



Changes to BT and KCOM's regulatory and financial reporting 2011/12 update

Consultation

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Contents

Section		Page
1	Executive Summary	1
2	Introduction	3
3	Items for Consultation	5

Annex		Page
1	Responding to this consultation	10
2	Ofcom's consultation principles	13
3	Consultation response cover sheet	15
4	Consultation questions	17
5	Impact Assessment	18
6	Legal Tests	20

Section 1

Executive Summary

Background

- 1.1 Relevant, reliable and timely regulatory financial information informs many of our decisions. We require this information in order to monitor and enforce various obligations that are placed on dominant providers in markets where they are found to have significant market power ("SMP").
- 1.2 In this consultation we propose minor changes to enhance the presentation and improve the quality of BT's regulatory financial statements ("RFS") reflecting developments over the last 12 months in the regulatory, technological and competitive environment, our ongoing analysis and use of the RFS, comments from users of the RFS and discussions with BT.
- 1.3 There are no proposals for significant changes to the RFS in the current year. The Cost Orientation and Regulatory Reporting (CORR) project is running at the same time with the remit of addressing fundamental issues and proposing changes to financial reporting. In order not to duplicate the work, we consider that the CORR project is better placed to consider concerns in depth this year.
- 1.4 The above was highlighted to stakeholders in pre consultation meetings and the stakeholders agreed to raise fundamental issues via CORR project. BT agreed not to make presentational changes to the 2011/12 accounts in the light of possible changes to the form of the RFS as a result of the CORR project.
- 1.5 There are no recent market reviews that would affect 2011/12 financial reporting.
- 1.6 We are consulting on two minor changes to BT's 2011/12 RFS. First, the change to reporting of services in the Alternative Interface Symmetric Broadband Origination ("AISBO") market. We propose to disclose Ethernet Access Direct services for rentals and connections separately by bandwidth. The change is aimed at improved disclosure of services in the RFS. Secondly, we propose to amalgamate Wholesale Extension Service connections due to forecast low revenue of these services.
- 1.7 The regulatory financial reporting regime is also applicable to KCOM. This year, however, we have identified no reporting changes relating to KCOM which require consultation.
- 1.8 As set out below in this consultation, in order to implement these changes Ofcom will have to modify Direction 4 under SMP condition OA2. Following amendments to the Communications Act 2003 (the "Act") which came into effect in May 2011¹, two new sections set out specific consultation procedures we must follow in order to modify a direction which gives effect to an SMP obligation². However, as set out below in more detail³, the nature and limited extent of the proposed changes are such that these two sections of the Act do not apply.

¹ Pursuant to the Electronic Communications and Wireless Telegraphy Regulations 2011/1210.

² Sections 49A and 49B.

³ See Section 3 and Annexes 5 and 6 below.

- 1.9 Nonetheless, in light of the fact that this is the first time we will be making changes to BT and KCOM's regulatory and financial reporting obligations since the relevant amendments to the Act came into force, we have decided to consult⁴. In so doing we have had regard to Ofcom's published guidelines on how it manages the way it consults (Consultation Guidelines)⁵, which include guidance on how Ofcom determines the period for which it will consult.
- 1.10 The closing date for responses to the consultation as set out in this document is 5pm on 5 March 2012.

⁴ Our decision here to consult is without prejudice to any subsequent decision we may take to consult or not where we are proposing, under section 49(1) of the Act, to give a direction, approval or consent that affects the operation of a condition set under section 45 of the Act or to modify or withdraw a direction, approval or consent so as to affect that condition's operation and where, in our view, section 49A and/or section 49B does not apply the consequence of which is we are not statutorily obliged to follow the consultation procedures set out in those sections.

⁵ How will Ofcom consult, Ofcom Consultation Guidelines, published November 2007 (<http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>). For more information please see our consultation principles in Annex 2.

