
Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements

Explanatory Statement and Consent under section 49 of the Communications Act 2003

STATEMENT:

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1. Overview

Each year KCOM is required to prepare Regulatory Financial Statements (RFS). These are prepared according to a defined framework and methodology and include published statements as well as information that is submitted to Ofcom privately. KCOM is currently required to publish and deliver to Ofcom the RFS and the corresponding audit opinion by 31 July (i.e. within four months after the end of the financial year to which the RFS relates).

On 4 June 2020 Ofcom published a Consultation entitled “Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements”¹ (the “2020 Hull Consent Consultation”). As set out in the 2020 Hull Consent Consultation, we explained that on 27 March 2020, KCOM wrote to Ofcom to request to change the deadline for submitting its RFS for 2019/20 and on an ongoing basis from four months after the end of the period to which they relate to nine months after. In the 2020 Hull Consent Consultation we proposed to consent to KCOM’s request for the 2019/20 and 2020/21 periods.

What we have decided

We have decided to grant consent for KCOM to defer the publication of its 2019/20 and 2020/21 RFS by an additional five months. This will mean that for 2019/20 and 2020/21, based on its current financial year end date of 31 March, it must publish its RFS and any corresponding audit opinions no later than 31 December.

As part of the Wholesale Telecoms Market Review for the Hull Area consultation, which was published on 16 July 2020, we have proposed to change the deadline for publication of KCOM’s RFS to 31 December, for the period 2021-2026.

¹ Ofcom, [Consultation: Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements](#), 4 June 2020.

2. Explanatory Statement

Background

- 2.1 Since 2004, KCOM has been subject to regulatory financial reporting requirements across all of the fixed telecoms markets in which it is regulated, these currently comprise:
- wholesale local access market;
 - business connectivity markets;
 - narrowband markets; and
 - wholesale broadband access markets.
- 2.2 As part of these requirements, each year KCOM prepares Regulatory Financial Statements (RFS). These are prepared according to a defined framework and methodology and include published statements as well as information that is submitted to Ofcom privately.
- 2.3 These requirements are designed to provide us with the information that we need to make informed regulatory decisions, monitor compliance with regulatory obligations, ensure that obligations address underlying competition issues, and investigate potential breaches of obligations. They should also provide reasonable confidence to stakeholders that KCOM has complied with its SMP conditions and add credibility to the reporting regime.
- 2.4 These requirements are imposed on KCOM by way of an SMP condition set in each regulated market and a suite of directions imposed in each market pursuant to that SMP condition. The SMP condition sets out our general regulatory financial reporting requirements, including any accounting separation and cost accounting obligations. The directions then set out our detailed financial reporting requirements.
- 2.5 In all the markets in which KCOM is regulated (set out in paragraph 2.1), KCOM is currently required to publish and deliver to Ofcom the RFS and any corresponding audit opinions by 31 July (i.e. within four months after the end of the financial year to which the RFS relates).

Consent consultation

- 2.6 On 4 June 2020 we published a consultation entitled “Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements”² (“2020 Hull Consent Consultation”). In the 2020 Hull Consent Consultation we explained that on 27 March 2020, KCOM wrote to Ofcom to explain that the 31 July deadline for submitting its RFS for 2019/20 and subsequent financial years was impracticable given the change in KCOM’s corporate status and its deadline to file its statutory financial statements. KCOM requested an extension of five months, with a new deadline of 31 December. We set out KCOM’s reasoning for its request in the 2020 Hull Consent Consultation³.

² Ofcom, [Consultation: Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements](#), 4 June 2020.

³ Paragraphs 2.6 – 2.9.

Analysis and conclusion

- 2.7 We explained in the 2020 Hull Consent Consultation the importance of prompt publication of KCOM's RFS but stated that we were minded to agree with KCOM that it would be reasonable in the circumstances to consent to a five month deferment to the deadline for publication of its RFS for 2019/20 and 2020/21 to take account of its new statutory accounts filing deadline. We therefore proposed to grant a consent accordingly.
- 2.8 The proposed consent related only to the publication deadlines for KCOM's 2019/20 and 2020/21 RFS. On the 16 July 2020 we published a consultation entitled "Promoting competition in fibre networks – Hull Area Wholesale Fixed Telecoms Market Review 2021-26"⁴ ("Hull WFTMR Consultation"). In the Hull WFTMR Consultation we are consulting on a new deadline of 31 December for the publication of KCOM's RFS and any corresponding audit opinions⁵.
- 2.9 We received one response to the 2020 Hull Consent Consultation from KCOM who agreed with our proposed consent.

