



The replicability of BT's
regulated retail business services
and the regulation of business
retail markets
Statement

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Section 1

Summary

Introduction

- 1.1 BT has Significant Market Power (“SMP”) in the retail markets which include exchange line services, inland calls and low bandwidth leased lines. In these markets BT is obliged, amongst other things, to offer services at standard published prices, terms and conditions, and is prohibited from unduly discriminating.
- 1.2 For some time, Ofcom has faced pressure from business users, as well as from BT itself, to allow BT to respond to the demands of individual business customers by offering unpublished bespoke prices for services in business retail markets where BT still enjoys SMP. Ofcom has also been concerned that the requirement to adhere to standard published prices may be muting competition by facilitating price following by BT’s competitors.
- 1.3 Regulation of wholesale markets is intended to facilitate the development of competition in downstream retail markets, by enabling competitors to use BT wholesale services to compete with BT in those retail markets, fairly and on level terms.

Regulation of BT’s retail business services

- 1.4 On 7 September 2005, Ofcom published a consultation document, *Regulation of Business Retail Markets*, (the “September 2005 Business Pricing consultation”) which invited comments on what form regulation of BT’s retail business exchange line services and business inland call services should take when these are deemed to be replicable by BT’s competitors. The preliminary view expressed by Oftel in that document was as follows;
 - where BT’s retail business exchange lines and business inland call services can be replicated by BT’s competitors, BT should be permitted to offer bespoke prices for these services not necessarily available to all comparable customers;
 - bespoke prices should not fall below a price floor which covers transfer charges for network components plus fully allocated retail costs;
 - BT should not be obliged to publish bespoke prices, as this may mute competition by making it easier for competitors to predict BT’s sales strategy;
 - BT would be expected to assess each bespoke price for compliance with the Competition Act and any ex ante safeguard tests, and to demonstrate that it has adequate management systems to ensure such compliance; and
 - these principles can equally be applied to prices offered to larger and smaller businesses but, as a precautionary measure, should initially be limited to prices offered to customers spending more than £1m per year with BT, until BT’s management systems have been adequately tested.
- 1.5 Stakeholders were invited to respond to this proposition by 16 November 2005. Having considered the 14 responses received, Ofcom has concluded that the proposition summarised in paragraph 1.4 above is appropriate and proportionate,

and should be given legal effect when the relevant services are considered replicable.

Mixed service bundles

- 1.6 Ofcom concluded in a preceding statement, *BT's Pricing of Services for Business Customers* published on 27 May 2004 ("the May 2004 Business Pricing statement"), that when BT's retail business exchange line services, inland calls and leased lines are deemed to be replicable, Ofcom should no longer presume that service bundles which mix those services with services from other markets where BT does not have SMP are unduly discriminatory (and, therefore, in breach of the prohibition of undue discrimination referred to in paragraph 1.1 above). The May 2004 Business Pricing statement also concluded that such service bundles should be required to pass an implicit price – cost test. Subsequently the September 2005 Business Pricing consultation, however, expressed the view that where the services from markets where BT has SMP are deemed replicable such bundles should not be required to pass such a test at the individual product level as, in the presence of replicability, competitors should be able to compete to supply the complete service bundle. Stakeholders were invited to comment on this proposition, in addition to the wider proposition set out in paragraph 1.4 above.
- 1.7 Having considered responses to the September 2005 Business Pricing consultation, Ofcom has concluded that the implicit price – cost test need not be applied at the level of individual services in respect of service bundles which mix services from SMP markets with services from other markets, provided that the services have been deemed to be replicable.

Replicability assessment of exchange lines, inland calls and leased lines

- 1.8 The May 2004 Business Pricing statement referred to in paragraph 1.6 above, concluded that BT's business retail exchange line, inland call and leased line services were not replicable. In a subsequent consultation document *Replicability of BT's regulated business services*, published by Ofcom on 20 July 2005 ("the July 2005 Replicability Assessment") Ofcom reconsidered whether these services are now replicable by BT's competitors, typically, by using BT's Wholesale Line Rental ("WLR"), Carrier Pre-Selection ("CPS") and Partial Private Circuit ("PPC") services.
- 1.9 Stakeholders were invited to respond to the July 2005 Replicability Assessment by 14 October 2005. Having considered the 12 responses received, Ofcom has concluded that BT's retail business exchange line and inland call services are still not replicable. Ofcom has concluded, therefore, that the changes to regulation summarised in paragraph 1.4 above should not be triggered at this time.
- 1.10 Ofcom believes, however, that it is feasible for BT to address certain specific deficiencies in its WLR and CPS services and, having achieved that, competitors will be able to replicate BT's retail business exchange line and inland call services. Ofcom has set out these deficiencies in Sections 4 and 5 and summarised them in Section 9 of this Statement.
- 1.11 The July 2005 Replicability Assessment also considered whether BT's PPCs now enable BT's retail low bandwidth leased lines (up to 8Mbit/s) to be replicated. However, as noted in the September 2005 Business pricing consultation, the Universal Service Directive severely limits Ofcom's ability to consent to BT offering unpublished bespoke prices for the minimum set of leased lines (up to 2Mbit/s). Where the market for the minimum set of leased lines is not competitive, National

Regulatory Authorities must impose certain conditions on providers with SMP, including requirements relating to discrimination, cost orientation, transparency and tariffs. Nevertheless, a finding of replicability would remove the presumption that when retail leased lines are included in a service bundle with non-SMP products such service bundles are unduly discriminatory.

- 1.12 Having reviewed responses to the July 2005 Replicability Assessment, Ofcom has concluded that BT's low bandwidth leased lines are still not replicable. Ofcom believes there are a number of issues outstanding with BT's PPC implementation that are a bar to replicability and these are discussed in Section 6 and summarised in Section 9. In addition, Ofcom is concerned that the pricing model used to determine PPC pricing may lead to disparities between the cost base of retail leased lines and of PPCs leading to competition issues with respect to the PPC as an effective remedy to BT's SMP in the market for low bandwidth retail leased lines. Ofcom is therefore proposing to conduct a short review of the PPC pricing model shortly after the publication of this statement. It is possible that the result of this review may indicate that a more thorough review of the leased line market is warranted.

Next steps

- 1.13 Ofcom has concluded that once BT has resolved the issues identified in this document which are a bar to replicability Ofcom should no longer presume that when products, in respect of which replicability is deemed to be possible, are bundled with products from non-SMP markets that such bundles are unduly discriminatory; and that BT be given consent in respect of business exchange line services and inland calls to offer bespoke pricing in offers to customers with an annual spend with BT above £1 million. The form of consent, when given, will be conditional on BT observing the price floor summarised in paragraph 1.4 and will relate to the obligation contained in condition *D3 Requirement to publish charges* (see Annex 2), (imposed on BT on 28 November 2003) to adhere to published prices, terms and conditions unless Ofcom otherwise consents in writing. BT will also continue to be required to comply with relevant ex ante SMP conditions, e.g. undue discrimination, and competition law.
- 1.14 Ofcom anticipates that once BT believes it has resolved the outstanding issues which are a bar to replicability, it will write to Ofcom informing it of this view. Ofcom will then determine whether it believes the outstanding issues have been satisfactorily resolved and, if so, will consult on this view and the draft form of consent. This consultation is expected to last one month and upon its conclusion Ofcom will publish its final statement. For the avoidance of doubt, this consultation will be concerned solely with the issues identified in this Statement.
- 1.15 It is not necessary for BT to wait until the outstanding issues with all three products (CPS, WLR and PPCs) are resolved before informing Ofcom as described in 1.14 above. Each product can be examined separately and the relevant consent published if appropriate.
- 1.16 While the conclusions of this statement relate only to BT, it is Ofcom's view that the principles can equally be applied to Kingston Communications plc in the retail markets where that provider has SMP, and in which it is subject to similar regulatory constraints. Ofcom has not, however, assessed whether the retail services offered by Kingston Communications plc can be replicated in the Hull area where Kingston Communications has SMP.

Section 2

Introduction

European Directives and Ofcom's strategy for regulation of retail markets

- 2.1 The Universal Service Directive provides for National Regulatory Authorities ("NRAs") such as Ofcom to impose ex ante conditions on providers with Significant Market Power ("SMP") in retail markets, but only where the NRA is unable to achieve the objectives set out in Article 8 of the Framework Directive by setting obligations imposed under the Access Directive (in wholesale markets) or Article 19 of the Universal Service Directive (carrier selection and carrier pre-selection). These Article 8 duties include the promotion of competition and the promotion of the interest of citizens. As a competitive market will produce a more efficient outcome than a regulated market, the promotion of competition is central to Ofcom's goal of securing the best deal for the consumer in terms of quality, choice and value for money. For these legal and strategic reasons, Ofcom is obliged to pay close attention to whether existing regulation of retail markets remains appropriate.
- 2.2 Article 18 of the Universal Service Directive, as implemented by Section 92 of the Communications Act 2003 ("the Act"), however, imposes additional duties on NRAs in respect of "the minimum set of leased lines". The minimum set was defined in Commission Decision 2003/548/EC dated 24 July 2003 as digital leased lines of bandwidth 64 kbit/s and 2Mbit/s and certain 2 and 4 wire analogue leased lines. Where an NRA has concluded that a provider has SMP in respect of the supply of any part of the minimum set, it is obliged to impose conditions in accordance with Annex VII to the Universal Service Directive. These conditions include provisions relating to discrimination, transparency and tariffs. The obligation to impose these conditions is not subject to a test of whether by setting conditions in upstream wholesale markets alone the NRA can meet its duties under Article 8 of the Framework Directive, as implemented by Section 4 of the Act, such as the duties to promote competition or the interests of citizens. Ofcom is currently constrained, therefore, in its ability to withdraw from, or significantly lighten, regulation in respect of retail low bandwidth leased lines while BT retains SMP and this document does not, therefore, consider allowing BT to offer unpublished bespoke prices for low bandwidth leased lines.
- 2.3 It should be noted that even if BT is permitted to offer unpublished bespoke prices, it would remain obliged, under Condition 10 of the General Conditions of Entitlement¹ which apply to all providers, to publish its standard prices for all Publicly Available Telephone Services, which services include business retail exchange lines and inland calls (but not retail leased lines if these are not deemed to be Publicly Available Telephone Services). The general obligation to publish prices explicitly excludes bespoke prices and individual prices and tariffs.

Regulation of BT today

- 2.4 BT has been designated as having SMP in the retail markets for the supply of exchange line service (analogue, ISDN2 and ISDN30) and inland calls to business

¹ http://www.ofcom.org.uk/telecoms/loi/g_a_regime/gce/gcoe/

users, and also in the markets for the supply of low bandwidth leased lines. A full list of these exchange line and calls markets is contained in Annex 1.

- 2.5 In the markets for business exchange lines and business inland calls, BT is currently subject to SMP conditions relating to price publication and undue discrimination. It is obliged to publish its charges, terms and conditions, and publish and notify to Ofcom any amendment within 24 hours of that amendment coming into force. BT is explicitly prohibited from departing from those published prices. The conditions relating to undue discrimination prohibit BT from unduly discriminating against particular persons or classes of person in relation to the services offered. These conditions are attached at Annex 2.
- 2.6 Additional conditions apply to the retail leased lines market, reflecting the obligations imposed on NRAs by the Universal Service Directive to impose specific conditions.
- 2.7 Where an SMP supplier, such as BT, is not obliged to offer uniform prices to all broadly comparable customers, and adequate safeguards are not in place, it may selectively cut the prices which it offers to customers for which it faces a degree of competition, while maintaining high prices in areas of weak or non-existent competition. Smaller competitors may find it very difficult to compete and market entry may be foreclosed. Acceptance of this outcome is unlikely to be consistent with Ofcom's statutory duty to promote competition. Ex ante conditions can address this concern by prohibiting the dominant provider from offering targeted prices. For this reason, BT is currently subject to the conditions referred to in paragraph 2.5 above.
- 2.8 If, however, competitors are able to replicate BT's retail services throughout a market, by relying on the use of BT's wholesale services, then the scope for BT to target selective price cuts in a way which would damage competition may be much reduced, even though BT may continue to have SMP. This is because attempts to raise prices in order to recover a high proportion of costs in areas of low or non-existent competition, while reducing prices in areas of stronger competition, could be matched by other operators using fit-for-purpose wholesale products. In these circumstances it may no longer be necessary to prohibit BT from offering bespoke retail prices, as the competition enabled by replicability may be sufficient to prevent variations in prices foreclosing market entry. Customers would then benefit from BT's ability to offer bespoke prices and services in response to specific needs, and from competitors' renewed vigour in competing with BT in an environment where the level of any bid which may be offered by BT is more difficult to predict.

Assessment of replicability

- 2.9 On 20 July 2005 Ofcom published a consultation document *Replicability of BT's regulated retail business services*² ("the July 2005 Replicability Assessment") in which it considered whether the Carrier Pre-Selection ("CPS"), Wholesale Line Rental ("WLR") and Partial Private Circuits ("PPCs") wholesale services offered by BT enable business inland calls, business exchange lines and low bandwidth leased lines respectively to be replicated by BT's competitors. That document also reiterated that, if and when business calls and exchange lines become replicable then, as had been concluded in the preceding statement *BT's pricing of services for business*

² http://www.ofcom.org.uk/consult/condocs/bt_retail/

*customers*³ published by Ofcom on 27 May 2004 (“the May 2004 Business Pricing statement”), Ofcom would no longer presume that service bundles which mix these services with services from markets where BT does not have SMP are unduly discriminatory, provided that prices for these bundles are published and made available to all broadly comparable customers, and provided that the bundle price meets certain economic tests. Ofcom invited interested parties to comment by 30 September 2005 on whether business inland calls, business exchange lines and low bandwidth leased lines are now replicable.

- 2.10 Having reviewed responses to the July 2005 Replicability Assessment, Ofcom has set out its conclusions, concerning the existence of replicability, in Sections 4, 5 and 6 below.

Future regulation of BT in business retail markets

- 2.11 On 7 September 2005, Ofcom published a further consultation document, *Regulation of business retail markets*⁴, (“the September 2005 Business Pricing consultation”), in which Ofcom considered whether, if BT’s retail business exchange line services and business inland call services are capable of being replicated by competitors using BT’s WLR and CPS services, BT should be permitted to compete by offering unpublished bespoke prices (in addition to published mixed service bundles as was concluded in the May 2004 Business Pricing statement). The possible impact of replicability on retail markets where BT continues to enjoy SMP, was explored in Section 4 of the September 2005 Business Pricing consultation, where Ofcom observed that replicability goes some way to addressing the problem of targeted price cuts by enabling competition to be more uniform.

- 2.12 The September 2005 Business Pricing consultation set out the following proposal:

- where BT’s retail business exchange lines and business inland call services can be replicated by BT’s competitors, BT should be permitted to offer bespoke prices for these services not necessarily available to all comparable customers;
- bespoke prices should not fall below a price floor which covers transfer charges for network components plus fully allocated retail costs;
- BT should not be obliged to publish bespoke prices, as this may mute competition by making it easier for competitors to predict BT’s sales strategy;
- BT would be expected to assess each bespoke price for compliance with the Competition Act and any ex ante safeguard tests, and to demonstrate that it has adequate management systems to ensure such compliance; and
- these principles can equally be applied to prices offered to larger and smaller businesses but, as a precautionary measure, should initially be limited to prices offered to customers spending more than £1m per year with BT, until BT’s management systems have been adequately tested.

³ http://www.ofcom.org.uk/consult/condocs/pricing_business_customers/ofcom_statement/

⁴ <http://www.ofcom.org.uk/consult/condocs/busretail/>

Pressure for change

- 2.13 The September 2005 Business Pricing consultation noted that, in addition to the requirements of European Directives to place reliance where possible on regulation of wholesale rather than retail markets, Ofcom's statement dated 23 June 2005 on its Telecoms Strategic Review ("TSR") also placed strong emphasis on the delivery of wholesale services which are intended to enable competition to develop in retail markets, and looked forward to a progressive loosening of the current complex and intrusive mesh of regulation as competition becomes increasingly effective. Leading on from the TSR Ofcom accepted a number of Undertakings pursuant to the Enterprise Act 2002⁵ ("the Undertakings") which embodied the concepts of equivalence within the context of wholesale products provided by BT to both its own downstream retail divisions and to other service providers. The implications of the Undertakings for the products which are the subject of the July 2005 Replicability Assessment are explored in the remainder of this Statement.
- 2.14 Furthermore, for several years, some of the UK's largest businesses, have lobbied Ofcom, and Oftel before it, to remove regulation which prevents BT from engaging with them to negotiate the price and other aspects of services in markets where BT has SMP. To an extent, the situation was eased when the UK implemented the new European Directives in July 2003. One of the outcomes of the process to identify and review markets afresh was a significant narrowing of the scope of retail regulation to the core exchange lines, inland calls and low bandwidth leased lines services; under the old regime BT had been obliged to publish and adhere to standard prices for almost all telecommunications services. Nevertheless, regulation still prevents these customers from negotiating with BT in respect of exchange lines, inland calls and low bandwidth leased lines.
- 2.15 As noted in the September 2005 Business Pricing consultation, it has been claimed by BT that obligations to publish and adhere to standard prices may enable a degree of price following by competitors, resulting in a muting of competition. Ofcom too recognises that greater uncertainty about the prices which a large competitor may offer, subject where necessary to safeguards to prevent anti-competitive pricing, is likely to stimulate other suppliers to compete more vigorously when bidding for business. This outcome would be advantageous to customers.
- 2.16 There is also strong anecdotal evidence that telecommunications services are increasingly being purchased by larger businesses as part of a much wider IT requirement within which the telecommunications component, particularly that part which relates to legacy PSTN services, may be relatively small. Where BT, and other UK telecoms suppliers, are facing retail competition from large IT systems integrators at home and abroad, ex ante regulation which requires adherence to a standard published price list may have little value for customers or competitors and may serve only to impose a layer of bureaucracy on the way in which certain prices within the overall package are presented.
- 2.17 Responses to the September 2005 Business Pricing consultation are summarised in Section 7 below. Having reviewed those responses, Ofcom has set out in Section 8 below its conclusions concerning changes to the way BT is regulated in retail business markets where it has SMP.