Section 2

Introduction

Background

- 2.1 Relevant, reliable and timely regulatory financial information is required to inform many of our decisions. It is essential therefore that the regulatory reporting framework is kept up to date and fit for purpose.
- 2.2 Under sections 87 to 91⁶ of the Act there are a range of remedies that can be implemented by Ofcom once it has been determined that an undertaking has SMP in an identified services market. These include obligations:
 - to offer cost-oriented charges;
 - not to discriminate unduly; and
 - to cap charges, i.e. charge controls.
- 2.3 When setting SMP conditions, Ofcom is exercising its duties under sections 3 and 4 and 4A of the Act. These include the duty to further the interests of consumers in relevant markets by promoting competition and to act in accordance with the six Community requirements, the first of which is to promote competition. Where these obligations have been imposed it is essential that they are monitored and enforced effectively through, in part, an effective regulatory financial reporting framework.
- 2.4 Regulatory financial information is normally prepared either on a regular (e.g. annual) basis for ongoing monitoring purposes or on request, for example in connection with investigations.
- 2.5 BT's RFS, like any form of business information, evolve over time to reflect a range of internally and externally driven factors. These include changes to accounting policies and standards, improved understanding or knowledge of cost drivers, changes in technologies and business processes and changes in the regulatory environment.

Structure of the Document

- 2.6 In Section 3 we set out specific proposals for BT to make improvements to the RFS and, subject to the outcome of this consultation, we expect these changes to be implemented in time to apply to the preparation and publication of BT's 2011/12 RFS.
- 2.7 The reporting changes that we present in this document impact solely on BT. There are no reporting changes which impact KCOM.

Costs and benefits of proposed changes

- 2.8 In preparing this consultation we have discussed our proposals with BT in order to understand the likely impact on them and to understand any implementation difficulties that are likely to arise.

⁶ As amended by the Electronic Communications and Wireless Telegraphy Regulations 2011/1210.

- 2.9 We have taken into account the burden on BT in implementing all the proposed changes. We have weighed this against the benefits of more relevant, reliable and understandable reporting. The analysis set out in Annex 5 of this document, together with that in Sections 1 to 5 and Annex 6, represents an impact assessment relating to our proposals.
- 2.10 We will work closely with BT to ensure the implementation of the final requirements is carried out as efficiently as possible.
- 2.11 Responses to the consultation and the questions raised in section 3 are due by 5pm 5 March 2012.

Section 3

Items for Consultation

Introduction

3.1 In this section we propose two reporting changes. The changes relate to BT only.

Disclosure of AISBO Services

Proposed Change

3.2 We propose to:

- Report separately:
 - EAD connections across 10Mb, 100Mb and 1000 Mb bandwidths;
 - EAD rentals across 10Mb, 100Mb and 1000Mb bandwidths.
- Reduce the current service breakdown by bandwidth to a single WES connections service.

Objective of Change

- 3.3 In our 2010 Statement on Changes to BT and KCOM's regulatory and financial reporting⁷ (2010 RFS Statement) we identified that the AISBO market was growing significantly and a charge control had been imposed in 2009. We emphasised the importance of BT disclosing reliable financial information for each main service provided in this growing market.
- 3.4 In our 2010 RFS Statement we required BT to increase the level of granularity of reporting to include services such as Wholesale Extension Services (WES), Ethernet Backhaul Direct (EBD) and Ethernet Access Direct (EAD). This allowed reporting to properly capture fast growing services and disaggregate services with significantly different price/volume mixes.
- 3.5 This improved analysis of services in this market has improved our monitoring of BT's compliance with its no undue discrimination and cost orientation obligations.
- 3.6 In the last 2 years EAD services experienced growth in take up and consequently growing revenues. We are now proposing greater granularity in reporting EAD services, namely splitting reporting by bandwidth in order to aid transparency.
- 3.7 On the other hand, total WES connections revenues across all bandwidths were c.£16m in 2010/11 and are forecast to fall to less than £5 in 2011/12. In the light of this we propose to amalgamate WES connections reporting into one line in the RFS.
- 3.8 This is to ensure the RFS focuses on the main regulated services produced by BT and these are not obscured by the reporting of many small services. Amalgamation

⁷ The Changes to BT and KCOM's regulatory and financial reporting 2009/10 update Statement, published in May 2010:

<http://stakeholders.ofcom.org.uk/consultations/btregs10/statement/>

of WES Connections is only for reporting purposes. We still require BT to collect more granular cost and revenue information.

The table below shows the proposed separate reporting and the services we propose to amalgamate in the regulatory financial statements.