Legal tests

- 2.10 We have considered our decision to grant the consent against the tests set out in section 49(2) of the Communications Act 2003 (the "Act") and have concluded that it is:
- a) objectively justifiable as it allows KCOM sufficient time in which to prepare its 2019/20 and 2020/21 RFS in the context of its new statutory accounts filing requirements and deadline;
 - b) not unduly discriminatory because BT is the only other SMP provider which has regulatory accounting obligations and, given the context of KCOM's delisting, does not face the same statutory accounts filing considerations in preparing its 2019/20 and 2020/21 RFS;
 - c) proportionate, as it does not grant more additional time than is necessary for KCOM to prepare its 2019/20 and 2020/21 RFS; and
 - d) transparent, in that it is clear that Ofcom's intention is to ensure that KCOM has sufficient time in which to prepare its 2019/20 and 2020/21 RFS in the context of KCOM's statutory accounts filing obligations and KCOM's obligations following this consent are clear.
- 2.11 We also consider that the granting of this consent is not of EU significance as in Ofcom's opinion it would not affect trade between Member States.⁶

⁴ Ofcom, [Consultation: Promoting competition in fibre networks – Hull Area Wholesale Fixed Telecoms Market Review 2021-26](#), 16 July 2020.

⁵ Proposed SMP condition 9.6(b)

⁶ The cumulative criteria that must be satisfied in order for a proposal to be of EU significance include the criterion that the proposal would, in Ofcom's opinion, affect trade between Member States (please see section 150A(2)(d) of the Act).

A1. The Consent

Consent under section 49 of the Communications Act 2003 and SMP services condition OB1 set out at Schedule 2, Annex 3 of the July 2004 Statement, SMP services condition 8.1 set out at Annex 6 of the 2018 WLA and WBA Statement and SMP services condition 7.1 set out at Schedule 4, Annex 26 of the 2019 BCMR Statement

Background

- A1.1 On 22 July 2004, Ofcom published a statement entitled “The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification – Accounting separation and cost accounting: Final Statement and notification” (“July 2004 Statement”).⁷ At Annex 3 of that statement, Ofcom imposed SMP conditions with respect to regulatory accounting (Conditions OB1 to OB33) on KCOM in markets in which KCOM had been found to have significant market power in previously concluded market reviews. SMP condition OB6 concerns the deadline for delivery of the RFS to Ofcom and its publication.
- A1.2 On 30 November 2017, Ofcom published a statement “Narrowband Market Review: Statement” (“2017 NMR Statement”).⁸ The 2017 NMR Statement found that KCOM continues to have significant market power in each of the markets covered by the review in the Hull Area. Ofcom decided to set on KCOM SMP conditions under section 45 of the Communications Act 2003 (the “Act”) designed to encourage greater competition for Narrowband services in the Hull Area. These included SMP condition OB6 in respect to regulatory financial reporting. Ofcom also amended, where necessary the 2004 Regulatory Financial Reporting Directions.
- A1.3 On 31 July 2018, Ofcom published a statement entitled “Wholesale Local Access and Wholesale Broadband Access Market Reviews: Review of competition in the Hull Area” (the “2018 WLA and WBA Statement”).⁹ The 2018 WLA and WBA Statement presents Ofcom’s conclusion that KCOM continues to have significant market power in each of the markets for wholesale local access and wholesale broadband access in the Hull Area. Ofcom decided to set on KCOM SMP conditions under section 45 of the Act designed to encourage greater competition in the provision of fixed telecoms services for consumers in the Hull Area. At Annex 6 of that Statement, Ofcom revoked Conditions OB1 to OB33 from the July 2004 Statement insofar as they applied to the WLA and WBA markets and in their place imposed SMP Condition 8 with respect to regulatory accounting on KCOM in the WLA and WBA markets. This did not represent a change to the substance of the accounting

⁷ Ofcom, [The regulatory financial reporting obligations on BT and Kingston Communications](#), 22 July 2004.

