information.

<sup>33</sup> Including the publication of a Reference Offer and notification of any changes to charges, terms and conditions, and technical information.

<sup>34</sup> Tougher rules on faults, repairs and installations for customers, transparent information on service quality, as well as automatic compensation for customers when BT does not respect its deadlines.

<sup>35</sup> Including: (i) disaggregated wholesale Ethernet access and backhaul segments; (ii) short range end-to-end wholesale Ethernet products; (iii) end-to-end wholesale WDM services and (iv) wholesale WDM backhaul services.

<sup>36</sup> Including: (i) disaggregated wholesale Ethernet access and backhaul segments; (ii) short range end-to-end wholesale Ethernet products; (iii) end-to-end wholesale WDM services and (iv) wholesale WDM backhaul services.

	Wholesale TI market (UK except Hull area)	Wholesale CI services in the London Periphery (LP)	Wholesale CI services in the Rest of the UK (RoUK)	Retail low bandwidth TI and CI services in the Hull area	Wholesale low bandwidth TI and CI services in the Hull area
Quality of service remedies	X	X	X		
Provision of Dark fibre		X	X		
Obligation to provide Partial Private Circuits (PPCs) and Radio Base Station (RBS) backhaul <sup>38</sup>	X				
Requirement to supply retail leased lines				X <sup>39</sup>	

#### 2.5.4. Introduction of access to dark fibre

OFCOM is imposing an obligation on BT to supply dark fibre in the LP and in the RoUK.<sup>40</sup> The objective of the remedy is to allow alternative providers to assemble a wider range of inputs in order to differentiate their leased lines services offer and to compete more effectively with BT. OFCOM concludes that, for the upcoming regulatory period, a package of active and passive remedies would be more effective than imposing active remedies alone. The regulator explains that the introduction of dark fibre is a step towards its longer-term objective of gradually removing active remedies to rely more heavily on passive remedies. OFCOM decided not to introduce a duct access remedy in the current review period.<sup>41</sup>

The technical, operational and commercial aspects of BT's active Ethernet services are used as a benchmark for establishing the arrangements applicable to dark fibre. OFCOM uses an 'active-minus' approach to determine the price cap of BT's dark fibre, which is linked to the price of BT's 1 Gbps Ethernet product.<sup>42</sup> OFCOM believes this approach

<sup>37</sup> Only for bandwidths up to and including 1 Gbps.

<sup>38</sup> BT is allowed to withdraw PPCs circuits and RBS backhaul below 2 Mbps as long as it gives existing consumers a year's notice.

<sup>39</sup> For very low bandwidth TI (below 2 Mbps) KCOM is not required to provide new retail services, and it is allowed to withdraw existing ones subject to a two years' notice.

<sup>40</sup> Including (i) disaggregated access and backhaul segments and (ii) short range end-to-end segments. These lines, with must have a distance limit of 45km, should be provided according to EoI. BT is expected to launch its dark fibre product by 1 October 2017, after a phase of negotiations with alternative providers and OFCOM to establish the detailed characteristics of the regulated product.

<sup>41</sup> Although OFCOM had identified certain additional benefits of a duct access remedy, it concluded that a package of active remedies and dark fibre would provide a better balance between benefits and risks in leased lines markets than a package of active remedies and duct access either with or without dark fibre for this review period. However, OFCOM explains it will continue to consider the potential role that duct and pole access could play in leased lines markets and will take them into account in its next review, assuming it is not necessary to intervene before then.

<sup>42</sup> The 'active-minus' approach involves subtracting the distributed long-run incremental costs (LRIC) of BT's 1 Gbps Ethernet active elements, not provided via dark fibre, from the regulated price of the active product. BT, who will be responsible for producing the calculation of the minus on an annual basis, is expected to be able to effectively recover its efficiently incurred costs of providing dark fibre.

should limit arbitrage opportunities and reduce the scale of the risks that could affect BT and other infrastructure competitors.<sup>43</sup>

#### 2.5.5. *Charge controls*<sup>44</sup>

OFCOM finds that BT currently earns an excessively high return on the capital it employs for the provision of leased lines.

The regulator proposes to significantly cut the regulated charges for BT's wholesale TI services (at bandwidths up to and including 8 Mbps), wholesale Ethernet services (at bandwidths up to and including 1 Gbps) and other services<sup>45</sup> provided outside of the CLA and Hull, in order to bring them down to an efficient level<sup>46</sup> over the upcoming regulatory period.<sup>47</sup> The new proposed charge controls include Starting Charge Adjustments (SCAs)<sup>48</sup> and a series of annual price caps, which will oblige BT to ensure that its charges do not increase by more than a benchmark for inflation (in most cases, the Consumer Price Index – CPI) minus a value of X<sup>49</sup> in each year of the control.

As for BT's wholesale Ethernet services at bandwidths above 1 Gbps and WDM services (very high CISBO) in the RoUK, OFCOM considers that a CPI-CPI safeguard cap

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<sup>43</sup> BT and a number of market players have questioned the introduction of this remedy, claiming it is not justified and that the regulated price of dark fibre will reduce their incentives to invest in new infrastructure. OFCOM, while recognising that the remedy could push some of the smaller alternative providers to exit the market and others to reduce their investments, believes that the impact on operators will be limited compared to the greater opportunities that dark fibre could open up. The regulator explains that, given its price, dark fibre would not be cost-effective for the delivery of services at bandwidths below 1 Gbps and therefore very few circuits would be impacted by the remedy.

<sup>44</sup> OFCOM estimates that the combined effect of the charge control will result in a reduction of approximately £800m in revenue over the three-year period.

<sup>45</sup> Such as accommodation services, Excess Construction Charges and Time Related Charges.