⁵ <http://www.ofcom.org.uk/telecoms/btundertakings/btundertakings.pdf>

Section 3

Replicability criteria

Background to the July 2005 Replicability Assessment

- 3.1 BT has SMP in the retail markets which include exchange line services, inland calls and low bandwidth leased lines. In these markets BT is obliged, amongst other things, to offer services at standard published prices, terms and conditions, and is prohibited from unduly discriminating. The May 2004 Business Pricing Statement concluded that when these services are deemed to be replicable, it should no longer be presumed that when BT offers service bundles that bundle these services with other services (including services from markets where BT does not have SMP) that such bundling is unduly discriminatory, and that consent should be given to BT to offer bespoke offers the prices of which do not need to be published subject to certain specified criteria. However the May 2004 Business Pricing Statement also concluded that none of these services were yet replicable.
- 3.2 In the July 2005 Replicability Assessment Ofcom reassessed the replicability of the services from markets where BT has SMP. Ofcom received 12 responses to the consultation from: BT, Cable & Wireless, Centrica, COLT, Energis, MCI, Scottish & Southern Energy, Telewest, United Kingdom Competitive Telecommunications Association ("UKCTA"), Viatel, Your Communications and one other respondent who wished to remain anonymous

Responses to the consultation

- 3.3 Question 1 of the July 2005 Replicability Assessment asked respondents whether they believe that the tests set out in the October 2003 consultation and May 2004 statement remain the correct tests to use when assessing whether the presumption of undue discrimination for bundled offers of SMP and non-SMP services should be removed or whether the Undertakings mean that some tests are no longer necessary. This question was also addressed in the September 2005 Business Pricing consultation and responses to it are considered in Sections 7 and 8.

Replicability criteria

- 3.4 In order for a product or service to be considered replicable, it must be commercially and technically capable of being replicated by competitor Communications Providers ("CP"s) to BT making it possible for effective competition to take place, with other CPs able to provide a service, which from the point of view of consumers, is comparable to that offered by BT. The precise requirements of replicability will depend on the circumstances under consideration and the context in which the assessment is being made.
- 3.5 It should be noted that a finding of replicability is not the same as concluding that a market is competitive or that regulation is no longer justified at the retail level. The effects of having wholesale products that allow competitors to provide comparable levels of service to BT's retail activities take time to percolate through to the retail markets, affect BT's position of strength in those markets and, hence, its ability to distort competition.
- 3.6 In order for competitors to be able to compete with BT in retail markets, it is necessary for them to have access, either via their own networks or through access

to BT's network, to the wholesale components that enable those retail products to be provided.

- 3.7 Any assessment of replicability needs to take account of the ability of competitors to compete on a national basis. BT's ubiquitous coverage means that competitors whose networks are more limited in geographical scope cannot rely only on their own networks to provide the necessary wholesale inputs to enable retail products to be replicated as these networks are unlikely to enable comparable coverage to be provided. Ofcom has, therefore, considered the extent to which the wholesale products made available by BT will enable competitors to replicate BT's retail products.
- 3.8 In considering whether a product group is replicable, it is first necessary to assess what components are required to enable the provision of the retail products in that group and then whether they have been made available by BT in the form of a cost oriented wholesale product. Once the wholesale products have been identified, it is then necessary to consider whether they are the same or comparable to those provided to BT's retail activities.
- 3.9 As discussed above, simply having the technical products or components necessary to create a retail product to compete with BT is not, in itself, sufficient to ensure an ability to compete. Competitors must also be able to offer, for example, comparable delivery times, quality of service, customer guarantees and compensation ("the service wrap"), as these elements affect the quality of the product received by consumers and, therefore, the commercial attractiveness of the product. The wholesale products or components obtained from BT must therefore come with a comparable service wrap that enables a competitor to be able to offer retail products which are commercially comparable to those from BT in terms of both quality and price. It should be noted that the focus of this consultation is solely on the replicability of BT's retail business products and not its retail residential products, which would require a different service wrap and the consideration of other factors.
- 3.10 Competitors must, therefore, have access to the wholesale products and components on a comparable basis to that which BT's retail activities have access to the same or similar components. In the July 2005 Replicability Assessment Ofcom considered retail business calls, exchange lines and retail leased lines individually, looking at the wholesale products and components that BT has made available to competitors, identifying any issues that remained outstanding as regards these products and assessing whether they meant that the retail products were sufficiently replicable to remove the presumption of undue discrimination when such products are bundled with other retail business products.
- 3.11 In Question 2 of the July 2005 Replicability Assessment respondents were invited to comment on Ofcom's proposed criteria for assessing whether BT's retail business products are replicable.

Responses to the consultation

- 3.12 In its response, BT accepted the principles cited by Ofcom in considering the criteria as to whether a product group is replicable and noted that it believes it has translated these into the undertakings subsequently accepted by Ofcom. It further accepted that replicability is an ongoing concept but felt that it was important to ensure there is a clear and unambiguous system with regard to this point so that:

“...on the one hand Communications Providers may feel secure that there is a continuing equivalence, on the other hand BT and Ofcom are not subjected to a series of frivolous complaints that spark a significant amount of additional and unnecessary work”.

- 3.13 UKCTA were concerned that it was not sufficiently clear how replicability will be judged where the product BT self supplies is different to the regulated product, or where different systems and processes are used to support that product. UKCTA believe that Ofcom appears to rely on “materiality” but do not adequately explain how materiality is measured. Another concern of UKCTA is that of cumulative materiality.

Ofcom’s response

- 3.14 Ofcom does not believe that Equivalence Of Inputs (“EOI”), as defined in the Undertakings, is a pre-requisite for replicability. Equivalence is important and shapes how the competitive market will operate after the Undertakings have been implemented but a product can be replicable without being provided in exactly the same way internally to BT’s downstream retail divisions and externally to other CPs.
- 3.15 It is Ofcom’s view that when a wholesale product has been supplied by BT that adequately meets the criteria necessary, such that other CPs can replicate both technically and commercially BT’s retail product, then the product is replicable. The method for assessing replicability was described in the July 2005 Replicability Assessment and the result of assessing replicability is contained within this statement. It is Ofcom’s view that cumulative materiality is only relevant within the context of each product and that it is addressed by considering together all the issues with that product that have been identified through this exercise. Ofcom has done this in Sections 4, 5 and 6 of this statement.
- 3.16 Ofcom believes that it is necessary to ensure a framework is in place to ensure that BT maintains replicability but enforcement of equivalence is a matter for the Undertakings. Ofcom believes that the appropriate framework is already in place through BT’s obligations not to unduly discriminate and CPs who suspect that replicability is no longer possible are able to raise their complaints with Ofcom.

Section 4

Retail fixed line telephony calls

Overview

- 4.1 As noted in Section 3 above, the markets covering retail business fixed line telephony calls are among those in which regulation has been imposed at the retail level.
- 4.2 In its review of fixed narrowband retail services markets, Oftel⁶ identified four different business call markets in which BT was found to have SMP and imposed non-discrimination and price notification obligations on BT in these markets:

Calls originating in the UK (excluding the Hull area)

Business local calls

Business national calls

Business calls to mobiles

Business operator assisted calls

- 4.3 In addition to the retail call markets, Oftel also assessed the upstream markets that provide inputs into these retail markets and identified five main components required for calls to be provided (see Figure 1 below):
- call origination;
 - local-tandem conveyance and transit;
 - inter-tandem conveyance and transit
 - single transit; and
 - call termination.
- 4.4 Oftel identified each of these components as forming a separate market⁷ and concluded that BT had SMP in the first four markets (call origination, local-tandem conveyance and transit, inter-tandem conveyance and transit, single transit) and that each operator held SMP for call termination on its own network. Ofcom has subsequently carried out a further assessment of local-tandem conveyance and inter-tandem conveyance and transit markets as part of its review of BT's network charge controls⁸. In this publication Ofcom published its decision to completely deregulate inter-tandem conveyance and transit and to loosen regulations on local-tandem conveyance. It is therefore necessary for other CPs to have access to call origination, local-tandem conveyance and transit, single transit and call termination

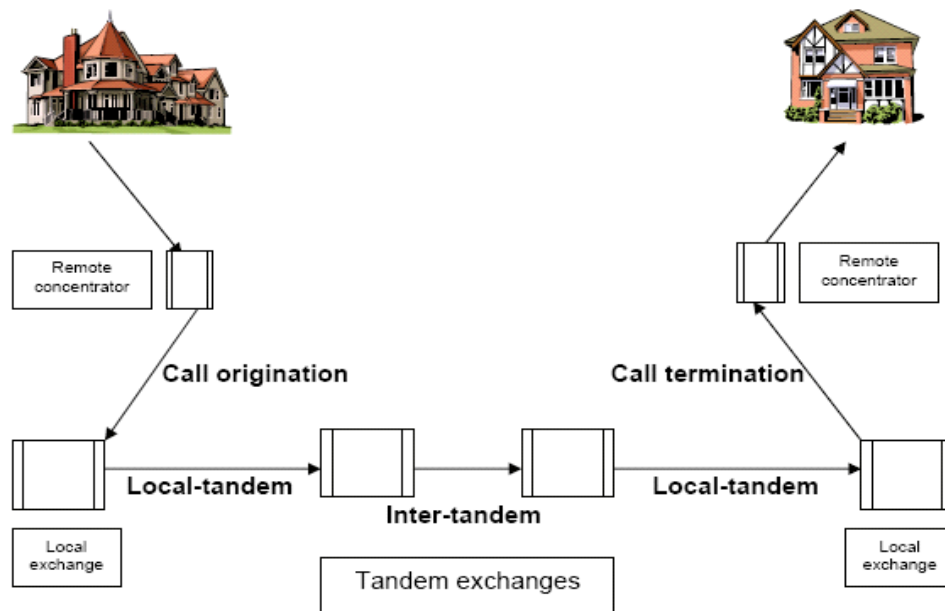
⁶ Ofcom assumed the responsibilities of Oftel on the 29 December 2003.

⁷ See Annex 1 for details of the markets.

⁸ <http://www.ofcom.org.uk/consult/condocs/charge/statement/>

(on BT's network) to compete at the retail level with BT in the provision of calls to business customers.

Figure 1: call components



- 4.5 As a result of finding that BT had SMP in the call origination market, Of tel obliged BT to make available to its competitors a CPS service to enable competition to develop in the downstream retail calls markets.
- 4.6 CPS is a mechanism that allows users to select, in advance, alternative communications providers to carry their calls without having to dial a prefix. The customer subscribes to the services of one or more CPS operators ("CPSO"s) and chooses the type of calls (international calls, national calls or all calls) to be routed through the network of the alternative operator. A customer can override the CPS service at any time by dialling a prefix before the number they wish to dial, as long as they have an agreement with the CPSO to whom the prefix code belongs.
- 4.7 In addition to the CPS service, BT was also required to make available an Indirect Access ("IA") service as a result of the finding that it has SMP in the call origination market described above. IA is a mechanism that allows users to select alternative communications providers to their access line provider on a call-by-call basis by dialling a short prefix before each number they wish to dial.
- 4.8 The obligations imposed on BT require CPS to be provided, at the request of any customer, and that relevant wholesale interconnection facilities be provided to CPSOs on reasonable terms and in accordance with the CPS Functional Specification ("the CPS Functional Specification") as published in Of tel's *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and*

*transit markets*⁹ published on 28 November 2003. The charges for such interconnection facilities must be reasonably derived from the costs of providing those services and the costs must be calculated on a forward looking long run incremental cost approach and allowing an appropriate mark-up for the recovery of common costs including an appropriate return on capital employed.

CPS issues

- 4.9 The CPS Functional Specification establishes some high-level principles for the operation of CPS, including, for example, the different call types covered by different CPS options. It does not however specify in detail how the service should be implemented. There is no IA functional specification and Ofcom considers that it is appropriate to assess whether the CPS product allows replicability, rather than whether or not the IA product allows replicability, as CPS has additional functionality over IA which makes it a better solution for providing a service comparable both technically and commercially to BT's retail business inland calls product.
- 4.10 The detailed implementation of CPS (and to a lesser extent IA) has been determined in practice by extensive discussion in relevant industry groups. The result is a product which has had significant success in the market place, with just under six million CPS-enabled lines as of February 2006, but – as Ofcom identified in the July 2005 Replicability Assessment – in which there were still a number of outstanding issues. In the July 2005 Replicability Assessment Ofcom described those issues which it was concerned may still be a barrier to CPS passing the replicability test for business customers, i.e. in order for CPS operators to be able to replicate the downstream retail business calls services:
- order rejection levels;
 - incompatible services;
 - transfer charges for rejected orders;
 - transfer charges in general;
 - forecasting and forecasting penalties;
 - customer database;
 - churn management;
 - the 'local calls' issue; and
 - CPS performance.
- 4.11 Question 3 of the July 2005 Replicability Assessment asked respondents to comment on whether the outstanding issues in relation to CPS had been correctly identified.

Responses to the consultation

- 4.12 BT stated:

⁹ http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

“In general terms we consider that Ofcom has identified the outstanding issues associated with replicability in CPS for other Carrier Pre-Section Operators (CPSOs). However, some issues do not affect BT Retail and so addressing them would make no difference to how BT Retail would operate; for example transfer charges on rejected orders.”

4.13 UKCTA believed that Ofcom had correctly identified the majority of the remaining outstanding issues but wished for six additional issues to be taken into consideration:

- delivery of Call Data Records (“CDR”s) for CPS Same and Adjacent Digital local exchange (“SAD”);
- CPS SAD call barring issues;
- CPS SAD Outgoing Calls Barred (“OCB”) problem;
- homemover out of exchange area (also known as ‘change of address, new number’);
- bulk migration; and
- FeatureNet transfer process including forecasting.

Ofcom’s response

4.14 Ofcom continues to believe that the July 2005 Replicability Assessment addressed the key outstanding issues but has also investigated the additional issues raised by UKCTA in response to the consultation. The three CPS SAD issues are dealt with in the section below titled ‘The ‘local calls’ issue’, whilst the homemover out of exchange area issue is dealt with in the section below titled ‘Churn management’. The FeatureNet transfer process including forecasting is discussed in the section below on forecasting. The remaining issue of bulk migration is discussed at the end of this section.

4.15 In the July 2005 Replicability Assessment Ofcom described in detail each of the issues it had identified and then proposed its own assessment of the status of the issue and any further work that would need to be completed before the issue could be considered no longer a barrier to replicability. Question 4 asked respondents whether they agreed with Ofcom’s assessment of the replicability of retail business fixed line telephony calls.

4.16 The following sections consider in turn each of the issues identified by Ofcom in the July 2005 Replicability Assessment and discusses each within the context of responses received to the consultation. For each issue Ofcom identifies whether further work is necessary before it will be satisfied that the issue is no longer a barrier to the replicability of retail business fixed line telephony calls. The additional issues raised by UKCTA in their response are also discussed.

Order rejection levels

4.17 Prior to the July 2005 Replicability Assessment, BT’s competitors had expressed concern at the high level of CPS orders that were rejected by BT. Approximately 15% of CPS orders submitted were being rejected and CPSOs believed that this was hampering their ability to compete with BT at the retail level. The main reasons for CPS orders being rejected were ‘invalid telephone numbers’ and ‘postcode matching’ errors, which combined accounted for around 50% of all CPS order rejections.

- 4.18 BT considered that a reduction in the level of rejections could not be made by BT in isolation as the vast majority were the result of sales acquisition processes employed by the CPSOs. BT had suggested that there was a lack of understanding of the limitations of CPS amongst the sales people employed by CPSOs and that the BT gateway was being used as a means of filtering out incompatible or invalid orders.
- 4.19 Invalid telephone number rejections occur where the CPSO submits a number to BT that is either a non-BT telephone number, an exported BT number, an invalid (non-operational) number or a security ring-fenced number. Postcode matching errors occur where the postcode entered by the CPSO does not match the postcode on BT's system that is allocated to the line that the CPSO is seeking to provide service to.
- 4.20 Ofcom acknowledges that not all of the CPS order rejections are within BT's control and that it would be almost impossible to eradicate order rejections completely, but nevertheless considered that the level of rejections at the time of the consultation appeared to be too high. Ofcom's preliminary view was that once an effective pre-validation process had been introduced and the postcode files made available, that the introduction of further measures to reduce order rejection levels can be dealt with on an ongoing basis and should therefore not be a bar to replicability.

Responses to the consultation

- 4.21 In its response BT stated that they had held meetings with CPSOs to discuss what the CPSOs need from a pre-validation process for CPS. The principal issue was that of 'address matching'. BT proposed to address this through an address matching system and through access to the BT address file by 31st December 2005 (an undertakings commitment).
- 4.22 UKCTA, in its response, was concerned that any available tool would be able to resolve the issue of rejections due to invalid numbers and suggested that Ofcom carry out a study to ascertain all the issues relating to such rejections and whether any available tool could resolve them.
- 4.23 On the issue of address matching, UKCTA was in favour of a tool to authenticate address details either at the point of sale or point of order entry either individually or in bulk. UKCTA was in favour of BT's proposal in the Undertakings but felt that its operational effectiveness should be assessed before this could be regarded as no longer a bar to replicability.

