



# **MS3** Networks

## Remedies for the Hull broadband markets

MS3

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NON-CONFIDENTIAL

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## 1 Executive summary

- 1 In its pre-consultation submission on Hull TAR market definitions, MS3 concluded that KCOM holds SMP in all the relevant broadband markets in Hull, at both retail and wholesale levels.
- 2 The markets defined are:
  - Retail broadband services at all speeds, but excluding wireless connections and leased lines;
  - Wholesale local access (WLA) market, and
  - KCOM's white label wholesale broadband services (also known as the WBA market)
- 3 In the WFTMR, only the WLA market was regulated and MS3 has presented clear evidence in the market definitions submission as well as its competition complaint that regulation in that market only has been insufficient to prevent KCOM from exercising its market power at both retail and wholesale levels.
- 4 In this submission MS3 sets out its proposals for regulatory remedies to be imposed in the three markets identified above. In summary, MS3 proposes that:
  - Regulation in the WLA market should remain more or less unchanged, with improvements added to prevent anticompetitive pricing and other commercial terms that **could** deter deployment of competitive fibre networks **and** adoption of those networks by wholesale and retail customers;
  - For the WBA market, MS3 proposes only limited regulation including no undue discrimination, prevention of anticompetitive pricing and other commercial terms that **could** deter deployment of competitive fibre networks **and** adoption of those networks by wholesale and retail customers, and regulatory financial reporting; and
  - For the retail broadband market, MS3 again proposes only limited remedies including no undue discrimination, prevention of anticompetitive pricing and other commercial terms that **could** deter deployment of competitive fibre networks **and** adoption of those networks by wholesale and retail customers, and regulatory financial reporting.
- 5 Since the WFTMR in 2021, MS3 and other providers have proven that there is appetite to invest in the Hull market to bring real choice to consumers. It is imperative that Ofcom now accepts that it

can no longer assume that a light version of the regulatory framework for Openreach is appropriate for Hull. Although small, the Hull broadband markets are viable for infrastructure competition and Ofcom has a duty to the consumers and citizens of Hull to enable that. This is especially urgent in light of the continued high price levels applied by KCOM where it does not apply deep discounts to harm its competitors.

## 2 Introduction

- 6 In its pre-consultation submission on Hull TAR market definitions, MS3 concluded that KCOM holds SMP in all the relevant broadband markets in Hull, at both retail and wholesale levels.
- 7 The markets defined are:
  - Retail broadband services at all speeds, but excluding wireless connections and leased lines;
  - Wholesale local access (WLA) market, and
  - KCOM's white label wholesale broadband services (also known as the WBA market)
- 8 Although Ofcom only defined one relevant market with SMP in the Hull WFTMR (the WLA market), MS3 concluded that KCOM has SMP in each of these three markets. In brief, the rationale for defining the two additional markets is that KCOM's retail market behaviour displays blatant abuse of market power and that the KCOM's most recent Regulatory Financial Statement (RFS) showed zero external revenues in the WLA market, showing that all wholesale broadband connections sold by KCOM must be sold as white label products.
- 9 In this document we set out what we consider to be appropriate and proportionate remedies to be applied in each of the three markets. Due to the principle that retail markets should only be regulated if remedies at the wholesale level are not sufficient to overcome any market failures experienced at the retail level. We will address the furthest upstream market (the WLA market) first, then moving to the while label wholesale broadband market and finally the retail broadband market.

### 3 WLA market remedies

10 In the Hull WFTMR, Ofcom mandated the following remedies in this market:<sup>1</sup>

**Figure 2.1: Summary of the general remedies we are imposing on KCOM**

<b>General remedies in the WLA and LL Access markets</b>
<b>Requirement to provide network access on reasonable request, and on fair and reasonable terms, conditions and charges (WLA excluding copper-based services)</b>
<b>Requirements relating to requests for new forms of network access (WLA only)</b>
<b>Requirement for no undue discrimination</b>
<b>Requirement to publish a reference offer</b>
<b>Direction requiring KCOM to amend its RO (WLA only)</b>
<b>Requirement to notify changes to charges, terms and conditions</b>
<b>Requirement to notify technical information</b>
<b>Requirement to publish quality of service information</b>
<b>Regulatory financial reporting</b>
<b>Requirement to produce a wholesale pricing transparency report (LL Access only)</b>

