

# Hull Area Wholesale Fixed Telecoms Market Review 2021-26

Volume 1: Overview, summary and introduction

**Non-confidential version**

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**CONSULTATION:**

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# 1. Overview

**This document explains how Ofcom proposes to create conditions to improve retail competition in the fixed telecoms markets in the Hull Area, through our wholesale regulation of KCOM.**

Our strategy for fixed telecoms markets is to promote competition and investment to deliver better broadband and mobile services wherever people live or work. In the Hull Area, we propose to focus our regulation on encouraging competing providers to enter the market.

In the Hull Area, consumers benefit from the availability of KCOM's full-fibre network. However, KCOM has retained a near monopoly at both the wholesale and retail level. This has resulted in less retail choice and higher retail prices than the rest of the UK, where competitive pressure has resulted in greater choice and lower prices.

We have therefore carefully considered whether more direct measures, such as retail price regulation, are required. However, we believe the evidence shows there is now a better prospect of competing providers entering the Hull Area, which ultimately should result in more retail choice and lower retail prices. We also understand KCOM has reviewed its retail prices, and is planning to bring them more into line with the rest of the UK.

We set out below our proposals for regulation of the wholesale local access and wholesale leased lines access services markets in the Hull Area from April 2021. These underpin broadband, mobile and business connections. We also set out how we plan to deregulate the wholesale broadband access and fixed voice markets.

## What we are proposing

We propose to find that KCOM has market power in local access and leased lines access services and to address that market power by regulating in a way that supports competition and investment, and protects customers.

**Encouraging competition in the retail market.** The move to fibre in both the Hull Area and the rest of the UK has the potential to encourage new providers to supply broadband in the Hull Area using wholesale products. In addition to ensuring that competitors will continue to have access to KCOM's network on fair and reasonable terms, we are also proposing to facilitate new entrants' use of KCOM's network by making improvements to the existing wholesale local access arrangements.

**Promoting access for rival providers to KCOM's leased lines access services, using dark fibre.** We propose that network providers should be able to lease from KCOM just the fibre element of a 'leased line' – the high-speed data connections used by large corporations and mobile networks.

**Deregulating the wholesale broadband access and fixed voice markets.** Given our increased focus on regulating KCOM's fibre wholesale local access services we now propose to deregulate the wholesale broadband access market. We also propose to deregulate fixed voice telephone services, as in the future these services will be provided over broadband connections. Improving access to KCOM's fibre network will mean more companies can provide such services in the Hull Area – our existing regulation is therefore no longer required. We are also deregulating the ISDN markets because the need for intervention is no longer necessary in this declining market.

## Next steps

Responses to this consultation must be received by 24 September 2020. We intend to publish our statement setting out our decisions before the new regulation will take effect in April 2021. This review only covers the Hull Area. We published a separate consultation on our proposals for wholesale fixed telecoms markets in the rest of the UK in January 2020.<sup>1</sup>

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<sup>1</sup> Ofcom, January 2020. [Wholesale Fixed Telecoms Market Review 2021-26: Consultation](#) (the 2020 WFTMR Consultation).

## 2. Background and framework

### Background

- 2.1 The fixed telecoms markets in the Hull Area are regulated separately from the rest of the UK. This is because KCOM, rather than BT, is the incumbent telecoms provider, and is the owner of the only universal fixed network in the Hull Area. The Hull Area has very different competitive conditions from the rest of the UK. Specifically:
- there is limited alternative fixed network build;
  - there is no cable network;
  - there is no competition from telecoms providers using wholesale access to KCOM's network; and
  - none of the large retail providers – such as Sky, TalkTalk, Virgin Media and Vodafone – operate in the Hull Area.
- 2.2 In the Hull Area, KCOM operates two fixed access networks: a copper network and a Fibre to the Premises (FTTP) network, and serves approximately 0.7% of UK premises (c.200,000 premises). KCOM has now completed the deployment of its fibre network, although it currently does not have plans to withdraw its copper network.