Ofcom's response

- 4.24 BT has made available as of 1st January 2006 a stand-alone address matching tool which allows CPSOs to enter an address prior to placing an order and thereby ensure that an order will not be rejected through a mismatched address. Although this tool currently only accepts single entries BT has committed to providing an XML interface to it, for bulk entries, in June 2006. Ofcom understands from BT that as of the middle of January 2006 there were some 67 CPs using the tool on a daily basis.
- 4.25 Whilst Ofcom welcomes the provision of a standalone address matching tool by BT, and it is clearly helping the address matching issue, in Ofcom's view the issue can not be regarded as resolved until a bulk facility is made available. Ofcom therefore proposes that order rejections due to address matching failures continues to be a bar to replicability until the bulk facility is launched.

- 4.26 Unlike post codes, which are associated with the line and it is easy to conceive of circumstances where the end user, BT and the CPSO could have differing records without affecting service, the number attached to the line is something that all parties should have a correct record of. If an incorrect entry is entered on the order then it is Ofcom's view that as BT claims it is likely to be due to deficiencies in the sales process and not a problem with BT's order entry system. Similarly, the majority of other reasons for 'invalid telephone number' are likely to be avoided by efficient sales processes. Ofcom is aware that BT is investigating means of reducing order rejections due to invalid telephone numbers and welcomes such moves, but in light of the foregoing discussion Ofcom considers that the bulk of problems in this area are due to inefficient sales processes used by some CPSOs – and, in some cases, use by CPSOs of the provisioning gateway as an order validation system – and are not therefore a bar to replicability.

Incompatible services

- 4.27 CPSOs had expressed concern that the set of services that are incompatible with CPS, and which therefore result in order rejections, had not been fully specified by BT. The services that are incompatible are, in general, dictated by the CPS Functional Specification and result from regulatory requirements or technical limitations. More recently, some products have been added to the incompatible list at the request of CPSOs, for example schools internet. At the time of the July 2005 Replicability Assessment, BT had advised that it would consider publishing a comprehensive list of retail products that are incompatible with CPS.
- 4.28 In the July 2005 Replicability Assessment Ofcom stated that it believes that a specification listing all incompatible products must be made readily available to CPSOs, and that it must be kept updated, and that once this was done BT's retail call products can be considered to be replicable in this respect.

Responses to the consultation

- 4.29 In its response BT stated that it had published a list of incompatible products¹⁰ and gave a commitment to maintain this document.
- 4.30 In its response UKCTA welcomed BT's offer to provide a list of incompatible products but noted that even with such a list it is not apparent to an end user from their bill whether they have such products present on their line. Also, since it is UKCTA's understanding that BT Retail does not suffer order rejections due to incompatible products they did not see how this could support replicability.

Ofcom's response

- 4.31 It is Ofcom's view that the publication by BT of a list of incompatible products, together with a commitment to keep this list updated, provides CPSOs with the information they need to be able to address this issue with their customers. It is Ofcom's view that the issue which was a bar to replicability was the availability of information as to what is incompatible and not that end users may be unaware of

¹⁰

http://www.btwholesale.com/content/binaries/service_and_support/Network_Resources/cps_documentation/conflicting_and_excluded_products.doc

what products they purchase or that BT appears not to suffer rejections. Ofcom therefore believes that there are no further issues related to incompatible services which are a bar to replicability.

Transfer charges for rejected orders

- 4.32 CPSOs have to pay transfer charges for rejected orders to cover the costs that BT faces in progressing the order to the point that it is rejected. CPSOs were concerned that BT does not appear to face a similar charge when dealing with its retail calls customers.
- 4.33 BT had previously suggested that it does not experience rejected orders as it already has a relationship with the customer for the line and is merely transferring the calls element back to BT. However, Ofcom considered that there will be circumstances in which BT will experience rejected orders. For example, where a consumer has taken a WLR service but decides then to route some of their calls through BT, BT will not have an existing relationship with the consumer and so may experience rejected orders.
- 4.34 Ofcom therefore proposed in the July 2005 Replicability Assessment that BT should face the same transfer charges for rejected orders as CPSOs in circumstances where BT has orders rejected, in order for retail calls to be considered to be replicable.

Responses to the consultation

- 4.35 In its response BT stated that it did not consider that there was a need to introduce transfer charges for BT Retail. It maintained the view that as it had a 'lines and calls' relationship with the end user it has access to "information related to a particular end user installation" and therefore does not experience order rejections. It therefore does not believe it is necessary to impose charges on BT Retail for rejected orders as no such charges will materialise.
- 4.36 UKCTA agreed with BT that in the majority of cases its relationship with the end user means that it does not experience rejected orders and was concerned that Ofcom was requesting BT to commit to something that doesn't happen. UKCTA suggested that CPSOs "should not face charges for rejected orders".

Ofcom's response

- 4.37 Ofcom continues to believe that it is appropriate for BT to recover the costs of progressing an order to the point of rejection, where this occurs as this provides incentives to ensure orders are correctly formatted and validated prior to submission which improves overall process efficiency. Ofcom further believes that there are likely to be cases where BT Retail, like the CPSOs, experiences some level of rejected orders.
- 4.38 Ofcom is content that the transfer charge is correct. Ofcom understands from BT that BT Retail pays transfer charges for orders as of 1 December 2005. BT contends that as it currently places orders directly onto the CSS database it does not suffer rejected orders. However, Ofcom does envisage circumstances where BT Retail might suffer a rejected order and this may become more prevalent in the future with BT Retail's adoption of WLR. Therefore, Ofcom believes that the lack of agreement from BT to the payment by BT Retail of transfer charges for rejected orders – should they occur – is a bar to replicability.

Transfer charges in general

- 4.39 Concern has been expressed by CPSOs as to whether BT faces the same transfer charge as a CPS operator for orders that are successful. For example, if an end-user transfers from a CPS operator to BT's wholesale end-to-end calls service, it is not clear whether a transfer charge is incurred by BT.
- 4.40 Prior to the July 2005 Replicability Assessment, BT advised that it could replicate the transfer charges incurred by CPSOs when their orders are successful for end-user transfers from a CPS operator to BT's wholesale end-to-end calls service and that this would allow for the improved integration of CPS and the wholesale end-to-end calls service, allowing one product to remove the other on migration.

Responses to the consultation

- 4.41 In its response BT stated:

"BT has agreed that BT Retail will incur the equivalent transfer charge as CPSOs on transfers from other operators to BT. The transfer charge will be the transfer charge incurred by CPSOs minus Retail costs, which is the appropriate cost as recognised by Ofcom. Such transfer charges will be implemented with effect from 1st December 2005."

- 4.42 UKCTA stated:

"it should be noted that BT's offer of replicating the charges for transfer between CPS and wholesale calls does not address the issue that no transfer charge exists when customers change from having their calls delivered by CPSO to BT Retail. If BT maintains that this is case, we would request further clarification of BT's internal charging structures to support such assertion."

- 4.43 UKCTA wished to see the principle of equivalent CPS charges extended to all parallel activities.

Ofcom's response

- 4.44 Ofcom welcomes BT's commitment to the payment of appropriate transfer charges by BT Retail in respect of successful orders. It is Ofcom's view that this commitment adequately discharges the concern over payment of a transfer charge when a customer is transferred from a CPSO to BT Retail. BT has clarified the issue by providing, in conjunction with its regulatory accounts, its internal reference offer for the comparable internal product to CPS¹¹ and by offering to update this document in response to comments from industry if this is necessary. Ofcom is of the view that with this commitment being in effect as of 1 December 2005 there are no further outstanding issues related to transfer charges in general which are a bar to replicability.

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http://www.btwholesale.com/content/binaries/service_and_support/contractual_information/docs/nsia/Narrowband_IRO_Issue_22-12-05.doc

Forecasting and forecasting penalties

- 4.45 CPS operators have to submit a forecast of the number of orders they expect to make and have to pay a financial penalty if they deviate from this forecast. BT does not face a similar process in relation to its retail orders. In the July 2005 Replicability Assessment Ofcom stated its view that punitive forecasting regimes are a significant bar to replicability and that BT should be able to show that any forecasting charges applied are no higher than the reasonably incurred costs of BT that result from inaccurate forecasting. Equivalence may not be effective in these circumstances as punitive penalties, even when faced by BT's retail activities, stay within the BT Group.
- 4.46 Prior to the July 2005 Replicability Assessment, BT advised that it was considering the possibility of its retail activities being subject to the same forecasting and penalty regime for transfers back as that used by CPSOs.

Responses to the consultation

- 4.47 In its response BT stated that from the 17th November 2005, BT Retail would submit to BT Wholesale, on a monthly basis, forecasts for the number of orders they expect to receive. BT also stated that BT Retail will also incur the same financial forecasting penalties as CPSOs.
- 4.48 UKCTA agreed with Ofcom that:
- “punitive forecasting regimes are a significant bar to replicability”
- 4.49 UKCTA believed that BT Retail should be subject to the same forecasting and penalty rules as the CPSOs. However, UKCTA also wished for the issue of FeatureNet lines specifically to be addressed as it believed that BT Retail did not have to forecast for new FeatureNet lines and that the CPS forecasting process for FeatureNet was unduly burdensome, acting as a barrier to switching.

Ofcom's response

- 4.50 It is Ofcom's view that forecasting penalties remain appropriate for CPS and Ofcom is content that the forecasting penalties as currently defined are appropriate.
- 4.51 Ofcom notes that BT has committed BT Retail to following the same forecasting processes as CPSOs follow, including the payment of penalties. Ofcom considers that this commitment also covers CPS FeatureNet and would regard the use by BT Retail of different processes as a bar to replicability. Although equivalence does not address the issue of such penalties remaining within the BT Group, Ofcom is content that the organisational separation of BT's upstream and downstream divisions, together with the accompanying incentive arrangements, as defined in the Undertakings ensures that penalties will be applied to BT's downstream divisions by BT Wholesale and that there is an incentive on BT's downstream divisions to minimise such penalties as they will affect the divisions' financial performance.
- 4.52 With the commitment, now in effect, by BT Retail to submit forecasts using the same processes as used by CPSOs, and to pay the same penalties as the CPSOs, Ofcom does not consider there are any further outstanding issues related to forecasting and forecasting penalties which are a bar to replicability.

Customer database

- 4.53 There is a concern that BT's access to data in its customer database gives it a significant advantage over its competitors (in relation to calling patterns, product preferences, price sensitivity, etc.). BT had advised that its retail activities do not have access to data within BT's systems in relation to the calling patterns of CPS customers, though it does have historic calling data for consumers to which it has previously provided service.

Responses to the consultation

- 4.54 In its response BT stated that all its employees are required to follow its internal compliance procedures which guard against inappropriate use of information. This issue was further addressed by the Undertakings relating to the use of confidential information held by one part of BT by another part of BT.
- 4.55 UKCTA was concerned that BT's large customer base gives it an unfair advantage in the analysis of customer spending trends, etc. and to design price plans accordingly and believed that these data should also be made available, on a non-confidential basis, to other CPSOs. It was also concerned that any data regarding the underlying network to which BT Retail has access should also be made available to CPSOs.

Ofcom's response

- 4.56 Ofcom believes that its existing powers under the Communications Act 2003 and the Competition Act 1998 are sufficient to ensure that BT does not inappropriately use information that it holds. Ofcom's Undue Discrimination Guidelines published in November 2005¹² ("the Undue Discrimination Guidelines") make clear that any use of information to favour BT's own retail activities would be considered to be a breach of the obligation not to unduly discriminate against its competitors. Further, the Undertakings cover in detail the use of customer information by BT and the circumstances under which information can be passed between different divisions of BT. Section 5.43 of the Undertakings ensures that the same underlying network information is available to both BT Retail and CPSOs on an equivalent basis.
- 4.57 Ofcom does not agree that BT Retail data on customer spending trends, etc. should be made available to CPSOs as the design of such a system which provides meaningful data whilst protecting customer confidentiality is fraught with difficulty and, in any case, is unnecessary given the non-discrimination obligations on BT referred to above. Ofcom does not believe there are any issues outstanding related to customer database which are a bar to replicability.

Churn management

- 4.58 There is a general view that CPSOs lose customers in situations where BT's retail activities would not do so, due, for example, to the lack of an adequate homemovers process for CPS. CPSOs submitted a Statement of Requirements ("SOR") to BT in relation to churn management but this was rejected on the basis that the cost could not be justified against the identified benefits. BT had asked CPSOs to try and

¹² <http://www.ofcom.org.uk/consult/condocs/undsmpl/statement/>

identify further benefits that would arise from the churn management process in order that a better case could be made for agreeing to the SoR.

- 4.59 In the July 2005 Replicability Assessment Ofcom recognised this issue and stated its belief that the homemovers process made available to CPSOs, and other similar processes, must be comparable to those made available to BT's retail activities in order for BT to be considered not to be unduly discriminating against CPSOs in favour of its own retail activities. Ofcom was of the preliminary view, therefore, that an effective homemovers process for CPSOs must be introduced before retail business calls could be considered to be replicable in this respect.

Responses to the consultation

- 4.60 BT acknowledged in its response that there were problems with churn management and stated that it was committed to a homemovers process for CPSOs.

- 4.61 In its response UKCTA was non-specific on this issue stating:

"We strongly believe there are many areas of churn management that still require addressing prior to a declaration of replicability. We would suggest that Ofcom undertakes a specific project to identify all material advantages that BT Retail currently enjoys."

- 4.62 However, UKCTA did separately raise the issue of a process for a homemover out of the exchange area.

Ofcom's response

- 4.63 BT has committed to implement a homemovers process including change of address, new number (i.e. homemover out of exchange area). Ofcom understands from BT that it plans to launch such a service in September 2006. It is Ofcom's view that once the homemovers process (including change of address, new number) is in place then there will be no further outstanding issues related to churn management which are a bar to replicability.

The 'local calls' issue

- 4.64 An important form of non-equivalence in relation to CPS has in the past been the 'local-calls' problem. BT has historically been able to route local retail calls more efficiently than CPS operators, because it can either route the call directly on the Digital Local Exchange ("DLE") (if both parties are hosted on the same DLE) or by routing it to an adjacent DLE if that DLE is directly connected (as many are). In both scenarios it is not necessary to route the call into the core network or via a point of interconnection with another network as was necessary for a CPSO.
- 4.65 This issue was addressed by the introduction of the CPS SAD Calls product¹³. This required local calls to be routed in the same way as is done for BT's retail services, but only for those operators that have points of interconnection at BT DLEs. Additionally, CPSOs are concerned that the introduction of BT's 21st Century Network ("21CN") may lead to changes in BT's network architecture that mean that

¹³ http://www.ofcom.org.uk/consult/condocs/cps_option/cps_statement/

DLE interconnection is no longer feasible or commercially sustainable. BT had suggested that this is a policy issue in relation to interconnection on 21CN and that it should be addressed through the wider debates on the subject with Ofcom and the industry, rather than through the consideration of retail business call replicability.

- 4.66 In the July 2005 Replicability Assessment, Ofcom stated its view that the CPS local calls product is sufficient to ensure replicability, as long as it continues to be practical to interconnect at BT DLEs. However, if DLE interconnection ceases to be available on commercially sustainable terms, and no other form of local interconnection replaces it, then Ofcom's view is that CPS would no longer be regarded as supporting replicability.

Responses to the consultation

- 4.67 In its response BT stated that it was of the view that the CPS local calls product was sufficient providing some form of local interconnection is available. It maintained that the issue of local interconnection in 21CN was under discussion with industry.

- 4.68 Many respondents agreed with Ofcom that the issue of the future of local interconnection is an important one which needs to be addressed. Some also mentioned a number of other issues which they had identified. These were summarised by UKCTA and Your Communications who referred to three CPS SAD issues they had identified and which they believed needed further consideration:

- delivery of CDRs for CPS SAD;
This is the contention that CPS SAD CDRs are not made available until up to 48 hours after the billing event whereas the equivalent local call CDRs are available to BT Retail in "virtually real time". They contend that this does not represent replicable billing capabilities.
- CPS SAD call barring issues; and
This is the contention that BT Retail has the ability to apply call barring – to facilitate debt management – at the network level which would also apply to SAD calls. A CPSO in contrast can apply a call bar at the level of its own network but is unable to effect a call bar at the SAD level thereby allowing SAD calls to continue to be made.
- CPS SAD call OCB problem.
This is the contention that if a customer line has outgoing calls barred (OCB) enabled then some CPS SAD calls may fail as may some other calls due to the "OCB SAD call incompatibility". The inability of the CPSO to detect whether a line has OCB on it can lead to customer support issues.

- 4.69 UKCTA went on to say:

"Given the financial advantages that the CPS SAD product offers CPS operators, we believe that the relatively low uptake of the product is a strong indication that the product is not fit-for-purpose in that it does not meet the requirements laid down in Ofcom's CPS SAD Direction."

Ofcom's response

- 4.70 Ofcom remains of the view that the SAD product as defined in Ofcom's July 2004 publication *Addressing the local call disadvantage* provides an appropriate solution to the local calls issue as long as it continues to be practical to interconnect at BT DLEs. It is Ofcom's view that an assessment of replicability today cannot be predicated on future network architecture and therefore believes that it is sufficient to

assert that the issue of replicability in this area may need to be re-assessed in the light of architectural changes due to BT's migration to the 21CN.

- 4.71 Billable quality CPS SAD CDRs are required to be made available to CPSOs each day although Ofcom understands from CPSOs that in some cases it can take up to 48 hours for CDRs to be delivered and that quality is inconsistent. Ofcom understands from BT that CDRs for BT Retail are fed into the BT Retail billing mediation systems on a regular basis throughout the day. It is Ofcom's view that this could place CPSOs at a disadvantage and that the inadequate timing and quality of CPS SAD CDRs is a bar to replicability and will remain so until BT is able to provide its CPS customers with regular daily feeds of billable quality CPS SAD CDRs.
- 4.72 Ofcom recognises that there may be issues with respect to call barring but considers that this is unlikely to represent a material disadvantage to CPSOs, particularly once the delivery of CPS SAD CDRs is improved in accordance as described above. In its July 2004 publication *Addressing the local call disadvantage* Ofcom stated its intention that billing issues in respect of SAD should be resolved by the Service Provider Forum ("SPF"). In February 2006, the SPF was superseded by the WLR / CPS Commercial Group, an industry-led forum. However, as the Commercial Group covers the same issues as the SPF, Ofcom considers that this group is the appropriate place for the discussion of proposals to address issues related to CPS SAD.
- 4.73 Ofcom is of the opinion that CPS SAD CDR availability represents a bar to replicability and believes that the WLR / CPS Commercial Group is the appropriate place for a solution to be agreed.