Annex 11

AISBO Market summary

Purpose of statement: to provide more detail on financial performance and first order tests of compliance with cost orientation and non-discrimination obligations

Alternative interface symmetric broadband origination (up to and including 1Gbit)

Summary

	Internal Sales £m	External Sales £m	Turnover (see note 1) £m	Operating costs £m	HCA Depreciation £m	Holding (gain)/loss £m	Supplementar y depreciation £m	Other adjustments £m	Roundings £m	Total CCA operating costs £m	Return £m	Mean capital employed £m	Return on mean capital employed
200x	£	£	£	£	£	£	£	£	£	£	£	£	%
200y	£	£	£	£	£	£	£	£	£	£	£	£	%

Note 1: Comparison of Average internal and external charges with each other and with FAC

for the year ended 31 March 200x	Non- discrimination				Cost orientation				
	Turnover £m	Volume	Unit	Average price £	FAC (see Section 5) £	Unaudited LRIC Floor £	Unaudited LRIC Ceiling £	Average price/FAC	
Service									
Wholesale Extension Services (WES)									
<u>Rental</u>									
Internal WES 10 Mbits	£		y x	£	£	x.xx	x.xx	x.xx	
External WES 10 Mbits	£		y x y	£	£	x.xx	x.xx	x.xx	
Internal WES 100 Mbits	£		y x	£	£	x.xx	x.xx	x.xx	
External WES 100 Mbits	£		y x y	£	£	x.xx	x.xx	x.xx	
Internal WES 1000 Mbits	£		y x	£	£	x.xx	x.xx	x.xx	
External WES 1000 Mbits	£		y x y	£	£	x.xx	x.xx	x.xx	
Internal WES other bandwidth	£		y x	£	£	x.xx	x.xx	x.xx	
External WES other bandwidth	£		y x y	£	£	x.xx	x.xx	x.xx	
<u>Connection</u>									
Internal WES	£		y x	£	£	x.xx	x.xx	x.xx	
External WES	£		y x	£	£	x.xx	x.xx	x.xx	
Internal WES 10-Mbits	£	y	x	£	£	x.xx	x.xx	x.xx	
External WES 10-Mbits	£	y	x y	£	£	x.xx	x.xx	x.xx	
Internal WES 100-Mbits	£	y	x	£	£	x.xx	x.xx	x.xx	
External WES 100-Mbits	£	y	x y	£	£	x.xx	x.xx	x.xx	
Internal WES 1000-Mbits	£	y	x	£	£	x.xx	x.xx	x.xx	
External WES 1000-Mbits	£	y	x y	£	£	x.xx	x.xx	x.xx	
Internal WES other bandwidth	£	y	x	£	£	x.xx	x.xx	x.xx	
External WES other bandwidth	£	y	x y	£	£	x.xx	x.xx	x.xx	
Backhaul Extension Services (BES)									
<u>Rental</u>									
External BES 1000 Mbit/s	£		y x	£	£	x.xx	x.xx	x.xx	
External BES other bandwidth	£		y x	£	£	x.xx	x.xx	x.xx	
<u>Connection</u>									
External BES	£		y x	£	£	x.xx	x.xx	x.xx	

Ethernet Access Direct (EAD)Rental

Internal EAD 10Mb	£	y x	£	£	x.xx	x.xx	x.xx
External EAD 10Mb	£	y x	£	£	x.xx	x.xx	x.xx
Internal EAD 100Mb	£	y x	£	£	x.xx	x.xx	x.xx
External EAD 100Mb	£	y x	£	£	x.xx	x.xx	x.xx
Internal EAD 1000Mb	£	y x	£	£	x.xx	x.xx	x.xx
External EAD 1000Mb	£	y x	£	£	x.xx	x.xx	x.xx

Connection

Internal EAD 10Mb	£	y x	£	£	x.xx	x.xx	x.xx
External EAD 10Mb	£	y x	£	£	x.xx	x.xx	x.xx
Internal EAD 100Mb	£	y x	£	£	x.xx	x.xx	x.xx
External EAD 100Mb	£	y x	£	£	x.xx	x.xx	x.xx
Internal EAD 1000Mb	£	y x	£	£	x.xx	x.xx	x.xx
External EAD 1000Mb	£	y x	£	£	x.xx	x.xx	x.xx

Main LinkRental

Internal Main Link charges	£	y x	£	£	x.xx	x.xx	x.xx
External Main Link charges	£	y x	£	£	x.xx	x.xx	x.xx

Other EthernetRental

Internal other ethernet all bandwidth	£	(ux)	(sx)	£	x.xx	x.xx	x.xx
External other ethernet all bandwidth	£	(ux)	(sx)	£	x.xx	x.xx	x.xx