- 11 MS3 considers that those remedies remain both appropriate and proportionate for the WLA market for the TAR period. We comment briefly on each for the WLA market.
- 12 Network access on reasonable request on fair and reasonable terms – With regards to the provision of the network access, MS3 considers it appropriate that this remedy is continued for the TAR period. KCOM operates the only ubiquitous network in Hull and the absence of a wholesale broadband access product would deny some consumers of even the possibility of choice. Although KCOM appears to have provided exclusively white label broadband services during the first three years of the WFTMR period, the WLA remedy allows the retail provider more freedom to define its products and therefore has the potential to add more value to consumers.
- 13 MS3 considers the existing network access remedy to be proportionate as KCOM already has a functioning WLA product and would likely face little or no incremental cost to continue to offer this product.

<sup>1</sup> Hull WFTMR V3 Figure 2.1, page 8.

- 14 With regards to the fair and reasonable terms, conditions and charges, MS3 consider that this remedy remains appropriate and proportionate. MS3 expects that the wholesale competition presented by MS3 will cause an additional incentive for KCOM to price its WLA product attractively and therefore no increase in the regulation of terms, conditions and charges is required.
- 15 MS3 considers it imperative that a margin squeeze (MS) prohibition be part of the price regulation applicable to the WLA product.
- 16 New form of WLA access – MS3 considers that it remains appropriate that KCOM offers the improved WLA product as specified in the Hull WFTMR. MS3 also considers it proportionate the KCOM should offer this improved WLA remedy as it is already developed and therefore little or no additional costs should be incurred by KCOM to support its continued supply.
- 17 No undue discrimination (NUD) – MS3 considers this remedy to be extremely important. We will set out in our separate submission with our proposals for improvements to the existing RFS remedy how the NUD remedy could and should be strengthened. MS3 does not believe that the introduction of an Equivalence of Inputs (EoI) for the WLA product would be proportionate.
- 18 Publication of reference offer (RO) – the publication of a RO is good practice and MS3 sees no reason why it would be either inappropriate or disproportionate for KCOM to continue doing so for all its regulated access products.
- 19 Amendment of RO – the WLA RO has already been amended, so this remedy is no longer required. MS3 is not aware of any further amendments required.
- 20 Notification of changes to terms, conditions and charges – MS3 considers this an essential safeguard against potential anticompetitive behaviour, which cannot be argued to be either inappropriate or disproportionate. We set out below proposals for further safeguard remedies against potential anticompetitive behaviour in the wholesale broadband markets
- 21 Requirement to notify technical information – MS3 considers this remedy essential for retail providers to be able to make use of the WLA access remedy. MS3 considers it both appropriate and proportionate.
- 22 Requirement to publish quality of service (QoS) information – The publication of this information is one of the means of monitoring KCOM's compliance with the NUD remedy. It is necessary, appropriate and proportionate.

- 23 Regulatory financial reporting (RFS) – The continuation of an RFS remedy is critical to the assessment of KCOM’s compliance with the NUD requirements and to add sufficient transparency to the market to enable informed “make or buy” decisions by other communications providers (CPs). MS3 will submit a separate note setting out proposals for changes and improvements to the current RFS remedies across all regulated products.