CPS performance

- 4.74 It is important that the operational performance of CPS is sufficient to allow CPS operators to compete with BT's retail activities. BT currently publishes a number of Key Performance Indicators ("KPI"s) on a voluntary basis, including:
- the percentage of BT handshakes sent within one hour of the CPS Operators file being received;
 - the percentage of electronic orders accepted or rejected within one day of receipt;
 - the percentage of orders switched on the switchover date; and
 - the percentage of orders that are rejected.
- 4.75 Prior to the July 2005 Replicability Assessment, CPSOs were concerned that the Service Level Agreement ("SLA") targets were not particularly demanding, being typically set at the 90% level, and were concerned that no target had been set for the percentage of orders that are rejected.
- 4.76 BT had proposed increasing the SLA targets from 90% to 98%, but had rejected the suggestion that an SLA on rejection levels was appropriate. BT argued that rejection levels are outside of BT's control and that, as such, it is not appropriate to impose an SLA. BT suggested that no other product offers rejection level SLAs.
- 4.77 In the July 2005 Replicability Assessment Ofcom stated the view that it accepts BT's argument that the level of CPS order rejections is not entirely within its control and that it would not be appropriate to impose an SLA on BT in relation to order rejections. However, Ofcom sought the views of respondents as to whether they

believe that the new SLA levels proposed by BT are sufficiently challenging as to ensure that CPSOs receive the appropriate level of service or are compensated where the service level fails to meet the SLA, and therefore there is replicability in this respect.

Responses to the consultation

4.78 In its response BT stated:

“Industry has been presented with new CPS Gateway SLAs increasing the targets from 90% to 98% and has been using the new targets in the August KPIs submitted to Ofcom and industry. The latest figures show that BT has exceeded the new targets of 98%.”

4.79 UKCTA maintained in its response that even 98% was not sufficient to create a level playing field with BT Retail and wished to see “99.99% service levels with appropriate and automatic service level guarantees for failure to meet those service levels”. UKCTA was also of the view that “the systems and processes BT Retail uses to instigate voice service are near instantaneous, whereas the CPS process has been designed with an inherent time lag”.

Ofcom’s response

4.80 Ofcom has been informed by BT that the CPS Gateway availability is typically 99% and BT has a commitment to investigate any incident which leads to it falling below that figure. However, this does not amount to an SLA commitment of 99% and BT are unwilling to make such a commitment. It is Ofcom’s view that UKCTA’s request for a 99.99% availability target is laudable as a target but would be unreasonable as a commitment and believes that BT’s commitment to 98% availability with investigation when it drops below 99% is an appropriate SLA and is not, therefore, a bar to replicability.

4.81 Ofcom does not believe there is any evidence of any systematic introduction of delays into the CPS ordering process or that the differences between the processes used by BT Retail and by CPSOs have been an undue impediment to the successful uptake of CPS. As such Ofcom does not believe that this is a bar to replicability.

Additional issues raised by the CPSOs

4.82 As referred to above, a number of additional issues were raised by a number of respondents and summarised in the UKCTA response. All but the issue of bulk migration are discussed above.

Responses to the consultation

4.83 In its response UKCTA stated that CPSOs had for some time been requesting a bulk migration tool which would be able to cope with all potential migration scenarios.

Ofcom’s response

4.84 Ofcom understands that BT is currently carrying out a trial of a bulk migration tool for CPS. BT wrote to CPSOs on 23 January 2006 inviting participation in this trial. Ofcom understands that this trial is currently taking place. The bulk migration tool has been designed in response to SORs submitted by the industry. Ofcom considers that the criteria for a bulk migration tool set out by industry are appropriate. Ofcom

would consider this barrier to replicability to be passed if the bulk migration tool currently being trialled by CPSOs meets the requirements set out in the industry SOR as agreed between BT Wholesale and industry at the CPS Process Group.

Conclusions

- 4.85 In summary, Ofcom is of the view that there are some issues that remain outstanding as regards the CPS product that, collectively, mean that BT's retail business calls products cannot currently be considered to be replicable. It is Ofcom's intention that once BT has rectified these issues, and is satisfied that BT has done so in a manner which provides the majority of CPSOs with the most proportionate and effective solution, then BT's retail business calls products will be replicable.
- 4.86 In Ofcom's opinion the remaining issues are:
- provision of a bulk facility on the standalone address matching tool;
 - payment by BT Retail of transfer charges for rejected orders;
 - implementation of a homemovers process (including change of address, new number);
 - CPS SAD CDR availability and quality; and
 - successful completion and implementation of the bulk migration facility.
- 4.87 These conclusions are repeated in Section 9.

Section 5

Exchange lines

Overview

- 5.1 Oftel's review of fixed narrowband retail services markets¹⁴ identified three different retail business exchange line markets and concluded that BT had SMP in these markets in the UK (apart from the Hull area). The markets identified were¹⁵:
- business analogue exchange line services;
 - business ISDN2 exchange line services; and
 - business ISDN30 exchange line services.
- 5.2 Oftel's review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets¹⁶ ("the Wholesale Narrowband Market Review") identified similar markets at the wholesale level and again concluded that BT had SMP in all three markets. As a result of these findings of SMP at the wholesale level, Oftel required BT to provide WLR to facilitate the development of competition in retail calls markets by allowing CPs other than BT to offer a 'single bill' for both calls (provided via CPS) and line rental (provided via WLR).
- 5.3 WLR is a service whereby competing providers effectively lease an exchange line and decide how best to route the customer's calls. Providers therefore take on the full retail relationship with the customer and offer a 'single bill' to end-users for all basic communications services.
- 5.4 The obligations imposed on BT as regards WLR require that BT provide analogue WLR, business ISDN2 WLR and business ISDN30 WLR in accordance with the published functional specifications. The business ISDN2 and ISDN30 functional specifications form part of the relevant SMP conditions, and are contained within the Wholesale Narrowband Market Review whereas the functional specification for analogue WLR is contained within Oftel's statement on WLR made in March 2003¹⁷ ("the WLR Statement").
- 5.5 The WLR Statement also sets out a process for determining whether WLR is fit for purpose ("the 'fit-for-purpose' test"). This test contains three elements to it: (i) an assessment as to whether the WLR product, as delivered, is consistent with the functional specification; (ii) an assessment as to whether the WLR product has been implemented in an effective manner that minimises barriers to effective competition (with the key business processes being measured through a set of defined Key Performance Indicators or "KPI"s); and (iii) an assessment of the actual market impact of the WLR product.

¹⁴ Review of Fixed narrowband retail services markets:

http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/fixednarrowbandrsm.pdf

¹⁵ See Annex 1 for details of the markets.

¹⁶ http://www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/nwe/

¹⁷ http://www.ofcom.org.uk/static/archive/oftel/publications/whole_line/2003/wlr_1_0303.htm

- 5.6 Ofcom considers that this 'fit-for-purpose' test represents a strong form of equivalence of outcomes¹⁸. BT has given an undertaking to move to an EOI model for WLR with ready for service ("RFS") dates of 30 June 2007, 30 September 2007 and 31 December 2007 for analogue WLR, ISDN2 WLR and ISDN30 WLR respectively. Ofcom is not of the view that EOI is a prerequisite for replicability as EOI is a more stringent requirement and is not a necessary condition for replicability. Ofcom considers that it would be disproportionate to require BT to move to an EOI model before the presumption of undue discrimination for bundles of retail business exchange line products with other retail business products is removed. It is important to note, however, that in line with the Undertakings BT's retail operations will gradually move to using the same gateways as other Service Providers. EOI may be necessary before the retail business exchange line markets could be considered to be effectively competitive.
- 5.7 Ofcom does not consider that the 'fit-for-purpose' test is the same as the test that should be applied to assess whether BT's retail business exchange line products are replicable, though there is clearly some relationship between the two tests. In particular, the measure of market impact contained in the 'fit-for-purpose' test is not relevant to the assessment of whether BT's competitors can match BT's retail products as it considers whether there is actual competition to BT rather than whether there are adequate wholesale products to enable it to occur. Ofcom does, however, consider that the other two elements of the test (consistency with the functional specification and effective implementation) are relevant for assessing replicability.
- 5.8 In July 2005 BT wrote to Ofcom indicating that it now believed the WLR product met the requirements of the 'fit-for-purpose' test as described in the WLR Statement. In response to this Ofcom conducted its own review of the WLR product and published its conclusions in a statement ("the WLR 'fit-for-purpose' statement") on 15 December 2005¹⁹.
- 5.9 The WLR 'fit-for-purpose' statement considers only analogue lines within its scope because at the point when the 'fit-for-purpose' test was specified, BT was not willing to make available digital WLR (i.e. ISDN2 and ISDN30) on a voluntary basis. BT did not make digital WLR available until it was required to do so by the Wholesale Narrowband Market Review. Nevertheless, the requirements of the 'fit-for-purpose' test as currently specified are capable of being applied to digital as well as to analogue WLR for the purposes of assessing replicability.
- 5.10 In the July 2005 Replicability Assessment, Ofcom proposed that business analogue exchange lines, business ISDN2 exchange lines and business ISDN30 exchange lines should be regarded as replicable if they fulfil the functional specification and operational effectiveness elements of the WLR 'fit-for-purpose' test. Question 5 asked respondents to comment on this.

¹⁸ In this context equivalence of outcomes refers to a process or product which provides a technically and commercially comparable wholesale product for purchase by other CPs but without using exactly the same systems and processes used by the internal product. Therefore, the outcome is equivalent even though the same inputs are not used by both BT and other CPs.

¹⁹ http://www.ofcom.org.uk/consult/condocs/line_rental/wlrffp_statement/

Responses to the consultation

- 5.11 In its response BT agreed that the stringency of an EOI model is not a necessary condition for replicability. BT stated that it believed the two 'fit-for-purpose' tests are appropriate and defined these tests as:
- “• the delivery by BT of a Wholesale Line Rental (Analogue) product that is consistent with the 'WLR2' Product Specification as set out in Annex A of the Statement issued on 11 March 2003 entitled 'Wholesale Line Rental: Of tel's Conclusions'; and
 - the implementation by BT such that the functionality of the 'WLR2' product is in such a manner as to minimise barriers to effective retail competition.”
- 5.12 BT also noted that it has implemented the “revised WLR2 product” as described in the WLR statement and in subsequent discussions with Ofcom and industry.
- 5.13 UKCTA, in its response, was concerned about the 'fit-for-purpose' test within the context of replicability and did not believe that the criteria within the test are sufficiently comprehensive to adequately address the product as it stands today. UKCTA cited “Effective Date and Letter Facilitation Reports” and contractual terms as, in its view, important aspects of the commercial viability of the product which are not covered in the 'fit for purpose' test.

Ofcom's response

- 5.14 It is Ofcom's view that EOI is not a prerequisite for replicability. Ofcom acknowledges that the WLR 'fit-for-purpose' statement stated that analogue WLR has been found 'fit-for-purpose'. However, Ofcom is of the view that the replicability test for WLR should also take into consideration the replicability of ISDN2 and ISDN30 WLR services. Ofcom continues to believe that the criteria within the functional specification and operational effectiveness elements of the 'fit-for-purpose' test are adequate for the determination of replicability.

WLR issues

- 5.15 In the July 2005 Replicability Assessment, Ofcom listed a number of requirements from the WLR functional specification relating to the products and service wrap that BT was required to make available to Service Providers (“SP”s). These requirements fall into the following broad categories:
- line types;
 - supplementary services;
 - ordering processes;
 - Service Provider forecasts and rationing;
 - consumer protection;
 - maintenance and fault management;
 - engineer visits;
 - billing, debt management, fraud and security; and
 - KPIs.

- 5.16 The KPIs are essentially the means to assess whether BT is complying with the second strand of the 'fit-for-purpose' test, i.e. whether the WLR products are operationally effective.
- 5.17 In the July 2005 Replicability Assessment Ofcom described in detail each of these requirements, and any issues it had identified, and then proposed its own assessment of the status of the issues and any further work that would need to be completed before the issue could be considered no longer a barrier to replicability. The following sections reproduce the key aspects of each requirement, and Ofcom's assessment of any issues related to that requirement, as detailed in the July 2005 Replicability Assessment.
- 5.18 Question 6 asked respondents whether they agreed with Ofcom's assessment of the replicability of retail business exchange line products. Responses are discussed below within the context of each issue.

Line types

- 5.19 In order for business exchange lines to be considered replicable, BT is required to ensure that the following line types are available for rental on wholesale terms:
- business single analogue exchange line;
 - business multiple single exchange lines (i.e. multiple individual lines with different directory numbers installed on the same site);
 - business multiple auxiliary analogue exchange lines (i.e. multiple individual lines serving the same site and configured so that they share the same directory number as the main line);
 - business ISDN2 exchange lines; and
 - business ISDN30 exchange lines.
- 5.20 BT is also required to make private payphone exchange lines and out-of-area exchange lines available.
- 5.21 BT is required to provide a standard business directory listing for each exchange line and full support for number portability (both import and export) to enable an SP to discharge its legal obligations in these regards. SPs must also be provided with the same capability to allocate 'golden' numbers for an exchange line as has BT's retail activities.
- 5.22 The SP must be able to take over all aspects of the retail relationship with the end user and be given the opportunity to offer a comparable level of customer service to that offered by BT, in relation to processes such as provisioning and fault management.
- 5.23 BT must not reject WLR orders due to the presence of the following services on the line unless there is no practicable alternative:
- customer premises equipment rented from BT;
 - services provided over the same copper loop but using different frequencies, e.g. 'Redcare' and broadband; and
 - services that allow end users to make calls from other telephones and charge them to the customer's own directory number, e.g. BT Chargecard.

- 5.24 Where services provided by BT over an exchange line are incompatible with WLR, the action to be taken is described in the product handbook²⁰ and has been agreed with industry.
- 5.25 In the July 2005 Replicability Assessment, Ofcom stated that it was satisfied that BT had made available the various WLR line types set out in the WLR functional specification and that service providers are able to take over all aspects of the retail relationship with customers and offer comparable levels of customer service to that which are offered by BT on its retail lines. Ofcom stated that it was also minded to conclude that the requirements as regards order rejections and incompatible services had been complied with.

Responses to the consultation

- 5.26 In its response BT made no direct reference to this issue beyond stating that they now believed that there were no longer any outstanding issues which acted as a bar to replicability.
- 5.27 UKCTA maintained that orders get rejected even though they shouldn't and that too many orders are still handled manually via inadequately trained staff.

Ofcom's response

- 5.28 BT has made available for rental via WLR the line types required. The other issues cited by UKCTA are regarded by Ofcom as ordering process issues and are discussed below. Ofcom does not believe there are any outstanding issues in relation to line types which are a bar to replicability.

Supplementary services

- 5.29 BT is required to make available over the wholesale exchange line types described above, on wholesale terms, the same supplementary services as are available on retail exchange lines, except where otherwise agreed by Ofcom. These should include those listed in the WLR functional specification.
- 5.30 BT is required to make available within WLR the following network services in order to enable SPs to manage their customers:
- indirect access call barring;
 - route 15x to SP;
 - route to credit control;
 - outgoing call barring;
 - call mapping; and
 - Direct Dialling In ("DDI").

²⁰ Available from: <http://www.openreach.co.uk/orpg/products/pstn.do>, <http://www.openreach.co.uk/orpg/products/isdn2.do> and <http://www.openreach.co.uk/orpg/products/isdn30.do>

- 5.31 In the July 2005 Replicability Assessment, Ofcom stated that it understood that BT had made the network services and supplementary services described above available within the WLR portfolio and that Ofcom was therefore minded to conclude that BT's retail business exchange lines are replicable in this respect.

Responses to the consultation

- 5.32 In its response BT made no direct reference to this issue beyond stating that they now believed that there were no longer any outstanding issues which acted as a bar to replicability.
- 5.33 In its response, UKCTA stated its belief that call mapping was not available within WLR and was not available on BT's UXD5 exchanges which caused problems with the provision of 1571 voicemail services.

Ofcom's response

- 5.34 It is Ofcom's view that the provision of services such as 1571 voicemail are a service differentiator for BT and would act to undermine the incentives for switching. Ofcom therefore believes that such services should be made available to WLR providers on all lines including those provided using UXD5 exchanges. BT has informed Ofcom that this is anticipated to be made available from April 2006. Until such time as it is provided this remains in Ofcom's view a bar to replicability.

Ordering processes

- 5.35 BT is required to implement operational processes in an efficient manner, minimising its overheads and introducing process automation. Similarly, BT is required to manage interactions with other wholesale services (e.g. CPS) in an efficient manner. The processes for ordering, provisioning and transferring lines are required to provide SPs with the opportunity to offer an equal level of customer service to that offered by BT's retail activities. Thus, there must be no material difference between the timescales for ordering, provisioning and transferring lines for SPs and the corresponding timescales for BT's retail activities.
- 5.36 BT is required to provide an electronic ordering gateway ("the Gateway") with both manual (low volume) and XML-based (high volume) interfaces. The Gateway is required to support the full range of order types, line types and supplementary services via both interfaces. The order process should be such that all correctly formatted valid orders submitted through the Gateway flow through the ordering process with no need for manual intervention. Through the Gateway the SP is able to provision a new line, transfer an existing line, cancel an order, change the status of an existing line and cease a line. If a WLR order is rejected, BT must provide sufficient information to enable the SP to establish the precise cause of the rejection and any incompatible services that caused the rejection.
- 5.37 SPs can submit orders for WLR and CPS on the same line, and BT is required to manage such orders so as to ensure that any process differences between WLR and CPS have no impact on the quality of service received by the end user. BT is required to ensure that there is no longer than a one-day gap between WLR and CPS activation. BT is required to ensure that any WLR transfer is done so seamlessly so as not to interrupt or change an existing CPS service.