Connection

Internal other ethernet all bandwidth	£	(ux)	(sx)	£	x.xx	x.xx	x.xx
External other ethernet all bandwidth	£	(ux)	(sx)	£	x.xx	x.xx	x.xx

Excess Construction Charges

Internal Excess Construction Charges	£	(ux)	(sx)	£	x.xx	x.xx	x.xx
External Excess Construction Charges	£	(ux)	(sx)	£	x.xx	x.xx	x.xx

Other Services

Service 1 Internal	£	y x	£	£	x.xx	x.xx	x.xx
Service 1 External	£	y x	£	£	x.xx	x.xx	x.xx
Service 2 Internal	£	y x	£	£	x.xx	x.xx	x.xx
Service 2 External	£	y x	£	£	x.xx	x.xx	x.xx

£

(sx) This service comprises a number of individual prices as indicated by the value of x
 (ux) This service comprises a number of individual volumetrics as indicated by the value of x

Key

Service which has amalgamated other services
 Service which has been amalgamated into other services
 New services reported in the year



Legal Tests

- 3.9 In order to implement these changes Ofcom will have to modify Direction 4 under SMP condition OA2. We have set out how we have satisfied the relevant legal tests under the Act in order to implement these changes at Annex 6.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 5 March 2012**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <https://stakeholders.ofcom.org.uk/consultations/bt-kcom-financial-reporting/howtorespond/form> as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email david.brown@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- David Brown
Floor 4
Competition Finance
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4103
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact David Brown on 020 7981 3718.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your

response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/account/disclaimer/>

Next steps

- A1.11 Ofcom has published guidelines on how it manages the way it consults (Consultation Guidelines)⁸, which include guidance on how Ofcom determines the period for which it will consult.
- A1.12 Taking into account: (i) the nature and limited extent of the proposed changes⁹; (ii) the impact assessment of our consultation proposals¹⁰; and (iii) the Consultation Guidelines, we have decided a period of one month presents BT, and other stakeholders, sufficient time in which to respond to our consultation proposals.
- A1.13 Following the end of the consultation period, Ofcom intends to publish a statement as soon as practicable.
- A1.14 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.15 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.16 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.17 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

⁸ How will Ofcom consult, Ofcom Consultation Guidelines, published November 2007 (<http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>). For more information please see our consultation principles in Annex 2.

⁹ See Section 3 above.

¹⁰ The impact assessment, as defined in section 7 of the Act, of our consultation proposals is set out in Sections 1 to 3 above and Annexes 5 and 6 below.

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401

Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles, set out below in paragraphs A2.2 to A2.8, that it will follow for each public written consultation¹¹:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals (so-called Category 1 consultations). For consultations which fall within one or more of the following, the time period for consultations is one month (so-called Category 3 consultations):

- detailed technical issues;
- where there is a need to complete the project in a specified timetable because of market developments or other factors which require the project to be concluded within a short period;
- the issue has already been the subject of a consultation;
- a proposal will have only a limited effect on a market;
- a proposal is only a limited amendment to existing policy or regulation.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

¹¹ How will Ofcom consult, Ofcom Consultation Guidelines, published November 2007 (<http://stakeholders.ofcom.org.uk/consultations/how-will-ofcom-consult>).

After the consultation

- A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

☐

Name

Signed (if hard copy)

Annex 4

Consultation questions

A4.1 Questions requiring responses by 5pm on 5 March 2012.

Question 1: Do you agree with Ofcom's proposal to disclose EAD services information for connections and rentals by bandwidth?

Question 2: Do you agree with the proposed change to amalgamate reporting for WES connections in the AISBO market?

Annex 5

Impact Assessment

Introduction

- A5.1 The analysis presented in this annex, sections 1 to 3 above and in Annex 6, represents an impact assessment, as defined in section 7 of the Act.
- A5.2 You should send any comments on this impact assessment to us by the closing date for this consultation. We will consider all comments before deciding whether to implement our proposals.
- A5.3 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on our website:
http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

The citizen and/or consumer interest

- A5.4 The consultation relates to proposed minor changes to the regulatory financial information prepared by BT. Ofcom requires regulatory financial information in order to monitor and enforce various obligations that are placed on providers in markets where they are found to have significant market power. The regulatory financial reporting regime also provides confidence to the industry that certain ex-ante obligations are being effectively monitored and enforced.
- A5.5 As set out in Section 3 above, these proposals are detailed technical changes and represent only a limited amendment to existing regulation. In and of themselves they will, in Ofcom's view, have only a limited effect on the markets to which BT's regulatory financial reporting obligations apply. However, they are designed to improve transparency of reporting and our ability to monitor the obligations on BT, which are there to prevent abuse of their market position which could have a negative impact on consumers. Therefore to the extent that an effective financial reporting regime in the round contributes to a competitive telecommunications market, there will be a benefit to citizen and consumers.

