

Annex 3 – legal instrument

Consents and Direction

CONSENT UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003 AND CONDITIONS 1 AND 2, CONSENTING TO BT NOT OFFERING NEW COPPER-BASED NETWORK ACCESS SERVICES IN THE SALISBURY AREA

CONSENT UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003 AND CONDITIONS 4 AND 5, CONSENTING TO BT NOT PROVIDING CERTAIN NETWORK ACCESS ON A NON-DISCRIMINATORY BASIS INCLUDING ON AN EQUIVALENCE OF INPUTS BASIS IN THE SALISBURY AREA AND MILDENHALL AREA

DIRECTION UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003 AND CONDITION 7B.8, DIRECTING A PARTIAL DISAPPLICATION OF CONDITION 7B.5(A)(i) IN THE SALISBURY AREA

WHEREAS

1. On 28 March 2018, pursuant to section 45 of the Act, Ofcom published a statement entitled “*Wholesale Local Access Market Review: markets, market power determinations and remedies*” (“**WLA 2018 Statement**”)¹. That document sets out Ofcom’s decisions on its review of the WLA markets, by identifying markets, making certain market determinations and setting SMP conditions (including charge control conditions). At Annex 33 of that document, Ofcom sets out its market identifications, market power determinations and setting of SMP conditions applied to BT (“**March 2018 Notification**”).
2. The obligations imposed on BT in the WLA market in the March 2018 Notification include:
 - a. a requirement to provide network access to a Third Party where that Third Party, in writing, reasonably requests it (SMP Condition 1), which includes network access in the form of MPF, Sub-Loop Unbundling Services and VULA (SMP Condition 2);
 - b. a requirement to not unduly discriminate against a particular person or description of persons in relation to the provision of network access under SMP Conditions 1 and 2 (SMP Condition 4), and an obligation to provide such network access on an Equivalence of Inputs basis (SMP Condition 5); and
 - c. a requirement on BT to charge the same price for FTTP 40/10 Voice and Data Rental as it charges for FTTC 40/10 Rental and MPF SML1 Rental at locations at which no GEA-FTTC services are available (SMP Condition 7B.5(a)(i)).
3. The obligations under SMP Conditions 1, 2, 4 and 5 are imposed as requirements “except in so far as Ofcom may from time to time otherwise consent in writing”. The obligation under

¹ Wholesale Local Access Market Review; markets, market power determinations and remedies, 28 March 2018, https://www.ofcom.org.uk/_data/assets/pdf_file/0020/112475/wla-statement-vol-1.pdf.

SMP Condition 7B.5 shall not apply to such extent as Ofcom may direct pursuant to Condition 7B.8.

4. The Consents and Direction set out below concern matters to which the abovementioned Conditions relate.
5. On 19 July 2019, BT requested that Ofcom consent to it not offering new Copper-based network access in the Salisbury Area from 1 December 2020.
6. On 24 July 2019 Ofcom published a consultation entitled "*Promoting competition and investment in fibre networks: measures to support Openreach's proposed trial in Salisbury – migrating customers to full fibre and withdrawing copper services*"² (the "**July 2019 Consultation**"). The July 2019 Consultation sets out Ofcom's proposals to consent to SMP Conditions 1 and 2 of the March 2018 Notification not applying to the extent that BT is not required to offer new copper-based network access services in the Salisbury Area from 1 December 2020.
7. Furthermore, on 25 November 2019, for end-users migrated from any of the Specified Services to any of the Target Services in the Salisbury or Mildenhall Areas, BT requested that Ofcom give certain regulatory consents to allow it to offer special prices to incentivise transfer to the Specified Service.
8. On 27 November 2019 Ofcom published a consultation entitled "*Measures to support Openreach's trials in Salisbury and Mildenhall*"³ (the "**November 2019 Consultation**") setting out proposals in relation to SMP Conditions 4, 5 and 7B.5(a)(i) of the March 2018 Notification, proposing to consent to BT not providing certain network access on a non-discriminatory basis including on an equivalence of inputs basis in the Salisbury Area and Mildenhall Area, and proposing to direct to disapply SMP Condition 7B.5(a)(i) in the Salisbury Area during the Trial Offer, or where an end user's Contracted Period ends after the expiry of the Trial Offer, until the end of that end user's Contracted Period.
9. Ofcom published the July 2019 Consultation and the November 2019 Consultation in accordance with sections 49 and 49A of the Act. Ofcom received several responses to its proposals set out in the said Consultation Documents, and it has considered every such representation. The Secretary of State has not notified Ofcom of any international obligation of the UK for the purpose of Ofcom giving effect to the Consents or Direction to which Ofcom is required to have regard.
10. Ofcom considers that the Consents and Direction are not proposals of EU significance, and therefore the requirements in section 49B do not apply.