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- 5.38 For homemovers, BT is required to adopt a process that enables SPs the same opportunity to retain customers who are moving home as is available to BT's retail activities.
- 5.39 In the July 2005 Replicability Assessment, Ofcom noted that BT has implemented the processes described above, but that Ofcom was aware that there were operational issues relating to the availability of the ordering Gateway and its general reliability. Ofcom was of the view that until the reliability and availability of the ordering Gateway had been improved, it is unlikely to be appropriate to consider BT's retail business exchange lines to be replicable. Ofcom invited respondents to provide their views as to the level of availability and reliability that Ofcom should accept in order to conclude that retail business exchange lines are replicable in this respect.

Responses to the consultation

- 5.40 In its response BT stated that they have conducted a process of improving and upgrading the service provider gateway together with work to address the WLR EOI requirements.
- 5.41 In its response UKCTA stated that a substantial number of orders require manual intervention. UKCTA also had specific concerns over the 'open order' rejection scenario, homemovers, and change of address where broadband is on the line. UKCTA also raised the issue of access to information.

Ofcom's response

- 5.42 Ofcom believes that the proportion of orders rejected continues to be too high and that there remains a disparity in provisioning times between WLR and BT Retail exchange lines. It is Ofcom's view that until pre-validation – to reduce order rejections – is made available and the disparity in provisioning times is eliminated these issues will continue to be a bar to replicability.

Forecasting and rationing

- 5.43 BT is required to ensure that its systems have sufficient capacity to deal with the number of WLR orders. In the July 2005 Replicability Assessment Ofcom stated that it was aware that there are ongoing discussions between BT and the industry regarding the forecasting requirements for WLR, and that it considers that this is a matter that can be dealt with on an ongoing basis and should therefore not be a bar to replicability.

Responses to the consultation

- 5.44 In its response BT made no direct reference to this issue beyond stating that they now believed that there were no longer any outstanding issues which acted as a bar to replicability.
- 5.45 UKCTA was concerned that forecasting and rationing has a significant effect on business WLR providers whilst BT Retail is not subject to the same requirements. UKCTA was also concerned about service provider gateway capacity in the future.

Ofcom's response

- 5.46 Forecasts are an important mechanism to ensure BT has in place the capacity to handle forecast orders. Ofcom understands from BT that BT Retail does not provide forecasts for WLR2 as it does not purchase it. BT has also stated that BT Retail will not provide forecasts for WLR3 (which it will buy in accordance with the Undertakings) although it will provide Openreach with anticipated volumes via commercial discussions. Ofcom does not believe that it is reasonable for BT Retail to provide forecasts currently given that it does not purchase WLR2. However, given that BT Retail is not anticipating providing forecasts for WLR3 – which it will purchase – Ofcom would expect to see the removal of the requirement to provide forecasts for WLR3 extended to all CPs and that if it were not then this could be viewed as a bar to replicability.

Consumer protection

- 5.47 Where BT is the losing SP, it is required to ensure that its losing Transfer Letter contains no marketing or 'save' content. End users have ten working days from when they ask their gaining SP to transfer them, to the transfer taking place. In addition, BT is required to provide the same malicious call protection on WLR lines as it provides to its retail activities.
- 5.48 In the July 2005 Replicability Assessment, Ofcom noted that in its recent WLR Notification²¹ Ofcom set out what it considers is acceptable for BT to include in its WLR losing Transfer Letter and that Ofcom therefore did not consider any additional issues need to be addressed as concern replicability in this area.

Responses to the consultation

- 5.49 With the conclusion of the issue of the wording of the Transfer Letter no responses indicated any further issues in this area.

Ofcom's response

- 5.50 Ofcom considers there are no outstanding issues in respect of consumer protection which are a bar to replicability.

Maintenance and fault management

- 5.51 For any particular Service Level Agreement ("SLA"), BT is required to provide the same quality of service for a WLR line as for an exchange line operated by its own retail activities. The same types of SLA as are available to BT's retail activities are required to be made available to other SPs.
- 5.52 BT is required to provide the same capability for SPs to submit a fault report for an exchange line, and track the status of that report, as is available to its own retail activities. BT is also required to make available the same line diagnostic tests as are available to its retail activities and provide these via an appropriate electronic interface.

²¹ http://www.ofcom.org.uk/bulletins/comp_bull_index/comp_bull_ccases/closed_all/cw_739/261129/

- 5.53 Ofcom noted, in the July 2005 Replicability Assessment, that the KPI reports provided by BT suggested that BT's performance as regards maintenance and fault management for retail exchange lines and WLR lines are broadly similar and that BT's competitors appear to be receiving a comparable level of maintenance service. Ofcom also noted, however, that it was aware of problems accessing the Gateway to log and monitor faults and proposed to monitor this situation during the consultation phase before reaching a conclusion as to whether the level of availability is sufficient to conclude that BT's retail exchange lines are replicable.

Responses to the consultation

- 5.54 In its response BT stated that in its view the agreed 'fit-for-purpose' KPIs showed that WLR SPs received comparable performance to BT Retail. BT also described some of the work it intended to undertake to improve the performance of the maintenance and repair platform used by the WLR SPs.
- 5.55 In its response UKCTA offers anecdotal evidence of BT Retail allegedly offering performance to end users superior to that which WLR providers offer and of BT engineers informing end users of superior service from BT Retail. UKCTA also mentions deficiencies with the maintenance and repair platform.

Ofcom's response

- 5.56 Ofcom does not believe that decisions about the replicability of BT's business exchange lines products can be based on anecdotal evidence. In contrast, Ofcom agrees that the objective measures of the KPIs show comparable performance. Ofcom further believes that behavioural issues are best tackled through the Undertakings BT has given Ofcom and captured by the Codes of Practice which all BT employees are required to adhere to²². Ofcom does not, therefore, believe there are any issues in this respect which are a bar to replicability.
- 5.57 Through December 2005 BT reported an availability of the eCo repair platform >99%. BT has stated that as of 10th February 2006 it has introduced additional server capacity to the eCo repair platform to increase capacity and resilience, and streamlined the user interface resulting in a reduction in call handling time. It has reported a 10% improvement in the time taken to retrieve fault tracking data and a 45% reduction in the time taken to retrieve customer details. Further enhancements were made available on 27 March 2006. However, although these changes have increased platform capacity, Ofcom is aware of on-going issues with respect to the eCo repair gateway availability. As of the publication date of this statement Ofcom is continuing to monitor the eCo repair platform to ascertain the impact of improvements made by Openreach. Ofcom is also aware of, and welcomes, Openreach's offer of goodwill payments in respect of this issue²³. However, it is Ofcom's view that until BT is able to demonstrate consistent availability of the eCo repair platform in line with its commitments and for a minimum of three consecutive months then this will remain a bar to replicability.

²² <http://www.btplc.com/Thegroup/Regulatoryinformation/Codeofpractice/BTPeople/BTpeople.htm>

²³ See: <http://www.openreach.co.uk/orpg/news/pstn.do>

Engineer visits

- 5.58 In the WLR statement (for analogue WLR) and the Wholesale Narrowband Market Review (for ISDN2 and ISDN30) a requirement is placed on BT to provide SPs with the same ability to book appointments for engineer visits as that available to its retail activities. It is required that a SP should be able to request a specific appointment time via an electronic gateway and an immediate response provided listing the available appointments closest in time to that requested, from which the SP can select the preferred appointment.
- 5.59 In the WLR Statement general guidance was given as to what was expected from BT engineers whilst on site visits and it was stated that more detailed guidance was expected to be agreed with industry during the WLR2 implementation programme. However, with the acceptance of the Undertakings and the establishment of Openreach the vast majority of these engineers have transferred into Openreach and are now required to be compliant with the relevant sections of the Undertakings and the Openreach Code of Practice²⁴.
- 5.60 In the July 2005 Replicability Assessment Ofcom stated that it was of the view that BT appeared to be complying with the relevant guidelines as regards engineer visits and proposed to conclude that BT's retail business exchange lines are replicable in this respect.

Responses to the consultation

- 5.61 In its response BT does not specifically mention the appointments book issue.
- 5.62 In its response UKCTA offers anecdotal evidence of BT Retail having superior access to BT's appointment books than is possible for WLR SPs. UKCTA also notes that BT has given an undertaking to "provide improved access to the engineering appointment books used by BT by 1 July 2006" and that in light of this it does not believe this aspect is currently replicable.

Ofcom's response

- 5.63 Ofcom does not believe that decisions about the replicability of BT's business exchange lines products can be based on anecdotal evidence, but does agree with UKCTA that it is important that BT delivers against its undertaking regarding improved access to appointment books²⁵. Ofcom is therefore of the view that BT's business retail exchange lines products can not be regarded as replicable until BT has delivered against this undertaking.

Bill, debt management, fraud and security

- 5.64 BT is required to provide SPs with billable quality CDRs on a daily basis and in an electronic format, separated by a small time gap from the date of the actual calls. For

²⁴

<http://www.btplc.com/Thegroup/Regulatoryinformation/Codeofpractice/BTPeople/Openreachversion.pdf>

²⁵ Section 3.5 in the Undertakings:

<http://www.ofcom.org.uk/telecoms/btundertakings/btundertakings.pdf>

calls carried over the BT network, BT is required to provide SPs with raw (i.e. non-billable quality) CDRs every four hours in order to allow the identification of fraud. Line rental, additional services and transaction charges are billed by BT on a monthly basis.

- 5.65 BT is required to ensure that SPs have the ability to manage end user bad debt by applying a series of escalating service restrictions to an exchange line using options on the electronic gateway.
- 5.66 BT is required to take the same responsibility for the physical security of its network in relation to an exchange line being rented by an SP as it would for an exchange line provided by its own retail activities.
- 5.67 In the July 2005 Replicability Assessment, Ofcom stated that – subject to consultation responses to the contrary – it was of the view that BT appeared to have adequately implemented these requirements and proposed to take the view that BT's retail exchange lines are replicable in this respect.

Responses to the consultation

- 5.68 In its response BT does not specifically mention the bill, debt management, fraud or security issues.
- 5.69 Scottish & Southern Energy commented in its response that the tools provided in this area for WLR are not as comprehensive as in CPS and that in its view:

“The same facilities should be available to service providers as are available to BT Retail before replicability can be assured.”
- 5.70 Energis noted only that there is a disparity between the contract terms it offers end users and the contract terms it receives from BT Wholesale which can result in cash flow inequality. Given that cash flow from BT Retail to BT Wholesale is within the BT Group, Energis argues that this presents it with a disadvantage.

Ofcom's response

- 5.71 Ofcom stated in the July 2005 Replicability Assessment that it was of the view that there were no issues outstanding in this area that were a bar to replicability. On the whole, most respondents did not mention this issue specifically which Ofcom assumes indicates that no significant issues do remain. However, both Scottish and Southern Energy and Energis did raise some issues.
- 5.72 Scottish and Southern Energy was concerned that tools available for the WLR product are not as comprehensive as those available for CPS and about a disparity between the debt management tools available to BT Retail versus those available to WLR providers. For an assessment of replicability a comparison of the tools available on WLR with CPS is not relevant, rather the appropriate comparator is with those available to BT Retail. Ofcom believes that the WLR Functional Specification adequately covered the functionality required in this area and, as Ofcom stated in the WLR 'fit-for-purpose' test, BT has met the requirement to provide billable CDRs in a timely manner and therefore does not believe that this is a bar to replicability.
- 5.73 Energis was concerned about a commercial disadvantage due to a disparity in contractual terms offered to retail customers. The implication appears to be that the contractual terms offered by BT Wholesale are more onerous than those which BT

Retail offers its customers, and which its competitors are commercially compelled to match, and therefore BT Retail is at an advantage as any transfer payment it is required to make in advance of payment from the customer does not constitute a cash flow out of BT Group placing BT Group, if not BT Retail, at an advantage compared to its competitors. The implication is that such an arrangement means that BT Retail can offer more advantageous payment schemes to end users. It is Ofcom's view that such arrangements would still reflect negatively on BT Retail and would be at odds with the proper commercial operation of it which its management are incentivised to maintain. It is Ofcom's view therefore that BT Retail is incentivised to negotiate contractual terms on a commercial basis taking into consideration the commercial arrangements with its suppliers, i.e. BT Wholesale, as would any other CP. Ofcom does not believe, therefore, that this is a bar to replicability.

KPIs

- 5.74 BT is required to provide transparency of its operational performance in relation to WLR business processes by publishing KPIs, as defined by Ofcom. Data are required to be published in sufficient detail to show whether SPs are receiving a comparable quality of service to that provided to BT's retail activities.

Responses to the consultation

- 5.75 In its response BT pointed out that it publishes KPIs in accordance with the various requirements issued by Oftel / Ofcom.
- 5.76 In its response UKCTA stated that "there have always been some concerns among WLR providers as to what exactly is measured by the KPIs". Other respondents indicated a similar general concern over the KPIs and cited anecdotal evidence as evidence that the KPIs are either inappropriate or not being applied correctly.

Ofcom's response

- 5.77 It is Ofcom's view that the issue of KPIs, being the means by which many other issues are measured, will always be contentious. However, Ofcom is concerned that any system of KPIs must be sufficiently rigorous to identify relevant performance such that it can be used to identify problems, whilst at the same time not presenting so much of a burden that it begins to distort the very performance it seeks to measure. It is Ofcom's view that the existing KPIs provide the correct balance and Ofcom does not, therefore, believe there are any further bars to replicability in respect of KPIs.

Conclusions

- 5.78 Ofcom is of the view that there are some issues that remain outstanding as regards the analogue WLR, ISDN2 WLR and ISDN30 WLR products that, collectively, mean that BT's retail business exchange lines products cannot currently be considered to be replicable. It is Ofcom's intention that once BT has rectified these issues, and is satisfied that BT has done so, then BT's retail business exchange lines products will be replicable.
- 5.79 In Ofcom's opinion the remaining issues are:
- provision of call mapping on UXD5 exchanges to facilitate services such as 1571 voicemail;

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- make available pre-validation to reduce order rejections;
- eliminate the disparity in provisioning times between WLR and BT Retail exchange lines;
- commitment to provide parity with respect to forecasts for the WLR3 product;
- improved and consistent eCo repair availability; and
- delivery of improved access to appointment books in line with BT's relevant undertaking.

5.80 These conclusions are repeated in Section 9.

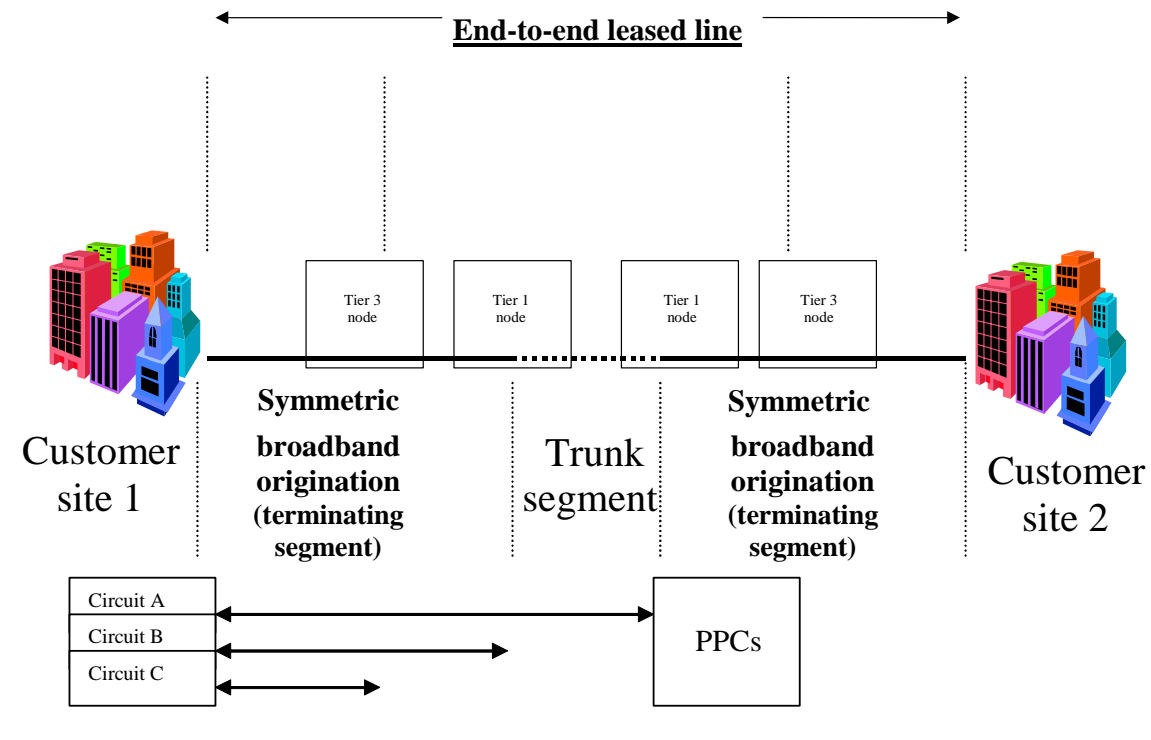
Section 6

Retail leased lines

Overview

- 6.1 Ofcom's *Review of retail leased lines, symmetric broadband origination and wholesale trunk segments markets*²⁶ ("the leased lines market review") identified a market for retail low bandwidth traditional interface leased lines (circuits with bandwidths up to and including 8Mbit/s) and concluded that BT had SMP in this market in the UK (excluding the Hull area)²⁷.
- 6.2 Ofcom further identified in the leased lines market review a number of wholesale leased lines markets, including those for:
- wholesale low bandwidth traditional interface symmetric broadband origination (up to and including 8Mbit/s) in the UK (excluding the Hull area); and
 - wholesale trunk segments at all bandwidths in the UK.
- 6.3 Ofcom concluded that BT has SMP in these two wholesale markets.
- 6.4 As a result of these findings of SMP in the wholesale leased lines markets, Ofcom required BT to provide partial private circuits (see Figure 2 below) to enable competition to develop in the downstream low bandwidth retail leased lines market.