Ofcom's policy objective

- A5.6 As set out above, the purpose of this consultation is to propose minor changes to the regulatory financial information prepared by BT. This is to facilitate our monitoring of BT's regulatory financial reporting obligations. To this effect, as set out in Section 3 above, we are proposing to allow for greater granularity in reporting EAD services, and to amalgamate WES connections reporting into one line.

Conclusion

- A5.7 Ofcom considers that the proposals and changes set out in Sections 1 to 3 of this document are necessary and appropriate because they represent amendments and enhancements required to maintain the relevance and usefulness of the financial statements. Given that the greater granularity of AI services reporting is at the level at which BT already collects cost and revenue information, Ofcom does not expect the proposals to result in a significant incremental cost to BT.

Annex 6

Legal Tests

Introduction

- A6.1 This annex sets out how Ofcom has satisfied the legal tests¹² for its proposals to amend the regulatory financial accounting obligations applying to BT, as set out earlier in this consultation document.
- A6.2 As set out in Section 3 above, in order to implement our proposed changes, Ofcom will need to modify Direction 4 under SMP condition OA2. For this purpose we show how our duties have been met under sections 3, 4, 4A and 49(2) of the Act.
- A6.3 We also show how the statutory procedures for domestic and EU consultations for the modification of directions that give effect to SMP obligations, as set out under section 49A and 49B of the Act, do not apply. The paragraphs below should be read in the light of relevant considerations and Ofcom's conclusions as set out above in this consultation document.

Sections 3, 4 and 4A – general duties, the six Community requirements and the duty to take account of European Commission recommendations for harmonisation

- A6.4 Section 3 of the Act sets out Ofcom's duties in carrying out its functions, in particular that it furthers the interests of citizens in relation to communications and furthers the interests of consumers in relevant markets.
- A6.5 Section 4 of the Act requires that Ofcom acts in accordance with the six Community requirements concerning: the promotion of competition; the development of the European internal market; the promotion of the interests of all EU citizens; non-discrimination; promoting efficiency and sustainable competition and the maximum benefit for consumers; and facilitating service interoperability and securing freedom of choice for consumers.
- A6.6 Section 4A of the Act requires Ofcom to take into account all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive¹³.

Section 49(2) tests

- A6.7 Ofcom has the ability to modify a direction that gives effect to an SMP obligation under section 49¹⁴ of the Act but only where it is satisfied that the tests under section 49(2) have been met. The tests are that the modification of the direction is:
- a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;

¹² Including changes to the relevant sections of the Act that took effect on 26 May 2011.

¹³ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common framework for electronic communications and services (OJ L 108 24.04.2002, p33), as amended,

¹⁴ As amended by the Electronic Communications and Wireless Telegraphy Regulations 2011/1210.

- b) not unduly discriminatory against particular persons or against a particular description of persons;
- c) proportionate to what it is intended to achieve; and
- d) transparent in relation to what it is intended to achieve.

Sections 49A and 49B

- A6.8 Sections 49A and 49B set out the relevant procedures that must be followed for domestic and EU consultations respectively on proposals to modify directions. Section 49A applies where the proposals are for the purposes of:
- a) an SMP apparatus condition¹⁵; or
 - b) any other condition set under section 45 where what is proposed would, in Ofcom's opinion, have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which Ofcom has functions under Chapter 1 of Part 2 of the Act¹⁶.
- A6.9 Section 49B applies where the proposals are of EU significance. Section 150A(2) sets out the cumulative criteria that must be satisfied in order for a proposal to be of EU significance.