### 3.1 Additional TAR remedies for the WLA market

- 24 The Hull WFTMR WLA remedies appear to have had very little impact on the Hull retail broadband market, for which purpose those remedies were designed. In MS3’s view, this is due to a number of factors.
- The total Hull market is approximately 206,000 premises, approximately 155k of which are in the city of Hull and its suburbs. This is a relatively small market, and it is therefore natural that Hull will not attract as many retail providers as the rest of the UK (RoUK).
  - KCOM’s WLA product was originally not easy to consume due to it requiring access to local exchanges – many of which had not space available. Although that has been remedied, it is likely that retail providers have become used to using the KCOM while label broadband product and have found it difficult (given the limited size of the market) to justify the investment necessary to consume the improved WLA product.
  - KCOM’s pricing practices in the retail broadband market seek to lock in retail customers to new contracts immediately upon expiry of the previous contract, make it extremely difficult to cancel the KCOM contract and impose extremely high early termination charges (ETCs) on customers exiting contracts before they have expired. This makes the Hull retail broadband market unattractive for potential retail competitors to KCOM.
- 25 It seems to MS3 that there is little Ofcom can do to overcome the first two of these challenges to retail broadband competition in Hull. The third issue is addressed later in this submission.
- 26 MS3 is, however, concerned that – whilst KCOM has so far focused its attention primarily at discouraging competition in the retail broadband, the fact that MS3 offers an attractively priced and easy to consume WLA equivalent will likely cause KCOM to turn its attention to the wholesale market as well and deploy practices that cause harm to the wholesale broadband market in Hull.

- 27 In the RoUK, Ofcom recognised that BT/Openreach, absent regulatory intervention, *“Openreach has the ability and incentive to engage in various forms of exclusionary and/or exploitative conduct that could distort competition and/or harm consumers”*<sup>2</sup> and MS3 considers that KCOM has that same ability and incentive.
- 28 In fact, MS3 considers that KCOM’s ability to engage in exclusionary and/or exploitative conduct is greater than is the case for BT/Openreach. This is due to KCOM’s clear dominance across all levels of the market from physical infrastructure to retail markets.
- 29 Further, MS3 considers that KCOM’s incentives to engage in such conduct could be even greater than is the case for BT/Openreach – this is due to the scale of the Hull market and the risk of KCOM’s operations falling under the minimum economic scale level.
- 30 MS3 therefore asks that Ofcom implement remedies that reduce KCOM’s ability to introduce pricing and other practices that could deter other providers, including MS3, from building competitive networks in Hull.
- 31 MS3, therefore, asks that Ofcom implement remedies to reduce KCOM’s ability to engage in exclusionary and/or exploitative conduct in the WLA market.
- 32 MS3 considers that the remedies applied to BT/Openreach in the RoUK WFTMR in relation to pricing or other commercial offers was well-intended but has proven to be too inflexible and has not effectively achieved the goals it clearly set out to achieve – namely to prevent BT/Openreach from *“use[ing] wholesale pricing structures to deter new network build by alternative network operators”*.<sup>3</sup> MS3, therefore, asks that Ofcom introduce a strong but sufficiently flexible safeguarding framework to prevent KCOM from introducing new and innovative prices or other commercial terms that could deter competitive network build in Hull.
- 33 One critical element that MS3 believes weakened the RoUK WFTMR remedies in this area is that they were designed to place the burden of proof of the potentially deterrent effect on the competing network builders.<sup>4</sup> As the ex-ante remedies imposed by Ofcom in market reviews are forward-looking, proving future deterrents is complex and requires detailed economic and (sometimes) technical analysis. Small market entrants building competing networks rarely have

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<sup>2</sup> RoUK WFTMR V3 paragraph 1.6.

<sup>3</sup> RoUK WFTMR V3 paragraph 7.2 and in a number of other places throughout section 7.

<sup>4</sup> With the exception of geographic discounts, for which approval depends on BT/Openreach demonstrating that they will have no deterrent effect.

access to the expertise or funding required for those analyses and the current remedies are therefore more similar to ex-post competition law, in that small competitors simply cannot mount the detailed economic cases to ‘prove’ that the proposed practices would be a deterrent. Therefore, MS3 does not consider that the existing remedies un the RoUK WFTMR are fit for purpose and Ofcom should not seek to replicate them in the Hull TAR.