Figure 2: leased line components



²⁶ <http://www.ofcom.org.uk/consult/condocs/llmr/>

²⁷ See Annex 1 for details of the markets.

- 6.5 The obligation on BT to provide PPCs was set out in a Direction made under the network access SMP condition and was published simultaneously with that SMP condition in the leased lines market review. This Direction did not formally include a functional specification for the PPC product, but it did set out a number of specific requirements that had been established under the previous regulatory regime as a result of a series of disputes²⁸.
- 6.6 This dispute-driven process has, however, left a number of outstanding issues in relation to PPCs that need addressing before replicability can be found. These include:
- routing inefficiencies;
 - pricing differences;
 - higher equipment costs;
 - forecasting;
 - inequality of information;
 - migration;
 - PPC contract complexity;
 - reasonableness of contract terms;
 - billing accuracy;
 - exclusion of certain services from the charge control;
 - PPC performance; and
 - circuits to other jurisdictions.
- 6.7 The July 2005 Replicability Assessment considered whether BT's PPC products now enable BT's retail low bandwidth leased lines (up to 8Mbit/s) to be replicated. However, as noted in the September 2005 Business Pricing consultation, the Universal Service Directive severely limits Ofcom's ability to consent to BT offering unpublished bespoke prices for the minimum set of leased lines (up to 2Mbit/s); where the market for the minimum set of leased lines is not competitive, NRAs must impose certain conditions on providers with SMP, including requirements relating to discrimination, cost orientation, transparency and tariffs. Nevertheless, Ofcom believes it is important to assess the replicability of these products and to publish that written assessment.
- 6.8 In Question 7 of the July 2005 Replicability Assessment Ofcom asked respondents to comment as to whether they believed Ofcom had correctly identified all the outstanding issues in relation to PPCs.

²⁸ See the PPC phase 1 and 2 disputes:
http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/leased_lines/ppcs0602.htm and
http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/leased_lines/ppc1202/direction.htm.

Responses to the consultation

- 6.9 In its response BT did not raise any new issues and stated its belief that a number of the outstanding issues identified in the consultation document had been addressed to the point necessary to ensure they were no longer a bar to replicability. BT addressed this within its answer to Question 8.
- 6.10 In its response C&W also raised the issue of diversity for higher speed circuits whilst Energis raised the issues of Digital Private Circuit Network ("DPCN") charges, cancellation charges and engineering time.
- 6.11 UKCTA stated that it believes that the routing and pricing issues are the most significant outstanding issues and bars to replicability. It also stated that the steps outlined by Ofcom in the July 2005 Replicability Assessment are insufficient, in its view, to ensure replicability. UKCTA also raised the issue of internal reference offers which were, in its view, inadequate to provide the transparency desired by industry to understand what the differences are between PPCs and the components BT self provides as inputs to retail leased lines. This information asymmetry UKCTA cited as a reason to be unsure as to whether all the outstanding issues had been identified.

Ofcom's response

- 6.12 Ofcom acknowledges that during the consultation period, and afterwards, BT continued to address the outstanding issues with PPCs. This effort is welcomed by Ofcom and the measure to which this addresses the outstanding issues as a bar to replicability is discussed in the remainder of this section.
- 6.13 The additional issues raised by C&W and Energis are also discussed below.
- 6.14 Ofcom acknowledges that there has been some information asymmetry with respect to PPCs and the internal product used by BT's retail divisions to provide retail leased lines and welcomes the publication by BT on 19 December 2005 of its internal reference offer as required by Section 4.1 of the Undertakings²⁹. Ofcom understands from industry that it has found this document useful and welcomes BT's commitment to work with industry to improve and update this document to ensure it continues to meet their needs. Ofcom is confident that the July 2005 Replicability Assessment, together with the responses to it, successfully identified the outstanding issues which are a bar to replicability.
- 6.15 In Question 8 of the July 2005 Replicability Assessment Ofcom asked respondents whether they agree with Ofcom's assessment of the replicability of retail leased lines. Their responses are discussed in each of the relevant areas below.

Routing inefficiencies and pricing differences

- 6.16 The model of a retail leased line that is set out in Figure 2, and which forms the basis of the PPC model, is not an accurate representation of the way in which BT provides retail leased lines to itself. In particular, BT is not constrained to route its own retail

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http://www.btwholesale.com/content/binaries/service_and_support/contractual_information/docs/ppcofer/PPCIRO_191205.pdf

leased lines via a Tier 1 node, but will instead optimise the routing on a case-by-case basis.

- 6.17 In the July 2005 Replicability Assessment, Ofcom noted that BT's competitors expressed concerns that this may give BT a cost advantage over other providers, somewhat analogous to the CPS local calls issue discussed above, though more complex. For example, BT may be able to provide a local leased line using only Tier 3 nodes, whilst a trunk leased line may be most efficiently routed via Tier 1.5 or Tier 2 nodes rather than via the nearest Tier 1 node.
- 6.18 BT advised that it uses the same routing system for both PPCs and its own retail leased lines and that the actual physical routings of circuits are allocated, on a like for like basis, depending on standard network optimisation rules and plant available for both types of circuits. There is no rigid hierarchy to its network and it is not always necessary to route circuits via a Tier 1 node.
- 6.19 BT acknowledged that there are leased lines scenarios which are not directly comparable between its retail leased lines and PPCs due to retail leased lines being designed as an end-to-end service and PPCs as an interconnection product. The extent to which a competitor can replicate BT's retail leased lines services will depend on the level of their network investment.
- 6.20 BT's competitors further argued that they would need to match BT's network infrastructure roll-out in order to be able to match BT's cost base and prices: BT's retail activities, in effect, obtain 'interconnection' at each of the 1,800 SDH node sites without having to pay the actual interconnection costs faced by its competitors.
- 6.21 BT suggested that competing operators would need to build out to just 200 exchanges in order to compete for 80% of BT's 2Mbit/s Megastream customer base and noted that at least one competitor has already built out to 180 of these exchanges for voice interconnect. Alternative network operators ("Altnets"), however, pointed out that beyond a certain number of exchanges, the cost benefit analysis of additional interconnections suggests that there are diminishing cost saving benefits.
- 6.22 The Altnets proposed two options for Ofcom to consider that may enable cost parity to be achieved with BT. The first option would be to create an artificial list of PPC handover points and require that BT route and cost its circuits on this basis. The second option would be to require BT's retail activities to incur similar charges for interconnection at all of the 1,800 sites in the same way that Altnets would incur the charges.
- 6.23 Ofcom recognised that there may be an issue as regards theoretical routing inefficiencies built into the PPC product design, particularly as regards leased lines that start and end in the same local exchange area ("same exchange leased lines"). Ofcom therefore sought the views of respondents as to whether there is actually a replicability issue as regards routing inefficiencies and, if so, whether it is material.
- 6.24 In July 2005 Replicability Assessment, Ofcom stated that if it concluded that same exchange leased lines are not replicable but that this is not material as regards the ability of Altnets to compete with BT in offering bundles of services that include leased lines then, provided that retail leased lines are replicable in other respects, Ofcom proposed to remove the presumption that a service bundle of retail leased lines with other retail business products is unduly discriminatory. If, however, Ofcom concluded that this is a material issue, it would be necessary to assess the reasons for the lack of replicability.

- 6.25 Ofcom further stated that if the routing inefficiencies stem from the design of the PPC product that BT is obliged to provide, rather than from BT's implementation of its obligations, Ofcom would be minded to remove the presumption that a service bundle of retail leased lines with other retail business products is unduly discriminatory but would, in parallel, consider whether the provision of a new wholesale product to address the routing inefficiency problem is appropriate. If the routing inefficiency stems rather from BT's implementation of its obligations, Ofcom would be minded to continue to presume undue discrimination if retail leased lines are bundled with non-SMP products until the issue had been addressed.
- 6.26 BT's competitors suggested that an Altnet using a PPC to deliver a trunk service may not only face a routing inefficiency, they may also face higher costs per kilometre. This is because the PPC pricing model assumes that such services are always routed via Tier 1 nodes, and the price per kilometre for transmission between Tier 1 nodes is significantly higher than for terminating segments. When BT routes its retail trunk services via Tier 1.5 or Tier 2 nodes it obtains an advantage in unit cost as well as routing efficiency.
- 6.27 BT pointed out that the regulatory framework for PPCs introduced a logical model (and hence a billing algorithm) as the basis for charging for PPCs. For retail leased lines with bandwidths of 34Mbit/s or higher, BT uses the pricing model to impute trunk and terminating segment rentals in the retail cost stacks. However, due to the high volume of retail leased lines below 34Mbit/s, BT uses an average distance of 15km to calculate the terminating/trunk segment split. BT's analysis of radial data for 2Mbit/s PPCs suggests that the average distance of a terminating segment is 14.32km.
- 6.28 BT treats infrastructure costs in a similar manner when imputing PPC rental charges for its retail leased lines, averaging the costs for circuits below 34Mbit/s but using actual infrastructure costs for circuits of 34Mbit/s and above.
- 6.29 The same pricing model is used for imputing retail leased line infrastructure and circuit charges for bandwidths of 34Mbit/s and above as is used for PPCs. For circuits of lower bandwidths, BT uses an average distance of 15km when calculating the terminating segment/trunk split for its retail circuits, rather than using the actual length.
- 6.30 In July 2005 Replicability Assessment, Ofcom stated its view that whilst pricing model differences may lead to BT pricing some of its retail circuits at a lower price than would be the case if the actual split was used, it will also mean that it prices others at a higher price than would be the case if the actual split was used. Averaged across all of BT's retail leased lines, similar costs are imputed into the retail cost stack as are charged to purchasers of PPCs.
- 6.31 Ofcom was, therefore, of the view that any differences between the PPC pricing model and that used by BT to calculate the transfer charges for BT's retail leased lines would appear not to be material to the assessment of whether Ofcom should remove the presumption that a service bundle of retail leased lines with other retail business products is unduly discriminatory, though would be material if bespoke pricing was being considered. However, part of this rationale depended on the use of the implicit price-cost test which Ofcom is no longer proposing to use.

Responses to the consultation

- 6.32 BT commented in its response on the proposals put forward by the Altnets for an artificial list of handover points and for BT to pay interconnection charges. BT felt that the former was disproportionate and that the latter would raise retail prices without any consumer benefit. BT also stated that the level of revenue obtained from same exchange circuits was low and that this could not therefore be viewed as material. Finally, BT stated:

“BT considers that any routing inefficiencies arise from the required design of the PPC product, and not BT’s implementation of that design, and that it therefore does not form a bar to replicability.”

- 6.33 In its response UKCTA cited a number of issues under this heading which it believes give rise to significant disparities between PPCs and retail leased lines:
- BT do not have to interconnect or pay for interconnect;
 - BT has an advantage in the routing of same exchange circuits;
 - BT pay proportionally less SG&A than other CPs; and
 - inherent differences in circuit routing could give rise to different ‘route factors’ being used for internal and external cost allocation.
- 6.34 UKCTA provided cost calculations to support its view of the materiality of these issues.

Ofcom’s response

- 6.35 It is Ofcom’s view that there are issues with the design of the PPC product that have a material impact on the ability of Altnets to compete with BT’s sub-8Mbps retail leased lines using the product. The disparity in the degree of effective interconnect for BT as against actual interconnect for its competitors does, in Ofcom’s view, lead to material differences which are detrimental to the ability of Altnets to compete with BT in this market.
- 6.36 Ofcom accepts BT’s point that some of these issues are a result of the design of the PPC product rather than BT’s implementation of it. As stated in paragraph 6.25 above, in the July 2005 Replicability Assessment Ofcom stated that if the routing inefficiencies of PPCs stem from the product’s design rather than its implementation, then Ofcom would be minded to remove the presumption that a service bundle of retail leased lines with other retail business products is unduly discriminatory. However, as some respondents identified, these inefficiencies give rise to significant disparities the size of which Ofcom believes to be sufficiently material that Ofcom should continue to view these as a bar to replicability and prevent the bundling of retail leased lines.
- 6.37 Ofcom further believes that these issues are sufficiently complex that they cannot be adequately addressed in this statement and that they are best addressed within the

context of a further review of the PPC pricing model as applied by BT³⁰. Ofcom therefore intends to conduct such a review at its earliest opportunity. It is possible that the findings of such a review may identify material changes which would warrant a review of the market for leased lines of 8Mbps and below.

Higher equipment costs

- 6.38 A PPC will frequently be used as the basis of a higher layer service (e.g. ISDN30, IP Virtual Private Networks). Altnets have expressed concern that BT appears to have the ability to terminate its leased lines on equipment that combines the requirements of both layers (e.g. an SDH port on an IP router) whereas Altnets using PPCs face the additional cost of an intermediate multiplexer.
- 6.39 BT had disputed this, arguing that whenever an SDH circuit is used as the basis of a higher level service it is always terminated on conventional network terminating equipment ("NTE"), in the same way that a PPC would be terminated. Any additional equipment needed to provide the higher level service is added subsequently. BT believes that this means that it faces identical equipment costs to an Altnet providing that same service using a PPC.
- 6.40 BT's competitors have questioned whether this is the case at the network level, as well as at the customer end, suggesting that the BT IP Clear Flex product uses different terminating equipment at the network end.
- 6.41 In the July 2005 Replicability Assessment Ofcom stated that it was satisfied that BT terminates its retail leased lines on the same equipment as it terminates PPCs and that any additional equipment needed to provide the retail service is added subsequently. Ofcom proposed, therefore, to conclude that retail leased lines are replicable in this respect.

Responses to the consultation

- 6.42 BT did not comment on this issue.
- 6.43 In its response UKCTA did not concur with Ofcom's view stating that it did not accord with information its members had received from BT, particularly with respect to the IP Clear Flex product, and requested Ofcom to provide more information.

Ofcom's response

- 6.44 Ofcom is satisfied that there is not any architectural difference between PPCs and the equivalent retail leased line which is used as an input into other products such as IP Clear Flex. Ofcom is therefore satisfied that there are no outstanding issues in respect of higher equipment costs that are a bar to replicability.

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http://www.btwholesale.com/application?pageid=editorial_two_column&nodeId=navigation/node/data/Pricing_and_Contracts/Reference_Offers/Partial_Private_Circuits_PPC/navNode_Partial_Private_Circuits_PPC

Forecasting

- 6.45 Altnets using PPCs have to submit a forecast of the number of orders they expect to submit so that they can expedite orders, and have to pay a financial penalty if they deviate from this forecast. BT's competitors have expressed concern that BT does not face a similar process in relation to its orders. They are further concerned that forecasting does not provide any benefit to them in terms of customer management centre ("CMC") dedicated staffing or equipment availability. Altnets have raised similar concerns in relation to the penalties for orders that are cancelled.
- 6.46 Ofcom stated in the July 2005 Replicability Assessment that it would consider a punitive forecasting regime to be a significant bar to replicability.
- 6.47 BT has advised that its own retail activities provide quarterly demand forecasts as part of the BT Group budget build, but acknowledges that this does not involve financial penalties for inaccurate forecasting. BT advised that its retail activities would be prepared to follow comparable forecasting procedures to the Altnets as part of the regulatory settlement. This would involve forecasting circuit numbers (but not point of handover requirements as BT does not believe that these apply to its retail activities), the payment of forecast underachievement charges and access to Reduced Requisite Period and Expedite processes.
- 6.48 BT had also sought to provide reassurance that forecasting penalties are not punitive, pointing out that the current arrangements were put in place by Oftel with the specific aim of striking a balance between incentivisation and the recovery of costs. The revenue received by BT from levying inaccurate forecasting charges represents less than 0.1% of billed PPC revenue and is significantly less than the compensation that BT has paid out for delayed repair and provision under the SLAs. BT had also made clear that Altnets are not obliged to provide forecasts and that there are a number of Altnets who do forecast accurately and so do not incur penalties.
- 6.49 Altnets questioned whether the outcome of BT's retail activities paying forecasting penalties would actually achieve replicability as it simply results in a transfer of money between different parts of BT, rather than a payment out of BT. UKCTA proposed two alternative options as a means of ensuring replicability in this respect. The first would be a complete modification of the PPC forecasting rules so that forecasting is either not required or that penalties reflect only the genuine costs incurred, for example the costs of warehousing equipment that was forecast but not used, for a reasonable time period. The second option would be to require BT's retail activities to become signatories to the PPC contract and all of its associated terms.
- 6.50 Ofcom stated in the July 2005 Replicability Assessment that it was of the view that it would not be appropriate to require BT's retail activities to sign up to the PPC contract as they do not actually purchase PPCs. Ofcom did not propose that BT be required to provide EOI as regards retail leased lines, only equivalence of outcomes. Ofcom therefore believed that it would be more appropriate to require BT to ensure that any penalties that it levies for inaccurate forecasts reflect only the genuine costs incurred. In order for BT's retail leased lines to be considered replicable in this respect, Ofcom proposed that BT must provide evidence to Ofcom during the consultation period to show that the forecasting penalties only reflect genuinely incurred costs.

Responses to the consultation

- 6.51 In its response BT stated its view that evidence as to the cost basis for penalties had already been provided to Ofcom. BT also stated that as of 1 December 2005 BT Retail is required to provide forecasts and will face the same charges as the Altnets.
- 6.52 In its response UKCTA supported Ofcom's view that forecasts should not be punitive. UKCTA also believed that the penalties should be firmly related to costs incurred and questioned whether, based on the performance of the CMCs that the Altnets perceive, forecasts were being used to ensure adequate staffing levels.