Disclosure of AISBO Services

Section 3, 4 and 4A

- A6.10 As part of the relevant EU market review process Ofcom has imposed wholesale cost accounting and accounting separation obligations (conditions and directions) on BT in specific identified markets as appropriate remedies to its SMP in these markets. The relevant individual market reviews determined that these regulatory accounting obligations met the tests outlined in Sections 3 and 4 of the Act. The proposed changes to Direction 4 under SMP condition OA2 are designed to enable BT to more effectively and efficiently fulfil the purpose for which these particular obligations were imposed (i.e. demonstrate cost orientation and non-discrimination) by disclosing AISBO services in a way that aligns with the charges levied by BT on the other communication providers. In consequence Ofcom believes the proposed amendments to Direction 4 under SMP condition meet the tests in Sections 3 and 4.
- A6.11 In proposing the changes to Direction 4 under SMP condition OA2, Ofcom has also taken into account all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive, in particular Commission Recommendation of 19 September 2005 on accounting separation and cost accounting systems under the regulatory framework for electronic communications¹⁷.

¹⁵ See section 49A(1)(a).

¹⁶ See section 49A(1)(b).

¹⁷ OJ L 266 11.10.2005, p64. This recommends, amongst other things, that "a national regulatory authority, when assessing the features and specifications of the cost accounting system, reviews the capability of the notified operator's cost accounting system to analyse and present cost data in a way

Section 49(2) tests

Objectively justifiable in relation to the networks, services, facilities, apparatus or directions to which it relates

- A6.12 Ofcom considers that modifying Direction 4 under SMP condition OA2 in the manner described in paragraphs 3.2 to 3.10 and Annex 10 is objectively justifiable. We are proposing reporting for certain services at a greater degree of granularity and amalgamating the reporting of certain low revenue services. This is consistent with forecast growth of revenues for these services. The modification would therefore allow us better to monitor that BT is complying with its non-discrimination and cost orientation obligations in this particular market, and is necessary for that purpose.

Not unduly discriminatory against particular persons or against a particular description of services

- A6.13 Ofcom considers that modifying Direction 4 under SMP condition OA2 in the manner described in paragraphs 3.2 to 3.10 and Annex 10 is not unduly discriminatory. BT is the only communications provider with SMP in the AISBO market which provides the relevant (or similar) services externally. KCOM, the only other communications provider with similar obligations, does not provide these or similar services externally.

Proportionate to what it is intended to achieve

- A6.14 Ofcom considers that modifying Direction 4 under SMP condition OA2 in the manner described in paragraph 3.2 to 3.10 and Annex 10 is proportionate. In proposing to amalgamate the reporting of WES connection services, we are modifying BT's regulatory obligations so that the reporting of many small revenue services does not obscure the focus on the main reported services. EAD revenues have grown and therefore greater granularity of reporting would allow us to monitor more effectively BT's compliance with obligations regarding those services. The extent of BT's obligations would therefore correspond with the purpose and effect of the RFS: to allow us to monitor that BT is complying with its non-discrimination and cost orientation obligations in the relevant market. The proposed modification is, accordingly, no more than necessary for BT to demonstrate compliance with its obligations in the AISBO market as well as providing assurance to market participants that products and services are not being provided on discriminatory terms.

Transparent in relation to what it is intended to achieve

- A6.15 Ofcom considers that modifying Direction 4 under SMP condition OA2 in the manner described in paragraph 3.2 to 3.10 and Annex 10 is transparent. Ofcom is explaining and consulting on this change and has provided background explanatory material and evidence from other projects.

that supports regulatory objectives", and that "national regulatory authorities make relevant accounting information from notified operators available to interested parties at a sufficient level of detail" (see paragraphs 3 and 5 respectively).

Section 49A

- A6.16 Section 49A(1)(a) does not apply because Ofcom is not proposing to modify Direction 4 for the purposes of an SMP apparatus condition. Section 49A(1)(b) does not apply because, on the basis of the impact assessment set out in this consultation¹⁸, in Ofcom's view our proposals would not have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which we have functions under Chapter 1 of Part 2 of the Act.

Section 49B

- A6.17 Section 49B does not apply because our consultation proposals are not of EU significance, as defined under section 150A(2), in particular because in our opinion, given the nature and limited extent of the proposals on which we are consulting and on the basis of the impact assessment set out in this consultation¹⁹, these proposals would not affect trade between Member States²⁰.

¹⁸ As set out in this annex together with Sections 1 to 3 above and Annex 5.

¹⁹ As set out in this annex together with Sections 1 to 3 above and Annex 5.

²⁰ 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 (see section 150A(2)(d)).