- 34 Additionally, Ofcom will be aware that infrastructure competition doesn’t materialise through the existence of competing network alone. As important as the deployment of the networks is the adoption of those networks by retail and wholesale customers. Without a reasonable level of take-up, the competing network operators will not be sustainable and enduring network competition will not materialise, nor will the downstream benefits to end users.
- 35 MS3 is working with other Altnets through INCA to provide inputs to the RoUK TAR process and hope that Ofcom will develop a more robust and flexible remedies framework to deter potentially anticompetitive pricing and other practices. If so, then MS3 asks that Ofcom implement that same framework in the Hull TAR. Whilst it may be considered that some of the remedies imposed on BT/Openreach may not be proportionate for the much smaller Hull market, these remedies do not require KCOM to incur significant up-front costs to comply, they simply put a rule-set around KCOM’s ability to design pricing and/or other commercial terms that could deter competitive network build.
- 36 The overriding principle for the design of remedies in this area should be to prevent practices that could deter competitive network build and take-up on those networks , thus giving certainty to network builders that they will be able to compete with the incumbent (and each other) in a balanced market place where the incumbent cannot leverage deep pockets and/or existing retail and wholesale customer relationships to raise barriers to the development of efficient network competition.
- 37 The Hull market also differs from the RoUK market in one more significant area, namely that KCOM has completed its full-fibre network deployment. This means that Ofcom does not need to consider the risk that any regulatory impositions could deter KCOM from completing that deployment. Given the emergence of competing networks and the undisputed long-term benefits to consumers arising from full infrastructure competition, Ofcom’s focus should be on ensuring that competitive network investment is not deterred and removing barriers to this objective at all levels in the value chain.

38 Up-front certainty that Ofcom intends to adopt and transparently enforce that approach would give comfort to investors in both network and services in Hull that they would be able to compete on a level playing field and that Ofcom would err on the side of caution when assessing whether any KCOM pricing or other commercial terms could deter continued investment in competitive networks.

### 3.2 Additional remedies for the WBA market

39 In the Hull WFTMR Ofcom withdrew regulation from the WBA market. MS3 believes this was done in the expectation that an improved WLA product would be attractive to retail ISPs and that, therefore, the WBA market would become less relevant.

40 Unfortunately, KCOM's latest RFS still shows zero external WLA sales. This means that, as of the end of March 2024, all of KCOM's wholesale customers still consumed the white label product only. The continued relevance of the white label product in the Hull wholesale broadband market, and the lack of regulatory remedies in that market, means that MS3 and others are competing against an almost entirely unregulated product despite that product being supplied by the SMP operator.

41 MS3, therefore, calls on Ofcom to reintroduce remedies in the WBA market. Our submissions on market definitions and SMP assessment demonstrated clearly that KCOM hold a position of SMP in the WBA market and MS3 contends that the lack of regulatory constraints and oversight puts at risk sustainable wholesale broadband competition in Hull.

42 MS3 is also conscious that any regulations imposed must be proportionate and that KCOM is a relatively small, regulated entity. MS3, therefore, does not propose that a full suite of remedies (as imposed in the WLA market) be imposed in the WBA market. Instead, MS3 proposes the following remedies, which it considers both appropriate and proportionate in the context of existing and likely future market failures in the Hull broadband markets:

- 1) No Undue Discrimination (NUD) – This remedy would ensure that the services offered to different retail ISPs and to KCOM's internal retail business<sup>5</sup> do not differ in pricing, functionality or other relevant terms unless there is a very good reason for that difference. This remedy is appropriate given that the white label product is the predominant wholesale broadband product sold by KCOM. The remedy is proportionate, as it requires little or no up-front cost of compliance.

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<sup>5</sup> Although, MS3 has observed that KCOM uses the regulated WLA product and not the white label product. This, in and of itself, is likely to represent

Compliance costs are only linked to ensuring that prices terms and conditions are non-discriminatory.

MS3 also asks Ofcom to consider whether it would be appropriate to require KCOM's retail business to consume the while label product until such time that KCOM's retail competitors are able to consume the WLA product at a meaningful scale. It would seem that obstacles for third party external ISP wishing to consume WLA are not applicable to KCOM's internal retail business and MS3 asks that Ofcom consider whether this represents undue discrimination.

