



**MS3**  
Networks

## Remedies for the Hull leased lines markets

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NON-CONFIDENTIAL

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## 1 Executive summary

- 1 In the three SMP markets defined in our market definition submission, it is important that Ofcom applies remedies that are designed to address market failures either already experienced in those relevant markets or anticipated based on KCOM's past behaviour.
- 2 Hull is a relatively small market, and it is important that regulation is both appropriate and proportionate to the type and level of competition anticipated, as well as to the behaviour observed or expected from KCOM. MS3 is confident that the remedies package proposed in this submission meets those criteria.
- 3 On the whole, MS3 proposed a continuation of the existing remedies as applied by Ofcom to the Wholesale Local Access (WLA) market in the Hull WFTMR, but to be applied in both of the newly defined wholesale leased lines markets.
- 4 One significant exception from that is that MS3 considers it both inappropriate and disproportionate to apply a dark fibre access (DFA) remedy in the market for wholesale leased lines use for end customer connections. Doing so goes against Ofcom's policy in the rest of the UK (RoUK) where Ofcom has recognised that the imposition of a DFA remedy acts as a disincentive for investors in competing fibre networks.
- 5 Additionally, MS3 considers it essential that Ofcom introduces a remedy to prevent pricing levels and structures, as well as other commercial terms, that **could** deter investment in and take-up of competitive fibre networks.
- 6 At the retail market level, MS3 proposes safeguard and transparency remedies only, including no undue discrimination (NUD) and margin squeeze, regulatory financial statement (RFS) and a remedy prohibiting pricing levels and structures and other commercial terms that **could** deter investment in- and take-up of competitive fibre network sin Hull.

## 2 Introduction

- 7 In its pre-consultation submission on Hull TAR market definitions, MS3 concluded that KCOM holds SMP in all the relevant leased lines markets in Hull, at both retail and wholesale levels.

- 8 The markets MS3 has defined are:
- Retail leased lines services at all speeds, but excluding wireless connections and broadband connections;
  - Wholesale leased lines used for end-customer connectivity; and
  - Wholesale leased lines used for mobile backhaul.
- 9 This submission sets out MS3's proposals for remedies to be applied in each of these markets including why the remedies proposed are appropriate to address the market failures observed or anticipated and proportionate in terms of compliance burden for KCOM.

### 3 Wholesale leased lines market remedies

- 10 In the Hull WFTMR, Ofcom defined a single leased lines access (LLA) market, but MS3 has presented data and analysis in its separate market definitions submission which support the definition of the above three markets.
- 11 In the Hull WFTMR, Ofcom mandated the following remedies in the single LLA market:<sup>1</sup>

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

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

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

### 3.1 Wholesale leased lines for end-customer connections

- 12 For the wholesale leased lines for end-customer connections market, MS3 considers that most of those remedies remain both appropriate and proportionate. We comment briefly on each for the wholesale leased lines for end-customer connection (WLLECC) market.
- 13 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 regulated wholesale leased lines product in the WLLECC market would deny some consumers the possibility of choice. It should be noted, however, that the MS3 definition of the WLLECC market excluded dark fibre connections. The rationale for that is set out in MS3’s separate market definition submission.
- 14 MS3 considers the existing network access remedy to be proportionate as KCOM already has a functioning LLA product and would likely face little or no incremental cost to continue to offer this product.
- 15 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 LLA product attractively and therefore no increase in the regulation of terms, conditions and charges is required.

- 16 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 LLA product would be proportionate.
- 17 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.
- 18 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 leased lines markets
- 19 Requirement to notify technical information – MS3 considers this remedy essential for retail providers to be able to make use of the LLA access remedy. MS3 considers this remedy to be both appropriate and proportionate.
- 20 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.
- 21 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.
- 22 Wholesale pricing transparency report – As this report is confidential between KCOM and Ofcom, MS3 cannot comment on the details of this remedy. However, given that the leased lines market can be extremely complex for regulators to analyse due to the (often bespoke) nature of retail products and pricing, MS3 considers that the report is likely to be necessary for Ofcom to monitor KCOM’s compliance with the relevant NUD remedy requirements. The PTR can also potentially

assist Ofcom in assessing any potential margin squeeze pricing practices by KCOM in the leased lines markets.

### 3.2 Additional TAR remedies for the WLLECC market

- 23 MS3 considers that Ofcom needs to consider the imposition of prohibition against anti-competitive pricing or other commercial terms in all the leased lines markets defined in the TAR. As presented in MS3's market definitions submission, KCOM has recently started actively promoting very long term leased lines contracts and MS3 is concerned that this is the early signs of a concerted effort by KCOM to prevent any further market share loss at both retail and wholesale levels.
- 24 MS3 recommends that Ofcom apply the same approach as that used in the wholesale broadband market for Openreach, including the improvements MS3 has presented in its submission relating to remedies in the Hull wholesale and retail broadband markets.