²Promoting competition and investment in fibre networks: measures to support Openreach's proposed trial in Salisbury – migrating customers to full fibre and withdrawing copper services, 24 July 2019, https://www.ofcom.org.uk/_data/assets/pdf_file/0028/158167/promoting-competition-and-investment-fibre-networks-consultation.pdf.

³ Measures to support Openreach's trials in Salisbury and Mildenhall, 27 November 2019, https://www.ofcom.org.uk/_data/assets/pdf_file/0021/181551/consultation-openreach-trials.pdf.

11. For the reasons set out in the Statement accompanying these Consents and Direction, Ofcom is satisfied that, in accordance with section 49(2) of the Act, each of these is:
- a. objectively justifiable in relation to the networks, services and facilities to which it relates;
 - b. not such as to discriminate unduly against particular persons or against a particular description of persons;
 - c. proportionate to what it is intended to achieve; and
 - d. in relation to what it is intended to achieve, transparent.
12. For the reasons set out in the Statement accompanying these Consents and Direction, Ofcom are satisfied that it has acted in accordance with the relevant duties set out in sections 3 of the Act, the six Community requirements in section 4 of the Act and the duty to take account of European Community recommendation for harmonisation in section 4A of the Act and any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by the Body of European Regulators for Electronic Communications (BEREC) pursuant to Article 3(3) of Regulation (EC) No 1211/2009. In accordance with section 2B(2) of the Act, Ofcom has also had regard to the Government's Statement of Strategic Priorities for telecommunications, the management of radio spectrum and post (as designated on 29 October 2019) in giving these Consents and Direction.

CONSENTS AND DIRECTION

13. Therefore, pursuant to section 49 of the Act and the above-mentioned Conditions of the March 2018 Notification, Ofcom gives the following Consent.
14. In relation to SMP Conditions 1 and 2, Ofcom consents to the requirement on the Dominant Provider under SMP Conditions 1 and 2 to provide network access to a Third Party where that Third Party, in writing, reasonably requests it, including the specific forms of network access comprising Metallic Path Facilities, Virtual Unbundled Local Access and Sub-Loop Unbundling Services, not applying in respect of new requests for Copper-based network access made on or after 1 December 2020 in respect of end users located in the Salisbury Area provided that Fibre-based network access is available to a Third Party on reasonable request in respect of any such end user.
- For the avoidance of doubt, the requirement on the Dominant Provider under SMP Conditions 1 to provide network access to a Third Party where that Third Party, in writing, reasonably requests it, including the specific forms of network access comprising Metallic Path Facilities, Virtual Unbundled Local Access and Sub-Loop Unbundling Services, continues to apply in respect of Existing Copper-based network access provided in respect of end users located in the Salisbury Area.
15. In relation to SMP Conditions 4 and 5, Ofcom consents to the requirement on the Dominant Provider under SMP Condition 4 to not unduly discriminate against a particular person, or

description of persons, in relation to the provision of network access, and Condition 5 to provide network access to Third Parties on an Equivalence of Inputs basis, not applying to rental charges made by the Dominant Provider for any of the Target Services, and the charges for Associated Services, for network access provided in respect of an end user located in the Salisbury Area or the Mildenhall Area for the duration of that end user's Contracted Period, where the Communications Provider supplying Specified Services to that end user has accepted the Trial Offer during the Trial Period in respect of that end user.