- 2) Regulatory Financial Statements (RFS) – It is essential that Ofcom and the market understand the size of the current Hull wholesale broadband markets. At present, the RFS for the WLA markets simply shows that KCOM self-provides 100% of wholesale broadband lines to itself. What is not clear is what proportion of those WLA connections are used to provide white label connections to competing retail ISPs. MS3's proposals for changes to the RFS remedies in Hull are set out in a separate submission.
- 3) Margin squeeze (MS) prohibition – Whilst MS3 does not believe it is necessary for Ofcom to impose a specific pricing remedy for the while label product, an ex-ante MS prohibition is essential. MS3 considers that an MS prohibition can help address market issues at both retail and wholesale levels.
- 4) Additionally, MS3 considers that Ofcom should consider the imposition of a reference offer remedy for the WBA market. This would help ensure full clarity between the WLA and white label products and enable ISPs to make informed purchasing decisions. MS3 notes that KCOM already publishes product descriptions and other associated documentation for the while label product, so the cost of compliance should be limited.
- 5) Finally, it is imperative that the remedies discussed above in the WLA market section to prevent KCOM for engaging in pricing or other commercial terms conduct that could deter build of or take-up on new competitive full fibre networks in Hull also be applied in the WBA market. Application in the WLA market only, in the knowledge of there being no or very little consumption of the WLA product, is not meaningful. As the majority of wholesale broadband products consumed in Hull are in the WBA market, this important remedy must also be applied in the WBA market.

## 4 Physical Infrastructure Access

- 43 Efforts have been under way for nearly 12 months to create the terms for MS3 and others to access the KCOM physical infrastructure (PI) to reduce costs of network deployment as well as preventing network replication resulting in multiple telegraph poles where one could be enough.
- 44 The wholesale product under development (and which MS3 has been trialling for several months) is known as KPIA and is an important cornerstone to the overall remedies framework for the two wholesale broadband markets in Hull (WLA and WBA). MS3 is working with KCOM on the development and (hopefully) early launch of the full KPIA product prior to the conclusion of this market review. Our specific suggestions for the KPIA remedy will be set out in a separate submission.

## 5 Retail broadband market remedies

- 45 The ‘golden rule’ in regulation of telecoms markets is that regulation should be focused upstream, and that upstream regulation will remove barriers to competition in downstream markets – obviating the need for retail market intervention. As set out earlier in this submission, that approach has clearly failed in Hull.
- 46 The clear evidence of abuse of market power in the Hull retail broadband market submitted by MS3 to Ofcom as a draft competition complaint<sup>6</sup> illustrates that wholesale access regulation has not been successful in generating downstream retail competition in the Hull broadband market. The competition complaint was submitted in draft form in reference to Ofcom’s concurrent competition powers in the telecoms sector and MS3 is still awaiting Ofcom’s assessment of the issues raised.
- 47 Although this submission relates to Ofcom’s forward-looking market review for the 2026-31 period, and that Ofcom’s duties and powers in relation to ex-ante regulation differ from those in competition law, the instances of abuse of market power documented and evidenced in the draft competition complaint submission are equally valid in both regimes. In the interest of brevity, MS3,

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<sup>6</sup> Insert document name and date submitted to Ofcom.

therefore, refers Ofcom to the draft competition complaint for the description of the issues identified, which are briefly summarised below:

- Introduction of ‘out of contract surcharge’ – this £5/month surcharge applies to all KCOM customers for whom their fixed term contract has expired. As the majority of broadband customer in Hull do not have a choice of provider, they have no realistic alternative but to re-contract with KCOM. This then, in turn, forecloses the market for MS3 and others as they deploy their networks to new areas.
- Offering special offer retail broadband rental prices that are materially below the prevailing wholesale corresponding wholesale charges. These prices apply for full 24-months contracts and KCOM could only reasonably expect to recover its wholesale costs from those contracts if it assumes that the customer will remain with KCOM at very high price levels for an extended period.
- Setting early termination charges (ETCs) unreasonably high based on very high full-price rental charges from which very low avoidable costs are deducted, thus erecting a significant barrier to consumers changing provider until their KCOM contract has expired.
- Creating barriers to consumer switching by removing all easily accessible options for service cancellation. This issue has been partially overcome by the introduction of One Touch Switch (OTS) but is still an excellent example of KCOM’s approach to erecting barriers to competition in the retail broadband market.