### Scope of our review

- 2.3 We are reviewing the following markets in the Hull Area:
- the Wholesale Fixed Analogue Exchange Line (WFAEL) market on which our most recent statement was published in November 2017 (the 2017 NMR Statement);<sup>2</sup>
  - the Wholesale Call Origination (WCO) market on which our most recent statement was published in November 2017 (the 2017 NMR Statement);<sup>3</sup>
  - the Integrated Services Digital Network (ISDN) 2 and ISDN30 markets on which our most recent statement was published in November 2017 (the 2017 NMR Statement);<sup>4</sup>
  - the Wholesale Local Access (WLA) market on which our most recent statement was published in July 2018 (the 2018 WLA/WBA Statement);<sup>5</sup>
  - the Wholesale Broadband Access (WBA) market on which our most recent statement was published in July 2018 (the 2018 WLA/WBA Statement);<sup>6</sup>

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<sup>2</sup> Ofcom, November 2017. [Narrowband Market Review: Statement](#). See Section 4 for market definition and three criteria test (WFAEL and WCO), Section 6 for SMP analysis for the Hull Area (WFAEL, WCO, ISDN30 and ISDN2) and Section 11 for remedies on KCOM (WFAEL, WCO, ISDN30 and ISDN2).

<sup>3</sup> 2017 NMR Statement. See Section 4 for market definition and three criteria test (WFAEL and WCO), Section 6 for SMP analysis for the Hull Area (WFAEL, WCO, ISDN30 and ISDN2) and Section 11 for remedies on KCOM (WFAEL, WCO, ISDN30 and ISDN2).

<sup>4</sup> 2017 NMR Statement. See Section 6 for SMP analysis for the Hull Area (WFAEL, WCO, ISDN30 and ISDN2) and Section 11 for remedies on KCOM (WFAEL, WCO, ISDN30 and ISDN2).

<sup>5</sup> Ofcom, July 2018. [Wholesale Local Access and Wholesale Broadband Access Market Reviews: Statement](#).

<sup>6</sup> 2018 WLA/WBA Statement.

- the wholesale leased line access services market on which our most recent statement was published in June 2019 (the 2019 BCMR Statement);<sup>7</sup>

2.4 We have committed to review these markets so that new regulation can take effect from April 2021.

## Legal and regulatory framework

### Market review process

- 2.5 Annex 5 provides an overview of the market review process. As required by the regulatory framework, we have reviewed the markets listed above in three analytical stages:
- a) we have provisionally identified and defined the relevant markets, taking into account national circumstances;
  - b) we have assessed whether the markets are effectively competitive, which involves assessing whether any operator has SMP in any of the relevant markets; and
  - c) where we propose to find SMP, we are also proposing appropriate remedies, based on the nature of the competition problems identified in the relevant markets.
- 2.6 Consistent with our duties, we are taking due account of any applicable European Commission (EC) recommendations or guidelines. In particular, we are taking due account of the EC's Recommendation on relevant product and service markets (the 2014 EC Recommendation)<sup>8</sup> and SMP Guidelines<sup>9</sup>.

### Forward look

- 2.7 Market reviews look ahead to how competitive conditions may change in the future. For the purposes of this review, we consider the period up to March 2026, reflecting the characteristics of the retail and wholesale markets and the factors likely to influence their competitive development.
- 2.8 The prospective nature of our assessment over this period means that we are required to gather a range of evidence to assess actual market conditions as well as to produce forecasts that we consider will appropriately reflect developments over time. Where appropriate, we have exercised our regulatory judgment to reach proposals on the evidence before us with a view, ultimately, to addressing the competition concerns we identify in order to further the interests of citizens and consumers in these markets.

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<sup>7</sup> Ofcom, June 2019. [Business Connectivity Market Review: Statement](#). See Section 9 for assessment of markets in the Hull Area and Section 16 for remedies in the Hull Area.

