

# A7. Draft legal instrument

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

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

#### BACKGROUND

1. On 8 January 2020, Ofcom published a consultation document entitled “*Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review*” (“**WFTMR Consultation Document**”)<sup>1</sup>. That document set out Ofcom’s proposals on its review of certain fixed telecoms markets including: the supply of wholesale local access at a fixed location in WLA Area 2; and the supply of wholesale local access at a fixed location in WLA Area 3. At Volume 5 of the WFTMR Consultation Document, Ofcom published a draft notification under sections 48A and 80A of the Act, containing its proposed market identifications, market power determinations and the setting of SMP conditions to be applied to the Dominant Provider (“**January 2020 Notification**”).
2. On 25 June 2020, Ofcom published a consultation document entitled “*Consultation: Copper retirement – process for determining when copper regulation can be removed*” (“**June 2020 Consultation**”)<sup>2</sup> in which it proposed to modify SMP Condition 1 set out in the January 2020 Notification to allow Ofcom to define by direction which premises are excluded for the purposes of calculating whether Ultrafast Network Access is available to 100% of premises in a Local Serving Exchange post April 2021.

#### PROPOSED SMP CONDITION

3. Schedule 1 of the January 2020 Notification proposed to impose, among others, an obligation on the Dominant Provider requiring it to provide network access to a Third Party where that Third Party, in writing, reasonably requests it (SMP Condition 1) in the markets for the supply of wholesale local access at a fixed location in WLA Area 2 and WLA Area 3.
4. SMP Condition 1 includes provision for the publication by the Dominant Provider of certain notices the effect of which is to limit the extent of the network access obligation. Specifically, the Dominant Provider may publish:
  - a. a First Threshold Notice in relation to a Local Serving Exchange where Ultrafast Network Access is available to 75% of Relevant Premises served by that Local Serving Exchange, the effect of which is that the requirement to provide network access under SMP Condition 1.1 does not apply to new requests for Copper-based network access in respect of any end user supplied with electronic communications services using that Local Serving Exchange provided that Fibre-based network access is

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<sup>1</sup> [Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26](#), 8 January 2020.

<sup>2</sup> [Consultation: Copper retirement – process for determining when copper regulation can be removed](#), 25 June 2020.

available to a Third Party on reasonable request in respect of any such end users;  
and

- b. a Second Threshold Notice in relation to a Local Serving Exchange where a First Threshold Notice has been published in relation to that Local Serving Exchange for a minimum period of 2 years and Ultrafast Network Access is available to 100% of Relevant Premises served by that Local Serving Exchange, the effect of which is that the charge control obligations will no longer apply to Copper-based network access in respect of any end user supplied with electronic communications services using that Local Serving Exchange provided that Fibre-based network access is available to a Third Party on reasonable request in respect of any such end users.
5. Since publishing the WFTMR Consultation Document, deployment of fibre by the Dominant Provider has progressed at pace, and recent developments suggest that fibre migration could be completed in some exchanges before the end of the market review period in March 2026. Therefore, Ofcom now believes that there is a benefit in removing the requirement on the Dominant Provider to provide Existing Copper-based network access in a Local Serving Exchange two years after that it has met certain pre-conditions, and provided that Fibre-based network access is available to a Third Party on reasonable request in respect of any end user supplied with electronic communications services using that Local Serving Exchange.
  6. Consequently, Ofcom is proposing to modify the proposed obligation on the Dominant Provider to provide network access under the SMP Condition 1 in the January 2020 Notification (as modified by the June 2020 Consultation) as set out in the Schedule to this notification, in relation to the markets (ii) and (iii) identified in Table A. Additions to the proposal in the January 2020 Notification (as modified by the June 2020 Consultation) are underlined and highlighted.
  7. Ofcom is also proposing a consequential revision to the proposed SMP Condition 8.2 in Schedule 1 to the January 2020 Notification in the following terms:  
*SMP Condition 8.2:*  
*“Where it is proposing to publish a First Threshold Notice or a Second Threshold Notice in relation to a Local Serving Exchange in accordance with Condition 1.7, a minimum of 12 months before the proposed date of publication of the First Threshold Notice or the Second Threshold Notice the Dominant Provider must publish and send to Ofcom in writing, a notice containing the expected date for publication of the First Threshold Notice or the Second Threshold Notice in relation to that Local Serving Exchange.”*
  8. For the avoidance of doubt, Ofcom is not proposing in this notification to modify any of the other proposed SMP conditions proposed in the January 2020 Notification. These proposed modified SMP conditions are to be applied to the Dominant Provider to the extent specified, and shall take effect from [the date of the notification published under sections 48(1) and 79(4) of the Act] or such other date specified in any notification under sections 48(1) and 79(4) of the Act adopting the proposals set out in this notification.