48 Due to the existence of competing networks in (growing) parts of Hull, there are now three groups of retail ISPs competing with KCOM in Hull:

- 1) Retail ISPs using the KCOM white label wholesale broadband product and potentially starting to use the WLA product;
- 2) Retail ISPs that use their own networks (including Connexin and Grain); and
- 3) Retail ISPs using the MS3 wholesale-only full fibre network.

49 Unfortunately, due to KCOM’s retail market practices as outlined briefly above, even this increased scope of retail competitors is not able to make significant inroads into KCOM’s retail broadband market share.

50 MS3 does not believe that the lack of retail competition can be remedied by increased regulation of KCOM at the wholesale level (other than as outlined above), not that the answer to this situation is to impose retail price regulation on KCOM. The (short term) retail market intervention required to overcome the barriers to competition erected by KCOM (and to prevent the erection of future creative initiative to thwart competition) is to:

- Introduce restrictions on KCOM’s freedom to set permanent and temporary retail prices that could harm retail competition, including mandating ex-ante margin squeeze test (or economic replicability test) at the retail level;
- Enforce existing provisions (including General Conditions of Entitlement (GCs)) relating to enabling consumer choice and OTS;
- Redefine the method KCOM (and potentially all CPs in the UK) can use to calculate ETCs to ensure that it can only recover unavoidable costs; and
- Design a framework that prohibits KCOM from introducing prices or other commercial terms that **could** deter retail market entry and expansion, effectively mirroring the concerns and measures at the retail level that MS3 has set out above in relation to the WLA and WBA markets at the wholesale level.
- Submit regulatory financial statements covering the retail broadband market<sup>7</sup>.

51 MS3 considers it essential that Ofcom intervenes at the retail level as set out above, but also that Ofcom does not intervene in a manner that has the unintended effect of sterilising the market from sustainable competition. MS3 is confident that, with the level of intervention outlined in this submission, both retail and wholesale broadband markets in Hull will see material change over the TAR period and that significant elements of the remedies needed now can be reduced or removed after that period.

## 6 A KCOM monitoring unit

52 Due to the increased complexity in the Hull market and the market issues experienced in recent years (which MS3 contends clearly demonstrates KCOM’s ability and willingness to abuse its

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<sup>7</sup> Please note that MS3 is submitting its RFS proposals under separate cover.

market power at all levels in the value chain), MS3 asks that Ofcom create a KCOM monitoring Unit (KMU) to which KCOM should provide ongoing compliance data and with whom MS3 and others can raise compliance concerns.

## 7 Conclusion

- 53 Although it may look as if MS3 is asking for a major increase in regulatory intervention in Hull, these are (in the main) short term interventions only. They are designed to address specific problems observed in the market, they do not create a long-term dependency on regulatory intervention nor impose undue compliance burdens on KCOM.
- 54 Hull is on the cusp of finally offering real choice and value to consumers. The recommendations set out in this document are appropriate for the specific market failures identified and proportionate in respect of the cost of compliance for KCOM.
- 55 MS3 is concerned that Ofcom must not consider the Hull area ‘too small for competition’. There are many smaller jurisdictions such as Crown Dependencies<sup>8</sup> and around the world where competition has been enabled and consumers have the benefit of choice. It may be that the very large ISPs in the RoUK market consider the Hull market too small for them to enter but, like in the many other small jurisdictions, smaller ISP can address the Hull market and deliver real benefits to consumers.
- 56 Likewise, KCOM should be able to continue operating profitable, even after losing market share at both retail and wholesale levels. It may be necessary for the business to restructure and potentially resize, but regulated incumbents in other small jurisdiction about able operate and turn profits even when subject to competition.

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<sup>8</sup> Including the Isle of Man, Jersey, Gibraltar and Guernsey.