<sup>8</sup> [Commission Recommendation 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 (2014/710/EU) [accessed 8 July 2020].

<sup>9</sup> [Guidelines on market analysis and the assessment of significant market power](#) under the EU regulatory framework for electronic communications networks and services (2018/C 159/01) [accessed 8 July 2020].

## Our duties under the Act

- 2.9 Annex 5 also describes our statutory duties and the matters to which we should have regard in the performance of our functions.<sup>10</sup> Our Strategic Review of Digital Communications<sup>11</sup> set out how we intended to approach the exercise of our functions to regulate communications markets in accordance with our duties. We consider that the proposals set out in this consultation, which reflect the DCR strategy, meet our duties in section 3 of the Communications Act 2003 (the Act). This includes our principal duty to further the interests of citizens in relation to communication matters, and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 2.10 In the rest of the UK (excluding the Hull Area), our strategy for regulation, set out in the 2020 WFTMR Consultation, focuses on securing network competition with Openreach and, where this is not possible, on incentivising Openreach to invest in very high-speed networks.<sup>12</sup>
- 2.11 In the Hull Area, KCOM has already completed its full-fibre network and there is a lack of competition at any level of the value chain which leads us to consider that the principal competition problems in the Hull Area do not relate to an absence of infrastructure access. Therefore, our strategy for this review is to further the interests of consumers by encouraging access-based competition at the wholesale level, including access to dark fibre. We consider that greater competition will have the long-term effect of reducing in particular retail broadband prices, and creating choice for consumers in retail telecommunications services.
- 2.12 In performing our duties, we have had regard, in particular, to the desirability of promoting competition in relevant markets, the desirability of encouraging investment and innovation in relevant markets, the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom and to the interests of consumers in respect of choice, price, quality of service and value for money.
- 2.13 We have also had regard to the principles under which our regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed.
- 2.14 We consider that our proposals are also consistent with our duty to act in accordance with the European Community requirements set out in section 4 of the Act, in particular, and for the reasons set out above:
- the first Community requirement to promote competition;
  - the third Community requirement to promote the interests of all persons who are citizens of the EU;

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<sup>10</sup> The UK left the European Union on 31 January 2020. A consequence of this is that some of our functions under the Act, including certain functions relevant to this review, will be amended. We consider that the proposals set out in this consultation would continue to fall within the scope of our powers and meet our duties.

<sup>11</sup> Ofcom, February 2016. [Strategic Review of Digital Communications](#) (DCR).

<sup>12</sup> See 2020 WFTMR 2020, Volume 3, paragraphs 1.4-1.14 where we set out our objectives and strategy for the wholesale fixed telecoms markets.

- the fourth Community requirement to take account of the desirability of Ofcom's carrying out of its functions in a manner which, so far as practicable, does not favour one form of or means of providing electronic communications networks, services or associated facilities over another (i.e. to be technologically neutral); and
- the fifth Community requirement to encourage the provision of network access for the purposes of securing efficiency and sustainable competition, efficient investment and innovation and the maximum benefit for persons who are customers of communications providers and of persons who make associated facilities available.

2.15 In identifying and analysing the markets in Volume 2, we have taken due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of the provisions of an EU instrument and which relate to market identification and analysis or the determination of what constitutes significant market power in accordance with section 79 of the Act.

2.16 In developing our remedies in Volume 3 we have taken due account of all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive in accordance with our duties under section 4A of the Act. In each case, pursuant to Article 3(3) of the BEREC Regulation<sup>13</sup>, we have also taken the utmost account of any relevant opinion, recommendation, guidelines, advice or regulatory practices adopted by BEREC relevant to the matters under consideration in this review.

2.17 Where relevant, we explain how we have taken account of these instruments.

## European Electronic Communications Code (EECC)

2.18 Directive EU 2018/1972 entered into force on 20 December 2018. It established the European Electronic Communications Code (the EECC), which amends and replaces the current EU regulatory framework for electronic communications.<sup>14</sup> The relevant provisions of the EECC are set out in Annex 5 of this document.