### 3.3 TAR remedies for the mobile backhaul market

- 25 In the Hull WFTMR, wholesale leased lines for mobile backhaul purposes were included in Ofcom's LLA market. MS3 has presented in its market definitions submission, why it considers that to not be appropriate for the TAR and has proposed a separate market for the provision of mobile backhaul circuits (the MB market).
- 26 MS3 considers that, in general, the remedies appropriate for the WLLECC market are also both appropriate and proportionate for the MB market. Below we set out where we think there is a justification for variation of remedies between the two markets.
- 27 Network access on reasonable request on fair and reasonable terms – whilst MS3 also does not include dark fibre circuits in the MB market, it does consider that dark fibre access (DFA) would be an appropriate and proportionate remedy in this market.
- 28 Publication of a reference offer – given the bespoke nature of mobile backhaul circuits, MS3 considers that it is unnecessary for KCOM to produce an RO, but it is important that pricing is open and transparent.
- 29 Requirement to publish quality of service (QoS) information – Again, due to the bespoke requirements for MB circuits, MS3 does not consider it proportionate for KCOM to publish QoS information for the MB market.

### 3.4 TAR remedies for the Hull retail leased lines market

- 30 In this market, MS3 considers that only transparency, NUD and prevention of anticompetitive practices remedies would be appropriate. MS3 also understands that due to the (often bespoke) nature of the retail leased lines market, the transparency remedy should require submission of the relevant information to Ofcom only and not publication for wider consumption.
- 31 As set out above under the WLLECC market remedies, MS3 is concerned that KCOM has the incentive and ability to engage in pricing and other practices that could deter MS3 and others for continued deployment of competitive networks and users (retail and wholesale) from taking up services on those networks.
- 32 MS3, therefore, considers it both appropriate and proportionate to impose remedies on KCOM that seek to prevent such behaviour. MS3 recommends

## 4 Physical Infrastructure Access

- 33 MS3 considers that PIA is an appropriate and proportionate remedy for the two wholesale leased lines markets MS3 has defined.
- 34 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.
- 35 The PIA 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 leased lines markets in Hull. 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 leased lines market remedies

- 36 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.

- 37 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>2</sup> illustrates that wholesale access regulation has not been successful in generating downstream retail competition in the Hull broadband market. MS3 considers the same to be the case in the retail leased lines market, where KCOM has recently commenced incentivising leased lines customers to enter into five- or seven-year contracts. MS3 is concerned that this behaviour is the first sign of KCOM erecting barriers to market entry and expansion in the Hull retail leased lines market with the objective of making it less attractive for MS3 and others to build competitive fibre networks in Hull.
- 38 Also like in the retail broadband market, MS3 is not asking that Ofcom impose significant new remedies that could be disproportionate to the market issues currently experienced and potentially also impose a disproportionate compliance burden on KCOM in this relatively small market. MS3 suggests only three remedies for the Hull retail leased lines market:
- No undue discrimination;
  - Prohibition of pricing and non-pricing initiatives that **could** deter investment in competing full-fibre networks in Hull; and
  - Regulatory financial reporting.
- 39 MS3 considers that these remedies are both appropriate to the existing and potential market failures and proportionate in terms of ensuring that KCOM is not subject to a disproportionate compliance burden.
- 40 No undue discrimination – this remedy should require that any differentiation in pricing or other terms by KCOM between different retail leased lines customers must be objectively justifiable. MS3 is not proposing that the retail leased lines market be subject to direct price regulation. This NUD remedy should also require that KCOM cover its upstream wholesale costs in any retail leased lines prices offered. This remedy should include an obligation to cost-justify price differences between different contract durations.

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<sup>2</sup> Insert document name and date submitted to Ofcom.

- 41 Not deterring the build or take-up of competitive retail leased lines in Hull – this remedy should address the structure and levels of retail leased lines pricing as well as other commercial terms that **could** deter the build or take-up of competitive retail leased line sin Hull. The remedy should require the ex-ante reporting and compliance of any special offers or discounts proposed by KCOM in the retail leased lines market.
- 42 Regulatory financial statement – in order to create greater transparency in this market and to enable Ofcom to police the remedies in this market, MS3 considers it essential that KCOM submit an RFS statement for this market<sup>3</sup>.

## 6 A KCOM monitoring unit

- 43 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 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

- 44 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.
- 45 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.
- 46 MS3 is concerned that Ofcom must not consider the Hull area ‘too small for competition’. There are many smaller jurisdictions within the UK<sup>4</sup> and around the world where competition has been

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<sup>3</sup> Please note that MS3 will submit its RFS proposals under separate cover.

<sup>4</sup> Including the Isle of Man, Jersey, Gibraltar and Guernsey.

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.

- 47 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 jurisdictions are able operate and turn profits even when subject to competition.