Ofcom's response

- 6.53 Ofcom is of the view that forecasts provide a useful means of ensuring that BT as a supplier is resourced to supply expected orders and that penalties are an important mechanism to ensure that forecasts are as accurate as possible. Together this incentivises efficient operation. Ofcom welcomes the commitment by BT Retail to also use the forecasting process.
- 6.54 Ofcom is also of the view that penalties should be cost based to allow BT to recover its efficiently incurred costs should forecasted orders not materialise. The model for determining penalties was described in Annex D of the PPC Phase two direction³¹. Ofcom has requested BT to recalculate penalties based on the most recent cost data. Until the revised penalty charges are instituted Ofcom continues to regard this as a bar to replicability.

Inequality of information

- 6.55 PPC charges depend on a number of factors that are not known until late in the ordering process (e.g. the availability of existing copper and/or fibre). Altnets expressed concern that BT's retail activities have visibility of this information and are therefore in a better position to estimate the costs of supplying a new customer. In particular, Altnets believe that BT's retail activities have access to customer data that pre-dated PPCs, when BT was the sole provider of retail leased lines. This would include data on many of the customer sites that Altnets are now serving.
- 6.56 BT advised that it does not have sufficiently accurate information to enable an immediate quote to be provided on receipt of an order and that in many cases it has to rely on physical surveys of a site before actual costs are known. The planning processes to establish these costs are the same for retail leased lines as for PPC orders. Thus although tools such as "Quickquote" enable price estimates to be given to customers, they use no wholesale data and the prices quoted remain subject to survey.
- 6.57 BT claimed that there is no real customer data available to it that predates PPCs (i.e. pre-August 2001), suggesting that there was no real historic need for such data. Capture mechanisms to gather such data were only put in place after PPCs were launched.

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http://www.ofcom.org.uk/static/archive/oftel/publications/broadband/leased_lines/ppc1202/direction.htm

Statement to replicability and large business pricing

- 6.58 Altnets claimed that anecdotal evidence did not support BT's assertions and that they understand that the planning resource for desk top surveys is provided by BT's retail activities, rather than wholesale. Altnets believed that in order to ensure replicability, BT should provide access to the customer data that predates August 2001.
- 6.59 BT, however, acknowledged that it ceases PPC orders where the end customer name or contact details are incorrect but that it does not do the same for retail leased line orders. Discrepancies of this type are instead addressed as the order progresses. BT had proposed to review its processes to ensure that the same approach is adopted for PPCs in similar circumstances.
- 6.60 Ofcom stated in the July 2005 Replicability Assessment that it was of the view that operators using PPCs should have a similar level of visibility of relevant data as BT's retail activities. Ofcom did not, however, consider that the data that BT holds for leased lines customers which pre-dates August 2001 is relevant to PPC operators or that BT's retail activities have sufficient data to be able to carry out their own desk top surveys. It is only since the introduction of PPCs, and the competition that it brought, that BT has gathered significant information on customer sites.
- 6.61 Ofcom considered that discrepancies between the way in which BT's wholesale activities deal with incorrect customer name or contact details for PPC orders and retail orders amounts to a lack of replicability as it results in higher levels of rejected orders for PPCs as compared to retail leased lines. Once BT had carried out its proposed process review and implemented the necessary changes to ensure that PPC orders are treated in the same manner as retail leased line orders when incorrect details are provided in orders, Ofcom proposed to conclude that retail leased lines are replicable in this respect.

Responses to the consultation

- 6.62 In its response BT stated that PPC orders are not cancelled subject to a change of name or contact.
- 6.63 In its response UKCTA stressed the importance of having equivalent information available to Altnets as is available to BT Retail, particularly with respect to circuit utilisation and customer delivery. UKCTA also suggested that if BT Retail were to use eCo, as is used by the Altnets, then equivalence would be possible.

Ofcom's response

- 6.64 Ofcom recognises the importance of timely availability of relevant information and is of the view that BT Wholesale makes such information available via the eCo system. Ofcom understands Altnets concerns that as BT retail do not also use eCo then there is a lack of understanding of what differences there may be with the availability of information. However, EOI has not been applied to PPCs and Ofcom does not believe it is necessary for BT Retail to migrate to eCo. Ofcom further believes that the publication of the PPC IRO by BT should address the transparency issue and urges the Altnets and BT to work together to improve this document to address any lingering concerns. Ofcom does not believe that there are any more outstanding issues in respect of inequality of information that are a bar to replicability.

Migration

- 6.65 Several operators commented that they would like to have a process for migrating their customers from retail private circuits to PPCs. Such a process was made available when the PPC product was first introduced, but is no longer available to the same functionality.
- 6.66 Although operators are able to migrate retail private circuits to PPCs, they currently do not have the ability to redesignate/grandfather retail muxes, which results in them incurring additional costs to purchase new muxes. Operators have therefore sought from BT the ability to redesignate muxes at a reasonable charge.
- 6.67 Ofcom stated in the July 2005 Replicability Assessment that it was of the view that in order for BT's retail private circuits to be fully replicable, competitors should be able to migrate customers from these circuits to PPCs without incurring unnecessary and inefficient costs. Ofcom therefore proposed to conclude that BT's retail private circuits should not be considered to be replicable in respect of migration until such time as operators have the ability to migrate retail circuits to PPCs and redesignate muxes at a reasonable charge.

Responses to the consultation

- 6.68 In its response BT stated that it had already reopened the circuit migration facility as of March 2005 and was planning to publish pricing for the grandfathering/re-designation of muxes.
- 6.69 In its response UKCTA welcomed Ofcom's position on migration and the grandfathering of muxes. However, UKCTA also raised the issue of termination clauses when an Altnet takes over a retail leased line after winning business. UKCTA believes that because PPCs use BT plant that when BT Retail wins business currently supported by PPCs it does not incur penalties as it is in a position to change the contract.

Ofcom's response

- 6.70 Ofcom welcomes BT's decision to provide pricing for the re-designation of muxes and is keen to see this facility made available on cost-oriented terms. Ofcom believes that the issue of penalties when lines are taken over by another supplier is a contractual one and should therefore be part of the discussions between industry and BT in respect of contractual terms (see below).
- 6.71 Ofcom therefore concludes until BT has made available grandfathering/re-designation of muxes on cost-oriented terms this will continue to be a bar to replicability.

PPC contract complexity

- 6.72 A variety of concerns had been expressed in relation to the complexity of the PPC contract. Operators would prefer to see the multiple contracts that currently exist replaced by a single contract with different schedules for different products. UKCTA recognised that contracts issues are dealt with in the Undertakings and had proposed that only the PPC-specific terms of the PPC contract be considered within this consultation.

- 6.73 BT had expressed a willingness to discuss the simplification of the PPC contract with the industry and with Ofcom, pointing to the WLR2, RBS and WES contracts as examples of simple form contracts that it had recently agreed with operators.
- 6.74 Ofcom was of the view that there should be scope for simplifying the current range of contracts, but recognised that it may not be possible for these discussions to be concluded by the time that Ofcom would seek to conclude on the issue of replicability. Additionally, the conclusion of such discussions is not entirely in BT's hands as it is also reliant on the input and agreement of the rest of the industry.
- 6.75 Section 12.1 of the Undertakings contains an obligation for BT to work with Ofcom and the industry to set up a mechanism to deal with the issues surrounding the terms and conditions relating to SMP products. In the July 2005 Replicability Assessment, Ofcom considered that this mechanism would provide an appropriate framework in which to address the complexity of the PPC contract and did not, therefore, propose to conclude the resolution of this issue as being sufficiently material as to prevent replicability from being found in this respect.

Responses to the consultation

- 6.76 In its response, BT stated its aim to simplify the contracts it has with CPs and asserted its commitment to the Master Services Agreement process as a means of ensuring this.
- 6.77 UKCTA in its response cited the commitment of the Altnet community to agreeing a suitable Master Services Agreement and believed that until such an agreement is concluded retail leased lines should not be found replicable in this respect.

Ofcom's response

- 6.78 Ofcom believes that the existing contractual framework is onerous and a bar to replicability. Ofcom further believes that the Master Services Agreement represents the best mechanism for solving this issue and believes that both BT and the Altnets are both incentivised to reach a satisfactory conclusion to these discussions. However, Ofcom recognises that the Master Services Agreement is not the only way of reducing PPC contract complexity and understands from BT that it is, in parallel, conducting a review of the PPC contract with its customers. Ofcom also recognises that the bilateral, or even multilateral, nature of such negotiations means that it is not entirely within BT's control to rectify this issue.
- 6.79 It is Ofcom's view that the current complexity of the PPC contract – together with the reasonableness of some of its terms (see the following section) – is a bar to replicability.

Reasonableness of contract terms

- 6.80 Concerns were also expressed in relation to the reasonableness of the PPC contract terms. In particular, concerns were raised in relation to BT's policies on credit vetting, payment terms, and the penalties for late payment. Operators argued that the current contractual terms in these areas are onerous when compared with other wholesale products.
- 6.81 BT disputed that the current credit vetting, payment terms and interest for late payment clauses in the PPC contract differed from its general policies over the entire

wholesale product portfolio. BT sought further clarification from operators as to the specific issues that they have with the PPC terms.

- 6.82 In the July 2005 Replicability Assessment Ofcom stated its view that the PPC contract should be no more onerous in respect of the terms listed above than that for other wholesale products, but considered that any necessary changes could be achieved through a process of commercial negotiation, with the ability to bring a dispute to Ofcom for resolution remaining as a backstop. Ofcom did not therefore consider that this issue is a bar to replicability.

Responses to the consultation

- 6.83 In its response BT stated that it was happy to consider these issues within the context of its PPC contract review process which commenced in October 2005. BT also felt that the Master Services Agreement process would help with this issue.
- 6.84 UKCTA listed many of the issues its members have with respect to the issues outlined above and its belief that they were unreasonable.

Ofcom's response

- 6.85 It is Ofcom's view that this issue should be addressed as part of the Master Services Agreement or PPC contract review processes as referred to above and that until one or other of these processes is satisfactorily concluded this issue will continue to be a bar to replicability.

Billing accuracy

- 6.86 Operators had expressed concerns in relation to the quality and accuracy of bills raised by BT for PPC products. The billing system currently in use for PPCs is a retail billing platform, and questions had been raised as to whether this is fit for purpose for a wholesale product such as PPCs.
- 6.87 BT acknowledged that the migration of some retail private circuits to PPCs exposed some inadequacies in the data that had previously been captured for these circuits, resulting in billing errors occurring. BT argued that this was not a defect in the billing platform, but rather a problem with the data set that was contained within it. Where the correct data is held on a circuit, accurate bills are produced.
- 6.88 BT undertook a process to validate the radial distance of its entire PPC inventory (around 64,000 circuits) and corrected postcode errors that were identified as well. On the basis of this revised information, BT recalculated the terminating and trunk segment charges for all PPCs and provided each operator with a list of circuits that have been impacted to enable them to validate the information.
- 6.89 BT believed that this should mean that PPC bills are now accurate. Operators believed that it was too early to assess whether the changes made by BT had been successful at eradicating billing errors and continued to believe that a billing Service Level Agreement ("SLA") is necessary.
- 6.90 Ofcom stated in the July 2005 Replicability Assessment its view that in order for BT's retail leased lines to be considered replicable, it is necessary for Altnets to know how much the wholesale circuits that they are purchasing from BT to compete at the retail level are costing them, and be able to relate these bills to the actual orders that they placed with BT. Without the provision of accurate bills, Altnets are unable to

accurately bill their own retail customers, leaving them at a commercial disadvantage to BT.

- 6.91 Ofcom was of the view that it was too early to assess whether the billing validation process undertaken by BT had been successful in ensuring that Altnets receive accurate PPC bills and are able to associate bills received with orders placed. Ofcom proposed to monitor the situation during the consultation process and use the results of this monitoring to inform its final statement. If it found that BT is now issuing accurate PPC bills, Ofcom intended to reach the conclusion that retail leased lines are replicable in this respect.

Responses to the consultation

- 6.92 In its response to the consultation, BT asserted its view that the results of the Circuit Review Assurance Board ("CRAB") should be visible in March 2006.
- 6.93 UKCTA was concerned that the issue was not just one of accuracy, but also of verifiability stating that its members incurred significant costs in verifying BT's bills and that these are costs which BT Retail does not incur.

Ofcom's response

- 6.94 Ofcom has discussed with Altnets the initial results of the CRAB exercise and is concerned that the lack of clarity within BT's bills not only makes it difficult for Altnets to verify the accuracy but also requires them to incur significant costs in processing the bills. It is Ofcom's view that BT's efforts to improve accuracy (through the CRAB exercise) have not yet been shown to have produced more accurate bills, and that the current bills produced by BT place a burden on Altnets which BT's retail arm does not face and that these issues remain a bar to replicability.
- 6.95 Ofcom urges BT to work with its customers to improve not only the accuracy but also the verifiability of its bills and until both accuracy and verifiability have been satisfactorily improved this will continue to be a bar to replicability.

Exclusion of certain services from the charge control

- 6.96 Concern had been expressed by some operators that In-Span Handover ("ISH") extension services and path protected services are excluded from the scope of the PPC charge control.
- 6.97 BT had advised that it was carrying out a review of the costs of these services and that it would make any necessary price changes as soon as possible.
- 6.98 Ofcom stated that it was of the view that although ISH extension services and path protected services are not specifically included in the PPC charge control, a number of the network components used to provide these products are identical to network components included in PPC products that are included in the charge control. Ofcom was of the view that the network components should be charged for in a consistent manner across all PPC products so as not to unduly discriminate, in order for BT's retail leased lines to be considered replicable in this respect.

Responses to the consultation

- 6.99 In its response BT stated:

“BT is addressing the issue of price changes on ISH extension and Path protection products. Path protection price changes took effect from 1 October 2005 and price changes on ISH extension are due to be submitted for internal authorisation in October.”

- 6.100 UKCTA welcomed Ofcom’s view that charging should be consistent and noted that price changes for ISH extension services were still under review by BT. UKCTA stated its belief that until these changes were effected then this is a bar to replicability and further stated:

“We consider that this requires BT to retrospect any decreases in ISH Extension charges to 1 October in order for BT Retail’s leased lines to be considered replicable.”

Ofcom’s response

- 6.101 It is Ofcom’s view that until BT has implemented the price changes relevant to ISH extension services retail leased lines will not be replicable in this respect.
- 6.102 Ofcom regards the assessment of replicability as a forward-looking concept and is not therefore concerned with issues of retrospection.

PPC performance

- 6.103 In order to ensure replicability, it is also important that the operational performance of BT in relation to PPCs is sufficient to allow alternative operators to compete with BT’s retail activities. The PPC direction sets out a number of requirements to publish KPIs. However, a variety of concerns had been expressed by operators using PPCs in relation to BTs operational performance.

Inadequacy of comparators

- 6.104 There was a general concern that the current KPI comparators are insufficient to permit detection of any undue discrimination. In particular, operators considered that the performance of BT at the wholesale level in relation to PPCs needs to be better than its performance in relation to retail leased lines, due to the additional activities that are required between provision of a PPC and provision of the retail leased line which it supports. Operators had also requested that figures for BT’s retail activities be added as separate line items to all the existing KPI comparators to enable direct comparisons to be made.
- 6.105 BT had commented that it had already agreed to provide performance figures for its retail activities to Altnets so that they can compare the service that they receive with that which BT provides itself. BT had also expressed a willingness to consider other comparators that Altnets may find useful and were awaiting a response from them on this.
- 6.106 In relation to provision performance, BT had responded that the Directions contained in the leased lines market review already require that a reduction be made in PPC delivery timescales (as compared to retail circuit timescales) in the SLA to enable testing of the circuits before they are handed over.
- 6.107 Ofcom had already built a requirement for BT to ensure that its provision timescales for PPCs are shorter than those for its retail leased lines into the obligations imposed on BT to provide PPCs and therefore did not believe that further performance

enhancements were required in this respect. The current KPIs³² already generally indicated that BT's performance in respect of PPC provision and repair is better than that for its retail leased lines.

- 6.108 UKCTA had additionally argued that BT should add details of the performance of its own retail activities as a separate line item to the KPI reports that it produces and that BT should not be allowed to 'stop the clock' for 3rd party incidents.
- 6.109 UKCTA had also set out a list of further KPIs that it believed were required in order to ensure that operators can check that they are receiving a comparable level of service to that received by BT's retail activities. These included KPIs relating to:
- the occurrence of jeopardies late in the delivery cycle;
 - the level of order rejections and site survey requests;
 - the percentage of orders accepted first time;
 - the number of circuits provisioned in less than RRP;
 - the percentage of forecasts actually ordered;
 - billing errors;
 - CMC performance;
 - missed CDDs and new provision dates; and
 - eCo Gateway outages.
- 6.110 UKCTA had also suggested that in order to ensure replicability, any deviation in favour of BT's retail activities shown by the KPIs should trigger compensation payments to BT's competitors.
- 6.111 Ofcom did not consider that it would be appropriate for BT to be required to make compensation payments where the KPIs suggest that BT's retail activities are receiving more favourable treatment than BT's competitors. The purpose of KPIs is to enable BT's competitors to monitor whether BT is unfairly favouring its own downstream activities in the provision of wholesale inputs to leased lines, not to provide compensation.
- 6.112 Compensation is already available where BT fails to meet the provisioning requirements set out in the SLA, so to require the provision of compensation through KPIs as well would, in some circumstances, lead to operators being compensated twice for the same failure by BT. If operators believe that the KPIs show that BT is unduly favouring its own retail activities then they are able to bring a complaint to Ofcom under the Act in regards to the alleged failure to comply with its SMP obligations not to unduly discriminate.
- 6.113 The existing KPI requirements were put in place in June 2004 following a detailed analysis of the leased lines markets and consideration of the remedies that were necessary to address the finding that BT has SMP in many of these markets. Ofcom

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http://www.btwholesale.com/application?origin=siblings.jsp&event=bea.portal.framework.internal.refresh&pageid=typical&nodeId=navigation/node/data/service_and_support/kpi/kpi

did not consider it necessary to require BT to publish separate details for the performance of its retail activities, instead taking the view that their inclusion in the aggregated report was sufficient. In the July 2005 Replicability Assessment Ofcom stated that it saw no reason to deviate from this position now and noted that BT has voluntarily agreed to provide retail comparators for the key metrics of provision and repair.