2.19 The UK Government consulted in July 2019 on its proposed approach to implementing the EECC into national law.<sup>15</sup> Its consultation included proposals on the key legislative changes that will be required to implement the EECC in the UK. The deadline for transposition is 21 December 2020. The requirement to transpose EU Directives will still apply to the UK by the time the deadline for transposing the EECC is reached. We therefore anticipate that the Act may be amended to reflect the EECC's provisions before we reach our final decisions on the matters set out in this consultation (our final statement is currently planned for

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<sup>13</sup> Regulation (EC) No 1211/2009 of the European Parliament and of the Council of 25 November 2009 establishing the Body of European Regulators of Electronic Communications (BEREC) and the Office (the [BEREC Regulation](#)).

<sup>14</sup> [Directive 2002/19/EC](#) on access to, and interconnection of, electronic communications networks and associated facilities, 7 March 2002 (as amended) (Access Directive); [Directive 2002/20/EC](#) on the authorisation of electronic communications networks and services, 7 March 2002 (as amended) (Authorisation Directive); [Directive 2002/21/EC](#) on a common regulatory framework for electronic communications networks and services, 7 March 2002 (as amended) (Framework Directive); [Directive 2002/22/EC](#) on universal service and users' rights relating to electronic communications networks and services, 7 March 2002 (as amended) (Universal Service Directive) [accessed 8 July 2020].

<sup>15</sup> Department for Digital, Culture, Media and Sport, [Implementing the European Electronic Communications Code](#), 16 July 2019 [accessed 8 July 2020].

early 2021). We have therefore also considered whether our proposals are consistent with these provisions of the EECC.

- 2.20 Article 3 of the EECC sets out the general objectives that national regulatory authorities should pursue. These mirror to a large extent the objectives currently set out in Article 8 of the Framework Directive, which are reflected in our existing duties under section 4 of the Act (such as the promotion of competition and citizens' interests). However, Article 3 of the EECC introduces a new objective to promote connectivity and access to, and take-up of, very high capacity networks, including fixed, mobile and wireless networks, by all citizens and businesses of the Union (we refer to this below as the "connectivity objective"), and related amendments to the other objectives.
- 2.21 We consider that our proposals are also consistent with Article 3 of the EECC. We have explained above that KCOM has completed its full-fibre network in the Hull Area. Our proposals will promote access-based competition, in order to encourage access to the network and take-up of fibre based services.

## Strategic Statement position

- 2.22 As required by section 2B(2) of the Communications Act 2003, we have had regard to the UK Government's Statement of Strategic Priorities<sup>16</sup> for telecoms, management of radio spectrum and postal services. In particular, we have had regard to the following priority areas covered by the SSP: world-class digital infrastructure, furthering the interests of telecoms consumers and ensuring secure and resilient telecoms infrastructure. We set out in Section 1 of Volume 3 further details of how we have done this.

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<sup>16</sup> Department for Digital, Culture, Media and Sport, [Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services](#), 29 October 2019 (SSP) [accessed 8 July 2020].

## 3. Detailed summary of our proposals

### Market definition and SMP findings

#### Proposed market definitions relevant for wholesale local access (WLA) and leased lines access services (LL Access)

- 3.1 We propose to define the WLA market as a single product market for wholesale local access at a fixed location which:
- a) includes all fixed network technologies (copper, fibre and cable), all bandwidths and services provided to both residential and business customers; and
  - b) does not include leased lines access or wireless services.
- 3.2 We propose to define the LL Access market as a product market for wholesale leased lines access services which:
- a) is a single market for LL Access services at all bandwidths, which includes all wholesale fibre-based Ethernet and wavelength division multiplex (WDM) services;
  - b) includes dark fibre used to supply or self-supply LL Access in the product market;
  - c) includes mobile backhaul in the product market; but
  - d) excludes business-grade connectivity services provided over Ethernet in the First Mile (EFM) and broadband (symmetric and asymmetric), from the product market.
- 3.3 For each of the WLA and LL Access markets we propose to define the Hull Area as a distinct geographic market.