For the avoidance of doubt, save for the above, the requirement on the Dominant Provider under SMP Condition 4 to not unduly discriminate against a particular person, or description of persons, in relation to the provision of network access, and SMP Condition 5 to provide network access to Third Parties on an Equivalence of Inputs basis, continues to apply in respect of network access provided in respect of end users located in the Salisbury Area, and the Mildenhall Area.

16. Ofcom directs pursuant to Condition 7B.8 that the requirement on the Dominant Provider under SMP Condition 7B.5(a)(i) to secure 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 and MPF SML1 Rental, is disappplied in respect of an end user located in the Salisbury Area for the duration of that end user's Contracted Period, where the Communications Provider supplying Specified Services to that end user has accepted the Trial Offer during the Trial Period in respect of that end user.
17. The Consents and Direction set out above shall take effect on the day they are published.
18. The effect of, and Ofcom's reasons for making, these Consents and Direction are set out in the accompanying statement. A copy of these Consents and Direction have been sent to the Secretary of State and the European Commission in accordance with sections 49C(1) and 49C(2) of the Act respectively.

INTERPRETATION

19. For the purpose of interpreting the Consents and Direction set out above –
 - a. except in so far as the context otherwise requires, words and expressions shall have the meaning assigned to them in paragraph 20 below, and otherwise any word or expression shall have the same meaning as it has in the March 2018 Notification and the Communications Act 2003;
 - 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.

20. The following definitions shall apply:

- “Act”** means the Communications Act 2003 (c.21);
- “Associated Services”** means MPF MDF Remove Jumper Order Singleton Charge; MPF MDF Remove Jumper Order Bulk Charge; SMPF MDF Remove Jumper Order Singleton Charge; SMPF MDF Remove Jumper Order Bulk Charge; LLU Internal Tie Cable Cease of 1-10 Cables (per Point of Presence); LLU Internal Tie Cable Cease of 11-20 Cables (per Point of Presence); LLU Internal Tie Cable Cease of 21-30 Cables (per Point of Presence); LLU Internal Tie Cable Cease of 31-40 Cables (per Point of Presence); LLU Internal Tie Cable Cease of 41-50 Cables (per Point of Presence); LLU Internal Tie Cable – early cancellation fee; FTTP any bandwidth – connection; SOGEA Install at Cabinet; SOGEA Start of Stopped Line or Transfer; SOGFast Engineer install at Premises [standard]; and SOGFast Start of Stopped Line or Transfer.⁴
- “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;
- “Contracted Period”** means the term of 12 months, which commences from the date that the Communication Provider supplying services to an end user located in the Salisbury Area or Mildenhall Area accepts the Trial Offer during the Trial Period in respect of that end user. The Contracted Period may extend beyond the Trial Period;
- “Copper-based network access”** means the provision of network access where the physical connection between the local access node and the network

⁴ Services as listed at:

entry 2.2.1 of the Openreach LLU price list found at [https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=totid5BwFmkf9vLcBITRyZF9loRxWlBkK6V7YWmlYAlMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtlFAKw%3D%3D](https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=totid5BwFmkf9vLcBITRyZF9loRxWlBkK6V7YWmlYAlMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtlFAKw%3D%3D;);

entry 2.3.1 of the Openreach LLU price list found at <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=LI%2BLzfp8sh2Y2DndjiRMoqOJDxc5GerAOSBb9tNt8RglMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtlFAKw%3D%3D>; and

entry 2.1.3 of the Openreach LLU price list found at <https://www.openreach.co.uk/orgp/home/products/pricing/loadProductPriceDetails.do?data=5mobMFYcGecpP%2F0hSknG1uEJJPvcLlxRgpsxpxNzPMclMnGHsqdC0vzO163bJmh34D91D7M0q8u%2FIISgtlFAKw%3D%3D>.