<sup>46</sup> OFCOM judges that BT's charges should be equal to its weighted average cost of capital.

<sup>47</sup> Market players have argued that, in order to promote investment, OFCOM should refrain from imposing a charge control. The regulator has nevertheless decided to impose one because it considers that, without it, costs to consumers would be very high and that the current and planned alternative infrastructure of which it is aware outside the CLA and Hull is unlikely to support competition which is effective enough to justify the removal of regulation.

<sup>48</sup> Prices charged by BT for wholesale Ethernet services with bandwidth up to and including 1 Gbps and wholesale TI services at bandwidths up to and including 8 Mbps will be cut by 12% and 9%, respectively, on the first day of the new regulatory period.

<sup>49</sup> OFCOM groups BT's services which are subject to price controls into baskets and sub-baskets. For each of these, the regulator then determines base year costs and forecasted costs over the duration of the charge control by applying BT's 'current cost accounting fully allocated costs' (CCA FAC) standard. Finally, the regulator calculates the annual 'CPI-X' caps and sub-caps to be applied by BT. OFCOM believes this approach allows setting prices consistent with signals for efficient investment.

control<sup>50</sup>, which is looser compared to a CPI-X charge control, would be more appropriate given the higher competition in very high bandwidths.

In view of the competitive conditions for high-end CI products in the LP, and in anticipation of the dark fibre remedy coming into effect during this control period, OFCOM considers it is not proportionate to impose any type of price control for very high bandwidth CISBO services (above 1 Gbps) in the LP.

### **3. COMMENTS**

The Commission has examined the notification and the additional information provided by OFCOM and has the following comments:<sup>51</sup>

#### **Imposition of physical infrastructure access in the non-competitive areas**

The Commission stresses the importance of the physical infrastructure access remedy to facilitate and incentivise also the roll-out of high speed business connectivity solutions by reducing their deployment costs. The Commission does not in fact share OFCOM's assertion that imposing universal duct access would create undue implementation risks (related to correct price differentials along the value chain). The latter risks could, in view of the Commission, be mitigated by the use of a uniform costing methodology with consistent asset valuation along the value chain, in line with the approach already adopted for pricing of dark fibre in relation to the 1 Gbps active product.

Therefore the Commission asks OFCOM to consider imposing universal physical infrastructure access (to ducts and poles) in the non-competitive areas.

#### **CISBO geographic market definition and remedies**

The Commission takes note of OFCOM's detailed analysis of the network reach in the UK and welcomes the regulator's intention to deregulate - or to impose lighter remedies - in those areas of the country where infrastructure based competition has developed in recent years.

The Commission further takes note of OFCOM's rationale for assessing whether a market is to be considered competitive or not. The regulator mainly builds its assessment on the presence or absence of at least four or five alternative network infrastructures, alongside the network of the incumbent, in close proximity to potential business customers. OFCOM argues that, once an alternative provider has invested in the deployment of its network in a specific area, it can then supply businesses with leased lines of varying bandwidth for a limited incremental cost.

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<sup>50</sup> With this type of control, BT's prices will be capped in nominal terms, i.e. prices for the controlled services may not rise during the charge control period.

<sup>51</sup> In accordance with Article 7(3) of the Framework Directive.

The Commission also takes note of the reasons leading OFCOM to conclude that a gradual introduction of passive remedies, starting with the imposition of dark fibre in the current review, could open up opportunities for alternative providers to innovate, differentiate their services and compete more effectively, eventually leading to a further reduction of regulatory intensity, and potentially deregulation in larger parts of the UK territory.

Against this background, the Commission has questions regarding the geographic differentiation of remedies as proposed by OFCOM. In particular, the approach could be further developed, in order to more accurately reflect the competitive conditions of a given area, especially where infrastructure competition might already be in place.

A more granular geographic differentiation of remedies for areas with less than five or six competing infrastructures could reduce the likelihood that alternative providers - having already deployed or committed to deploy infrastructure – would be incentivised to downscale their investments or even exit the market because of the imposition of remedies undermining their business cases.

In this respect, the Commission notes that OFCOM identified boundary test criteria for the identification of competitive areas, without at the same time providing clear characteristics which would qualify other areas in the UK for the imposition of lighter remedies.

This would in view of the Commission call for an approach which would help to identify in an unambiguous manner all those areas in the UK where infrastructure competition has already developed to an extent that the imposition of lighter remedies would be appropriate. As a result, OFCOM may find that also in areas other than the LP, such as central business districts (CBDs) of other major cities, the imposition of charge control (for very high speed lines) may no longer be appropriate. Equally, there may be grounds to conclude that in areas with a significant degree of infrastructure based competition, by alternative operators which have rolled out their own fibre lines capable of providing very high bandwidth CISBO services (> 1 Gbps), access to BT's physical (duct) infrastructure may be sufficient to ensure an adequate level of additional competitive access and pressure at the infrastructure level, and a dark fibre remedy may not be necessary or proportionate. It would therefore appear appropriate for OFCOM to establish criteria also addressing this dimension of infrastructure competition and its relevance for the type of remedies imposed.

Therefore, the Commission asks OFCOM to consider in their final draft measure the imposition of a lighter set of remedies not only in the LP area, but also other parts of the UK territory, including the five CBDs, based on a set of clear criteria reflecting all relevant parameters of the state of infrastructure-based competition therein.

Pursuant to Article 7(7) of the Framework Directive, OFCOM shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC<sup>52</sup> the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission<sup>53</sup> within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.<sup>54</sup> You should give reasons for any such request.

Yours sincerely,



For the Commission,  
Roberto Viola  
Director-General

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<sup>52</sup> Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

<sup>53</sup> Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

<sup>54</sup> The Commission may inform the public of the result of its assessment before the end of this three-day period.