#### Proposed SMP findings

- 3.4 We propose to find that KCOM has significant market power in these markets.

### Other markets within this Review

- 3.5 We do not propose to review the physical infrastructure market. See Annex 7 for more information.
- 3.6 We have reviewed the WBA market and propose to deregulate this market. We consider that the completion of KCOM's full-fibre roll-out and the introduction of KCOM's fibre WLA product means that there are no longer high and non-transitory barriers to entry to the WBA market, and it is no longer susceptible to *ex ante* regulation (see Volume 2 for more information).
- 3.7 We have also reviewed the markets for WFAEL, ISDN2/30 and WCO. We propose to deregulate these markets, for the following reasons:

- a) It is no longer necessary to use WFAEL to provide fixed voice services in the Hull Area, as KCOM's fibre WLA product enables other telecoms providers to offer fixed voice services using a managed voice over IP (VoIP) service. There are no longer high and non-transitory barriers to entry to this market, and it is no longer susceptible to *ex ante* regulation (see Volume 2 for more information).
- b) The markets for ISDN2 and ISDN30 in the Hull Area are declining and the number of customers is small in absolute terms, so we propose that competition law would adequately address any harm caused by KCOM exploiting its SMP, and the market is no longer susceptible to *ex ante* regulation (see Volume 2 for more information).
- c) It is no longer necessary to regulate WCO because the ability to use managed VoIP service to offer fixed voice services means that providers are able to originate calls themselves, instead of relying on KCOM to originate calls on its voice network. There are no longer high and non-transitory barriers to entry to this market, and it is no longer susceptible to *ex ante* regulation (see Volume 2 for more information).

## Remedies

- 3.8 In the light of our provisional SMP findings we are proposing a number of remedies in each of the relevant markets.
- 3.9 We are proposing to impose a general network access obligation supplemented by transparency and non-discrimination requirements in each of the WLA and LL Access Markets, as well a specific remedy on the LL Access market.

### Wholesale local access (WLA) and leased lines access services markets (LL Access)

- 3.10 Figure 2.1 below summarises our proposed general remedies for the WLA and LL Access markets. It sets out the network access requirements we are proposing and our approach to transparency, quality of service and non-discrimination.
- 3.11 As part of our general remedies, in addition to the remedies summarised below, we are proposing to give a direction requiring KCOM to modify its WLA Reference Offer so as to remove provisions which require access seekers to be located at KCOM's exchanges, and instead to provide appropriate interconnection arrangements anywhere in the Hull Area. We consider that this will have the effect of improving the existing WLA access arrangements and facilitating the use of KCOM's network by access seekers.
- 3.12 In the LL Access market, our proposals include a new requirement for KCOM to provide access to dark fibre as well as active leased lines services. Our proposed specific remedy is summarised in Figure 2.2 below.

Figure 2.1: Summary of our proposed remedies in the WLA and LL Access markets

<b>Proposed remedies in the WLA and LL Access markets (including dark fibre access)</b>
Requirement to provide network access on reasonable request, and on fair and reasonable terms, conditions and charges (excludes copper-based services in the WLA market).
Requirements relating to requests for new forms of network access [WLA only]
Requirement not to discriminate unduly (NUD)
Requirement to publish a Reference Offer (RO)
Requirement to notify changes to charges, terms and conditions
Requirement to notify technical information
Requirement to publish quality of service information as directed by Ofcom (QoS)
Regulatory Financial Reporting (general accounting separation and cost accounting)
Requirement to produce a Pricing Transparency Report (PTR) [LL Access only]

Figure 2.2: Summary of the proposed specific remedy

<b>Proposed specific remedy in the LL Access market (including dark fibre access)</b>
Requirement to provide Ethernet and dark fibre network access in the following circuit configurations:
<ul style="list-style-type: none"><li>• connecting end-user premises and KCOM's ODF Site or Third Party premises; and</li><li>• connecting an end-user premises and another end-user premises.</li></ul>

## WFAEL, WCO and ISDN2/30 markets

3.13 Although we are proposing to deregulate the WFAEL, WCO and ISDN2/30 markets, we propose to maintain aspects of the existing regulation on KCOM for a 12-month transitional period (see Volume 3 for more information). We do not propose any transitional remedies in the WBA market.