⁸ Ofcom, [Narrowband Market Review Statement](#), 30 November 2017.

⁹ Ofcom, [Wholesale Local Access and Wholesale Broadband Access Market Reviews](#), 31 July 2018.

separation and cost accounting conditions as set out in the July 2004 Statement but was a 'structural' change to the way in which the financial reporting obligations are imposed, aimed at clarifying KCOM's obligations.

- A1.4 On 28 June 2019, Ofcom published a statement entitled "Promoting competition and investment in fibre networks: review of the physical infrastructure and business connectivity markets" ("2019 BCMR Statement"). The 2019 BCMR Statement found that KCOM continues to have significant market power in the market for wholesale CI Access services in the Hull Area. Ofcom decided to set on KCOM SMP conditions under section 45 of the Act designed to encourage greater competition in this market in the Hull Area. At Annex 26 of that Statement, Ofcom revoked Conditions OB1 to OB33 from the July 2004 Statement insofar as they applied to the market for wholesale CI Access services and in their place imposed SMP Condition 7 with respect to regulatory accounting on KCOM in the market for wholesale CI Access services.
- A1.5 SMP Conditions OB6 of Schedule 2, Annex 3 of the July 2004 Statement, 8.6 of Schedule 1, Annex 6 of the 2018 WLA and WBA Statement, and 7.6 of Schedule 4, Annex 26 of the 2019 BCMR Statement all require KCOM to publish its RFS and any corresponding audit opinions within four months after the end of the period to which they relate.
- A1.6 On 4 June 2020, Ofcom published a consultation entitled "Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements"¹⁰ ("2020 Hull Consent Consultation"). The 2020 Hull Consent Consultation set out KCOM's request that its RFS and any corresponding audit opinions be published and delivered to Ofcom by 31 December 2020 and 2021, a five-month deferment with respect to the existing deadline, with the pre-publication RFS sent to Ofcom by 16 December 2020 and 2021.
- A1.7 Ofcom published a notification under s.49A of the Act of the proposed consent with accompanying explanatory text in the 2020 Hull Consent Consultation on 4 June 2020 and invited representations by 6 July 2020. Ofcom sent a copy of it to the Secretary of State in accordance with section 49C of the Act.
- A1.8 Ofcom did not receive any notification from the Secretary of State or any representations about the proposed consent, except for a supportive response from KCOM.

Decision to grant consent

- A1.9 SMP Conditions OB1 of Schedule 2, Annex 3 of the July 2004 Statement, 8.1 of Schedule 1, Annex 6 of the 2018 WLA and WBA Statement and 7.1 of Schedule 4, Annex 26 of the 2019 BCMR Statement all provide that the regulatory financial accounting conditions shall apply except in so far as Ofcom may consent otherwise in writing.
- A1.10 Therefore, Ofcom has decided to consent to KCOM's request set out in paragraph A1.6 above. This consent shall take effect on the day it is published.

¹⁰ Ofcom, [Consultation: Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements](#), 4 June 2020.

A1.11 The effect of and reasons for proposing the consent are set out in the accompanying explanatory statement.

Ofcom's duties and legal tests

A1.12 Ofcom considers that the consent referred to in paragraph A1.10 complies with the requirements of section 49(2) of the Act as set out in the accompanying consultation document.

A1.13 In granting the consent referred to in paragraph A1.10, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act, the six community requirements in section 4 of the Act and the duty to take account of all applicable recommendations for harmonisation issued by the European Union in section 4A of the Act. 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. Ofcom has also had regard to 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 Act on 29 October 2019 in making the decision referred to in this consent. Ofcom has also considered every representation about the proposed consent and has fulfilled its duty under section 49A(6) of the Act.

Interpretation

A1.14 Except as otherwise defined, words or expressions used shall have the same meaning as they have been ascribed in the SMP services conditions set out in Annex 3 of the 2004 Statement, Annex 6 of the 2018 WLA and WBA Statement and Annex 26 of the 2019 BCMR Statement. Otherwise any word or expression shall have the same meaning as it has in the Act.



David Brown

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A person authorised by Ofcom under paragraph 18 of the Schedule to the Office of Communications Act 2002

27 July 2020