9. The effect of, and Ofcom's reasons for making, this proposal are set out in the accompanying consultation document.

#### **OFCOM'S DUTIES AND LEGAL TESTS**

10. Ofcom considers that the proposed SMP conditions above comply with the requirements of sections 45 to 47 of the Act, as appropriate and relevant. In particular, for the reasons we set out in section 8, Volume 3 of the WFTMR Consultation Document and in the accompanying consultation document, Ofcom is satisfied that the proposed amendment is objectively justifiable in relation to the networks, services and facilities to which it relates; not such as to discriminate unduly against particular persons or against a particular description of persons; proportionate to what it is intended to achieve; and transparent in relation to what it is intended to achieve.
11. In making the proposal referred to in this notification, Ofcom has considered and acted in accordance with its general duties set out in sections 3 and 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. Pursuant to Article 3(3) of Regulation (EC) No 1211/2009, Ofcom has also taken the utmost account of any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by BEREC.
12. Ofcom has also had regard to the Statement of Strategic Priorities in making the proposals referred to in this notification.

#### **MAKING REPRESENTATIONS**

13. Representations may be made to Ofcom about the proposal set out in this notification and the accompanying consultation document by no later than 26 November 2020.
14. Copies of this notification and the accompanying consultation have been sent to the Secretary of State in accordance with section 49C of the Communications Act 2003.

#### **INTERPRETATION**

15. For the purpose of interpreting this notification –
  - a. except in so far as the context otherwise requires, words and expressions shall have the meaning assigned to them in paragraph 16 below, and otherwise any word or expression shall have the same meaning as it has in the January 2020 Notification and 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.

16. In this notification

- “Act”** means the Communications Act 2003 (c.21);
- “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;
- “Copper-based network access”** means the provision of network access where the physical connection between the local access node and the network 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 as at
- “January 2020 Notification”** means the notification described in paragraph 1 above;
- “June 2020 Consultation”** means the publication described in paragraph 2 above;
- “Local Serving Exchange”** means the site of an operational building of the Dominant Provider, where interconnection is made available by the Dominant Provider to a Third Party for Network Termination Points served by that site for the provision of network access provided by the Dominant Provider in accordance with Condition 1 and Condition 2 (as applicable);
- “Ofcom”** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;
- “Statement of Strategic Priorities”** means the Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services designated by the Secretary of State for Digital, Culture, Media and Sport for the purposes of section 2A of the Communications Act 2003 on 29 October 2019;
- “Third Party”** means a person providing a public electronic communications service or a person providing a public electronic communications network;
- “Ultrafast Network Access”** means the wholesale provision of network access which can be used to provide Ultrafast Broadband Services and which is

provided over the Dominant Provider's electronic communications network;

**"United Kingdom"**

has the meaning given to it in the Interpretation Act 1978 (1978 c30); and

**"WFTMR Consultation Document"** means the document described in paragraph 1 above.

Signed

A handwritten signature in black ink, appearing to read 'B. Potterill', with a long horizontal flourish extending to the right.

**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**

**15 October 2020**

## Schedule

### Condition 1 – Network access on reasonable request

- 1.1** Except insofar as Ofcom may from time to time otherwise consent in writing, and subject to conditions [1.2 and 1.6 to 1.8] the Dominant Provider must provide network access to a Third Party where that Third Party, in writing, reasonably requests it.
- 1.2** Condition 1.1 does not apply to requests for new forms of Copper-based network access other than where the new form of Copper-based network access requested facilitates the migration of end users provided with Copper-based network access to Ultrafast Broadband Services.
- (WLA Area 2, WLA Area 3)**
- 1.3** Except where Condition 1.4 applies, the provision of network access by the Dominant Provider in accordance with this Condition must:
- (a) take place as soon as reasonably practicable after receiving the request from a Third Party (and, in any event, in accordance with condition 10); and
- (b) be on:
- (i) fair and reasonable terms, conditions and charges; and
- (ii) such terms, conditions and charges as Ofcom may from time to time direct.
- 1.4** Where any of Conditions 1.10, 1.11, 6 or 12 apply the provision of network access by the Dominant Provider in accordance with this Condition must:
- (a) take place as soon as reasonably practicable after receiving the request from a Third Party (and, in any event, in accordance with Condition 10); and

(b) be on:

(i) fair and reasonable terms and conditions (excluding charges);  
and

(i) such terms and conditions and charges as Ofcom may from time to time direct.

**1.5** The provision of network access by the Dominant Provider in accordance with this Condition must also include such associated facilities as are reasonably necessary for the provision of network access and such other entitlements as Ofcom may from time to time direct.