## 4. Structure and recent consultations

4.1 In this section we set out the structure for the rest of the document, and our approach to impact assessment.

### Structure of the consultation document

4.2 The proposals of our review are published in four Volumes and nine Annexes, which together set out our analysis of and proposals for the fixed telecoms access markets in the Hull Area:

- a) **Volume 1** provides an overview and summary of our proposals;
- b) **Volume 2** sets out our market assessment for WLA and LL Access. It also includes the analysis leading to our proposals to deregulate the WBA, WFAEL, WCO and ISDN2/30 markets;
- c) **Volume 3** sets out our approach to remedies for the WLA and LL Access markets (including dark fibre) and transitional arrangements in the WFAEL, WCO and ISDN2/30 markets;
- d) **Volume 4** sets out the detail of our proposed SMP conditions.
- e) **Annexes 1 – 9** contain details which are referred to in each of the Volumes. These Annexes support the analysis in Volumes 1 to 3 and are an integral part of our reasoning.

### Impact assessment and equality impact assessment

#### Impact assessment

4.3 This consultation document constitutes our impact assessment for the purposes of section 7 of the Act.

4.4 Impact assessments provide a valuable way of assessing the options for regulation and showing why the chosen option was preferred. They form part of best practice policymaking. This is reflected in section 7 of the Act, which means that, generally, we have to carry out impact assessments in cases where our conclusions would be likely to have a significant effect on businesses or the general public, or where there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out impact assessments in relation to the great majority of our policy decisions.

#### Equality impact assessment

4.5 Section 149 of the Equality Act 2010 (the “2010 Act”) imposes a duty on Ofcom, when carrying out its functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership;

pregnancy and maternity; race; religion or belief; sex and sexual orientation. The 2010 Act also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.

- 4.6 Section 75 of the Northern Ireland Act 1998 (the “1998 Act”) also imposes a duty on Ofcom, when carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations across a range of categories outlined in the 1998 Act. Ofcom’s Revised Northern Ireland Equality Scheme explains how we comply with our statutory duties under the 1998 Act.
- 4.7 To help us comply with our duties under the 2010 Act and the 1998 Act, we assess the impact of our proposals on persons sharing protected characteristics and in particular whether they may discriminate against such persons or impact on equality of opportunity or good relations.
- 4.8 It does not appear to us that our proposed remedies will have any particular impact on any of these matters. We anticipate that our proposals will not have a differential impact on people of different sexes or ethnicities, consumers with protected characteristics in Northern Ireland<sup>17</sup> or disabled consumers compared to consumers in general.
- 4.9 The intention behind our approach to regulating the WLA and leased lines access services markets is to promote competition to the ultimate benefit of consumers.

#### **WLA services**

- 4.10 We regularly monitor the take-up and use of fixed line services by different groups within society. While this on-going research does show evidence of variation in consumption, we do not consider that the wholesale regulation proposed here is likely to have a disproportionate impact on any of the groups as our regulation is aimed at promoting competition across the range of services for all equality groups that rely on WLA.

#### **Leased lines access services**

- 4.11 We do not have detailed sectoral information on the businesses that purchase wholesale leased lines access services. However, given the nature of the services – core network services which support a variety of retail services – we do not have any reason to suspect that there would be a disproportionate impact on any of the above defined equality groups through modification of the regulation on these services.

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<sup>17</sup> In addition to the characteristics outlined in the 2010 Equality Act, in Northern Ireland consumers who have dependents or hold a particular political opinion are also protected.