termination point comprises copper wires either in whole or in part;

“Dominant Provider”

means BT;

“Existing Copper-based network access” means the particular form of Copper-based network access that is being used in respect of the relevant end user located in the Salisbury Area as at 30 November 2020;

“Fibre-based network access”

means the provision of network access where the physical connection between the local access node and the network termination point comprises entirely of optical fibre;

“FTTP”

means Fibre-to-the-Premises, an Electronic Communications Network consisting of optical fibre extending from the local access node to the customer’s premises;

“GEA”

means Generic Ethernet Access, the BT non-physical wholesale services providing wholesale access to higher speed broadband products;

“GEA (FTTC)”

means BT’s product consisting of the provision of GEA services via its FTTC network;

“GEA (FTTP)”

means BT’s product consisting in the provision of GEA services via its FTTP network;

“GEA (G.fast)”

means BT’s product consisting of the provision of GEA services via its G.fast network;

“G.fast”

means the communications technology of that name, designed to support very high bandwidth connections over short distances on a copper access network;

“July 2019 Consultation”

means the consultation described in paragraph 6 above;

“March 2018 Notification”

means the notification described in paragraph 1 above;

“Mildenhall Area”

means the geographic area in Mildenhall, Suffolk, which is served by the telephone exchange represented by the exchange code ‘EAMIL’;

“November 2019 Consultation”

means the consultation described in paragraph 8 above;

“Salisbury Area”

means the geographic area in Salisbury, Wiltshire, which is served by the telephone exchange represented by the exchange code ‘STSALIS’;

“SOGEA”	means BT’s product consisting of the provision of a GEA service as a ‘standalone service’ without an MPF or WLR product;
“Specified Services”	means in relation to the Salisbury Area: WLR, SMPF, MPF, GEA (FTTC) 40/2 Mbit/s, GEA (FTTC) 40/10 Mbit/s, GEA (FTTC) 55/10 Mbit/s, GEA (FTTC) 80/20 Mbit/s, GEA (G.fast) 160/30 Mbit/s, GEA (G.fast) 330/50 Mbit/s, SOGEA 40/10 Mbit/s, SOGEA 55/10 Mbit/s and SOGEA 80/20 Mbit/s; and in relation to the Mildenhall Area: WLR, SMPF, SMPF SLU, MPF, GEA (FTTC) 40/2 Mbit/s, GEA (FTTC) 40/10 Mbit/s, GEA (FTTC) 55/10 Mbit/s, GEA (FTTC) 80/20 Mbit/s, GEA (G.fast) 160/30 Mbit/s and GEA (G.fast) 330/50 Mbit/s;
“Target Services”	means in relation to the Mildenhall Area: SOGEA 40/10 Mbit/s, SOGEA 55/10 Mbit/s, SOGEA 80/20 Mbit/s, SOGEA 160/30 Mbit/s, SOGEA 330/50 Mbit/s and SOGEA Low Bandwidth, and in relation to the Salisbury Area: Generic Ethernet Access (FTTP) 40/10 Mbit/s, Generic Ethernet Access (FTTP) 55/10 Mbit/s, Generic Ethernet Access (FTTP) 80/20 Mbit/s, Generic Ethernet Access (FTTP) 160/30 Mbit/s, Generic Ethernet Access (FTTP) 330/50 Mbit/s and Generic Ethernet Access (FTTP) Low Bandwidth;
“Trial Offer”	means the Special Offer to support the Salisbury and Mildenhall Trials set out in Access Charge Control Notice OR624 of 6 January 2020;
“Trial Period”	means the period during which the Trial Offer will be available, that is from 3 February 2020 to 4 May 2021;
“WLA”	means wholesale local access;
“WLA 2018 Statement”	means the statement described in paragraph 1 above; and
“WLR”	means Wholesale Line Rental.