**1.6A** Where the Dominant Provider has published a First Threshold Notice in  
**(WLA Area** relation to a Local Serving Exchange, the requirement to provide  
**2, WLA Area** network access under Condition 1.1 does not apply to new requests for  
**3)** Copper-based network access in respect of any end user supplied with electronic communications services using that Local Serving Exchange provided that Fibre-based network access is available to a Third Party on reasonable request in respect of any such end users.

**1.6B** Where the Dominant Provider has published a Third Threshold Notice  
**(WLA Area** in relation to a Local Serving Exchange and that Third Threshold Notice  
**2, WLA Area** has taken effect in relation to that Local Serving Exchange, the  
**3)** requirement to provide network access under Condition 1.1 does not  
apply to requests for Copper-based network access in respect of any  
end user supplied with electronic communications services using that  
Local Serving Exchange, provided that Fibre-based network access is  
available to a Third Party on reasonable request in respect of any such  
end user.

An end user for the purposes of this Condition 1.6B shall exclude any  
end user that subscribes to an electronic communications service  
which supports Critical National Infrastructure.

**1.6C (WLA Area 2, WLA Area 3)** A Third Threshold Notice will take effect for the purposes of Condition 1.6B in relation to a Local Serving Exchange two years after publication of that Third Threshold Notice in accordance with Condition 1.9 in relation to that Local Serving Exchange.

**1.7 (WLA Area 2, WLA Area 3)** The Dominant Provider may publish a Threshold Notice in respect of a Local Serving Exchange where:

(a) Ultrafast network access is available to 75% of Relevant Premises served by that Local Serving Exchange but excluding any premises that Ofcom may from time to time direct (“First Threshold Notice”); or

(b) a First Threshold Notice has been published in relation to that Local Serving Exchange for a minimum period of 2 years and Ultrafast network access is available to 100% of Relevant Premises served by that Local Serving Exchange but excluding any premises that Ofcom may from time to time direct (“Second Threshold Notice”); or

(c)

(i) a Second Threshold Notice has been published in relation to that Local Serving Exchange;

(ii) no more than 10 percent, or such other percentage as Ofcom may from time to time direct, of end users served by that Local Serving Exchange are supplied with an electronic communications service using Copper-based network access;

and

(iii) the Dominant Provider has put in place reasonable measures to support the migration of Vulnerable End Users served by that Local Serving Exchange from an electronic communications service using Copper-based network access to an electronic communications service using Fibre-based network access, including such steps as Ofcom may from time to time direct.

(“Third Threshold Notice”).

“Relevant Premises” means all premises in a Local Serving Exchange Area as at the date of the First Threshold Notice given in respect of that Local Serving Exchange.

**1.8** Not used

**(WLA Area  
2, WLA Area  
3)**

**1.9** A Threshold Notice must state the Local Serving Exchange to which it applies, and:

**(WLA Area  
2, WLA Area  
3)**

- (a) be published on the Dominant Provider’s website; and
- (b) be sent to Ofcom by means of electronic mail to such person in Ofcom as notified from time to time.

**1.10** Where the Dominant Provider publishes a Second Threshold Notice in relation to a Local Serving Exchange, Condition 1.3 does not apply to Copper-based network access in respect of any end user supplied with electronic communications services using that Local Serving Exchange

**(WLA Area  
2, WLA Area  
3)**

provided that Fibre-based network access is available to a Third Party on reasonable request in respect of any such end users.

**1.11** The provision of network access by the Dominant Provider in accordance with this Condition shall also include such Ancillary Services as are reasonably necessary for the provision of network access and such other entitlements as Ofcom may from time to time direct.

**1.12** The Dominant Provider must comply with any direction Ofcom may make under this Condition.

**1.13 (WLA Area 2, WLA Area 3)** The consent dated [Date] published at Annex [X] of the statement entitled “Measures to support Openreach’s trials in Salisbury and Mildenhall” shall apply as if it has been given under condition 1.1 from the date that this condition enters into force and that consent must be read accordingly.

**1.14** In this Condition 1:

(a) “Fibre end user” means an end user who is supplied with an electronic communications service by a Third Party using Fibre-based network access”;

(b) “Ultrafast network access” means the wholesale provision of network access which can be used to provide Ultrafast Broadband Services and which is provided over the Dominant Provider’s electronic communications network;

(c) “Ultrafast Broadband Services” means a retail broadband service which offers at least 300Mbit/s download speed and which is provided over the Dominant Provider’s electronic communications network;

(d) “Critical National Infrastructure” means those critical elements of infrastructure the loss or compromise of which could result in a major detrimental impact on the availability, integrity or delivery of a service which is essential for the maintenance of critical societal or economic activities and/or could have a significant impact on national security, national defence or the functioning of the state; and

(e) “Vulnerable End Users” means end users who, due to their personal circumstances, are especially susceptible to harm.