- 6.114 Ofcom was further of the view that it is appropriate to allow BT to 'stop the clock' for delays caused by 3rd party incidents. The major causes of 3rd party delays are lack of access to the customer site to be able to carry out work and the need to obtain local authority planning consent before carrying out public works. BT has little control over delays caused by either of these factors so Ofcom remains of the view that it is not appropriate to include such delays when calculating the time take to provision PPCs.
- 6.115 As regards the new KPIs proposed by UKCTA, Ofcom was of the view that further KPI requirements were unnecessary for the purposes of considering replicability. KPIs are a means of assessing whether BT is complying with its obligation not to unduly discriminate, rather than a form of improvement to a wholesale product. KPIs do not impact on whether or not a product is replicable, they simply indicate the levels of performance provided by BT and whether these are the same as it provides on its own retail leased lines.
- 6.116 The tests and assessment set out in this section sought to identify whether BT's retail leased lines products are replicable or not and Ofcom did not consider that it was necessary to impose further KPI requirements on BT in order to carry out this assessment. The imposition of KPIs imposes a regulatory burden on BT and Ofcom must take this into consideration when deciding whether there is a need for further KPIs. Given the transparency obligations in the Undertakings, Ofcom did not consider that it was necessary to impose further KPIs on BT at this stage and that this issue was not a bar to replicability. Ofcom concluded that consideration as to whether additional KPIs are required would seem better left to the next leased lines market review when the markets, obligations and remedies can be properly assessed as a whole, rather than in isolation.

Lack of availability of enhanced SLAs

- 6.117 Operators had raised concerns that BT was able to offer enhanced SLAs to particular types of retail customer (for example the NHS and NATO) but the current PPC SLAs did not permit these enhanced care levels to be replicated.
- 6.118 BT had advised that it did not provide enhanced SLAs on wholesale leased lines to its retail activities that are not available on PPCs and suggested that there were two different issues here, the first relating specifically to NATO and the second relating to service wraps offered on retail leased lines.
- 6.119 BT argued that it is not the lack of enhanced SLAs that was preventing Altnets from competing with it for the provision of retail leased line services to NATO, but rather the lack of security accreditation. In order to provide leased line services to NATO, special security accreditation is required from NATO. BT's retail activities are not the only provider of leased lines that NATO has chosen to grant this security accreditation to and Ofcom considered the granting of such security accreditation to be a matter for NATO and did not consider this to be a replicability issue. In addition, Ofcom considered that the number of circuits purchased by NATO to be sufficiently small as not to be material to its consideration of replicability.

- 6.120 BT had advised that to a certain extent the SLAs offered to customers such as the NHS are based on the same wholesale SLAs but with a greater commercial risk taken by BT's retail activities. SLA payments are only required to be made where the agreed service level is not provided. BT's retail activities have taken a commercial decision to offer better SLAs to certain of its customers than it receives when purchasing wholesale inputs. Any differences between the wholesale and retail SLAs must be met from revenue from the retail leased lines.
- 6.121 BT had, however, advised that a special level of service care is provided to those circuits that are categorised as being essential for the preservation of human life and/or defence of the Realm³³. Priority Prompt and Total Care³⁴ provides the same services as are available for Prompt Care and Total Care but gives additional priority to responding to faults which interrupt or restrict the use of equipment or service provided.
- 6.122 Ofcom was of the view where improved retail SLAs are based on BT's retail activities adopting a higher level of commercial risk, that such SLAs can also be offered by Altnets with the result that the retail leased lines could be considered replicable. However, where the improved SLAs are based on the provision of better service levels at the network layer, as is the case with Priority Prompt and Total Care, Altnets were unable to offer comparable services unless they are also provided with similar levels of service. Ofcom was therefore of the view that BT should make a comparable priority care service available for PPCs that fall in the category of being essential for the preservation of human life and/or defence of the Realm as is available for BT's retail leased lines in order for retail leased lines to be considered replicable in this respect.

Jeopardies

- 6.123 Altnets had expressed concern in relation to the volume of jeopardies (which was seen as too high), and the process of notifying jeopardies (which was seen as being too late).
- 6.124 BT had advised that both its retail activities and PPC customer service personnel have access to the same fault event systems, with Altnets having the ability to obtain automatic notifications through the eCo Gateway, which are not available to BT's retail activities.
- 6.125 Altnets had advised that they need to understand better how BT goes about fault fixing and the data systems available to it before they could conclude whether or not they have comparable access to BT's retail activities.
- 6.126 Ofcom was of the view that the fault notification processes available to Altnets mean that they were not placed at a material disadvantage to BT's own retail activities in this respect and therefore proposed to conclude that retail leased lines are replicable in this respect.

³³ The circuits falling within this category have been agreed with Ofcom and are contained on a list held by BT.

³⁴ <http://www.serviceview.bt.com/list/current/docs/Maintenance.bo0/02015.htm>

Escalation

- 6.127 Altnets had also expressed concern that they did not have access to more senior engineering staff within BT to expedite work, whereas BT's retail activities appeared able to escalate issues that may arise during the provisioning process. Altnets are permitted to expedite provisioning of 15% of their circuits but have no information on the ability of BT to expedite retail provisioning.
- 6.128 BT had advised that it always tries to respond positively to customer requests and suggested that both PPC customers and its own retail activities have the same access to BT managers via the service centres and account teams. BT provided Altnets with a summary of the expedite process for both retail leased lines and PPCs to enable them to compare the two processes to assess whether they are comparable.
- 6.129 Ofcom was of the view that the escalation processes available to Altnets suggests that they are not placed at a material disadvantage to BT's own retail activities in this respect and therefore proposed to conclude that retail leased lines are replicable in this respect.

CMCs

- 6.130 Concern had also been expressed about the apparent inadequacy of CMCs when installing large numbers of PPCs that has led some operators to feel the need to purchase additional project management from BT, in the form of Wholesale Assist, in order to provision the PPCs.
- 6.131 Altnets had advised that the CMCs are set up so that they are unable to choose who in the CMC they contact, instead having to deal with whoever picks up the phone. When seeking to install a large number of PPCs, operators require regular updates on the status of the circuits from BT but are unable to contact a single individual within the CMC to provide the regular updates.
- 6.132 As a result of this, some operators are purchasing Wholesale Assist from BT, which provides for a single project co-ordinator and point of contact. Altnets believe that the project co-ordinator is generally someone who already sits in the CMC, meaning that they effectively pay twice for the resource as they already pay for the CMC through PPC charges.
- 6.133 Altnets had questioned whether the service provided by CMCs is adequate when a number of them feel the need to purchase additional project management despite the existence of standard SLAs.
- 6.134 It was not clear to Ofcom whether Altnets had a genuine need to purchase additional project management or not but Ofcom did not consider that this was the relevant issue when assessing replicability. Rather, the relevant issue is whether BT's retail activities receive the same level of service from the CMCs as competing operators do. Ofcom did not consider that it was necessary to introduce a new KPI to assess this issue, as had been suggested by UKCTA, but instead proposed to monitor the level of service provided by the different CMCs. Over time, this would enable Ofcom to identify whether operators are receiving the same level of service as BT's retail activities and whether that level of service is adequate. Where the level of service is materially different, Ofcom would consider whether this amounts to a breach of BT's obligation not to unduly discriminate. Ofcom did not consider this issue to be a bar to replicability.

Major outage notification

- 6.135 Altnets had expressed concern about poor notification of major outages, in particular the processes for planned outages. Altnets had complained that planned outages are scheduled for times of the day that are inconvenient to them and their customers.
- 6.136 Ofcom was of the view that planned outages are likely to affect all customers in the area that the outage takes place, regardless of whether they are customers of Altnets or BT's retail customers. Any service disruption is likely to be inconvenient and would affect the consumer regardless of whether it was BT or an Altnet using a PPC who was providing them with the leased line.
- 6.137 Ofcom was satisfied that the major outage notification processes available to Altnets mean that they should not be placed at a material disadvantage to BT's own retail activities in this respect and therefore proposed to conclude that retail leased lines are replicable in this respect.

Responses to the consultation

- 6.138 In its response BT stated:

"BT has reviewed its current practices and has ensured that it offers the same processes to all BT Wholesale customers (including BT Retail) on the same terms for emergency repair."

- 6.139 UKCTA stated that the IRO was insufficient for its members to determine if they were at a material disadvantage to BT's retail divisions and therefore they rely heavily on KPIs to perform this comparison. UKCTA was disappointed that Ofcom had not chosen to use any of the KPIs it suggested and re-submitted them.
- 6.140 On stop the clock UKCTA was concerned that BT used this mechanism for situations that are within its control as well as without. UKCTA also wanted to see the priority SLA for safety of life and defence of the realm applications made available on PPCs.
- 6.141 On jeopardies UKCTA stated its belief that BT Retail had access to more information with respect to, for example, alarm history and that BT regularly leaves it late in the process before informing its customers of delays. UKCTA was similarly concerned that BT Retail employees could use internal contacts to escalate problems.
- 6.142 Finally UKCTA was concerned that by having its own CMC BT Retail was able to secure superior performance to the Altnets without having to purchase Wholesale Assist; and during major outages UKCTA was concerned about the level of information its members received.

Ofcom's response

- 6.143 Ofcom has re-considered the KPIs suggested by UKCTA and considers that the only area in which it might be appropriate to impose additional KPIs on BT is in the area of CMC performance where Ofcom is of the view that the existing KPIs are insufficient to be able to determine the level of performance within the BT Retail CMC as opposed to the CMCs used by the Altnets. This is relevant within the context of the perceived need to purchase Wholesale Assist. Ofcom has been unable to satisfy itself that BT's downstream divisions do not receive superior performance via their dedicated CMC and will seek to agree with BT appropriate KPIs to illustrate this. Until these KPIs are in place Ofcom views this as a bar to replicability.

- 6.144 Whilst Ofcom accepts that purchasing and security clearance of suppliers are issues for the relevant purchasers, it is of the view that should an Altnet receive an order for a circuit for which safety of life or defence of the realm issues are relevant then it should be possible to purchase a PPC from BT with the appropriate SLA and that the absence of this as an option is a bar to replicability.
- 6.145 Ofcom does not believe, however, that BT Retail has superior information available to it with respect to alarm history or other aspects related to jeopardies, and does not view this as a bar to replicability.
- 6.146 Similarly, Ofcom is of the view that Altnets are not disadvantaged relative to BT's downstream retail divisions with respect to escalations. However, as stated above Ofcom does perceive the need for a CMC KPI to allow the comparison of the performance of the BT Retail and BT Wholesale CMCs. Ofcom does not view escalations as a bar to replicability.
- 6.147 Finally, Ofcom continues to be of the view that there is no disadvantage to Altnets from the major outage notification process since any major service disruption is likely to affect all users equally and not just those using PPCs. Ofcom does not view this as a bar to replicability.

Other issues raised by respondents

- 6.148 UKCTA and others raised a number of additional issues as follows:
- cancellation charges – Altnets were concerned that when an order is cancelled after the FOC point then they are charged the full price for equipment even though this can be re-deployed;
 - Statement of Requirement – Altnets were concerned that the requirement for reasonable demand effectively precluded BT from agreeing to their requests;
 - jeopardies schedule – C&W wished to see its re-introduction providing a rolling 5 day pre-delivery schedule as used to be provided;
 - efficiency of engineering visits – Energis was concerned about discretionary arrangements between the engineer and the customer, and the ability for an engineer to do both circuit provision and BT Retail activities within the same visit;
 - DPCN bearers – Energis was concerned over the requirement to purchase DPCN bearers to the point of handover for circuits <1Mbps and that BT Retail did not have to do so; and
 - Assured resilience – C&W wished to see the availability of assured resilience as an option on PPCs in excess of 2Mbps.

Ofcom's response

- 6.149 Ofcom understands that the point related to cancellation charges is that BT may receive full payment for equipment not subsequently used for the original order if that order is cancelled after the FOC point, and hence there is the possibility of BT receiving payment twice for the same equipment if it is subsequently used to fulfil another order. Similarly, if the ordering entity was refunded that would require BT to carry the risk of the cost of equipment which it may not subsequently be able to use. It is Ofcom's view that it is inappropriate for BT to be paid more than once for the same equipment when that equipment is not used in fulfilment of the original order and that BT should work with industry to determine an appropriate mechanism for

avoiding such a situation. Until an agreed mechanism is in place Ofcom regards this as a bar to replicability.

- 6.150 Ofcom is of the view that the requirement for 'reasonable demand' is reasonable within the context of the SOR process and that this process, as modified by conditions G9 and GG9 in Annex D of the leased lines market review, is an effective process which meets the needs of both BT and the Altnets. Ofcom does not view this as a bar to replicability.
- 6.151 Ofcom understands that the jeopardies schedule referred to by C&W was introduced as a limited interim facility whilst eCo was introduced into C&W and that it is no longer needed. Ofcom does not view this as a bar to replicability.
- 6.152 It is Ofcom's view that BT adopts the same processes in the field irrespective of whether the field engineer is installing a retail leased line or a PPC in accordance with the Undue Discrimination Guidelines. Ofcom does not view this issue as a bar to replicability.
- 6.153 Ofcom understands from BT that it also has to use DPCN bearers for its sub-1Mbps private circuits but as these are provided on an end-to-end basis they are not a separately orderable component of a retail leased line and do not, therefore, appear in the retail price list. Due to the nature of a PPC the DPCN bearer is required to be ordered as a component which terminates at the point of handover. Ofcom does not view this as a bar to replicability.
- 6.154 The scope of the July 2005 Replicability Assessment is retail leased lines of 8Mbps and below and therefore circuits of higher bandwidths are out of scope. 2Mbps circuits have an assured resilience option available and 8Mbps retail circuits are no longer available for new supply. It is possible to purchase an N x 2Mbps retail option (where N is between 2 and 4) which has an assured resilience option. It is Ofcom's view that such a product can be replicated by purchasing a similar number of PPCs with the assured resilience option. Ofcom does not, therefore, view this issue as a bar to replicability.

Conclusions

- 6.155 Ofcom is of the view that there are a number of issues that remain outstanding as regards the PPC product that, collectively, mean that BT's retail business leased lines products cannot currently be considered to be replicable.
- 6.156 In Ofcom's opinion the remaining issues are:
- address cost disparities between retail leased lines and PPCs as a result of the PPC pricing model;
 - implementation of revised forecasting penalties;
 - implementation of an option to re-designate/grandfather muxes on cost-oriented terms;
 - successful conclusion of the Master Services Agreement or PPC contract review process;
 - prove adequate billing accuracy and bill verifiability;
 - implement relevant price changes for ISH extension circuits;

- introduce KPIs to allow the performance of the BT Retail CMC to be compared to the wholesale CMCs;
- availability of Priority Prompt and Total Care SLAs on PPCs designated for use in safety of life or defence of the realm applications; and
- potential double payment for equipment cancelled after the FOC point and subsequently deployed in fulfilment of another order.

6.157 These conclusions are repeated in Section 9.

Section 7

Consultation on appropriate regulation in the presence of replicability

Ofcom's proposal made in September 2005

- 7.1 As summarised in Section 2 above, in the September 2005 Business Pricing consultation Ofcom invited comments on the form regulation of BT's retail business exchange line services and business inland call services should take when these services are deemed to be replicable by BT's competitors.
- 7.2 Stakeholders were asked to consider five questions as follows:
- *Question 1:* Do you agree with the proposal to consent to BT departing from its published prices where services are replicable?
 - *Question 2:* Do you agree that consent to BT departing from its published prices should be limited to prices above a floor defined by fully allocated costs? Would the application of such a price floor adequately address any concerns which you have about the general proposal to consent to departures from the published price list? Do you agree that Ofcom should not presume that service bundles which fail an implicit price – cost test at the individual service level are unduly discriminatory?
 - *Question 3:* Do you agree that BT should not be obliged to notify bespoke prices to Ofcom or publish bespoke prices after the event?
 - *Question 4:* Do you agree that any consent to BT departing from its published prices should initially be limited to prices offered to customers already spending in excess of £1m per year with BT?
 - *Question 5:* Do you agree that where business inland calls and business exchange lines are considered replicable for the purpose of allowing service bundles which include these products, then business inland calls and business exchange lines should also be considered replicable for the purpose of allowing unpublished bespoke prices?

Responses to the consultation exercise

- 7.3 A total of 14 Responses were received from: BT, Cable and Wireless, the Communications Management Association (CMA), Easynet, Energis Communications, Kingston Communications, MCI, the Royal Mail, Scottish and Southern Energy, Telewest, the UK Competitive Telecommunications Association (UKCTA), Your Communications and a further respondent which wished to remain anonymous.
- 7.4 BT, with certain reservations about the limitations which Ofcom proposed should be imposed, was broadly in favour of the proposal that it should be permitted to offer bespoke unpublished prices where services are replicable. The two responses representing the views of purchasers of business retail communications services (the CMA and the Royal Mail) were also broadly in favour of these proposed changes. One of BT's competitors, Telewest, also broadly endorsed the proposal, but all other responses from BT's competitors argued strongly against any relaxation of retail regulation, at least until such time that BT has met its commitments in respect of EOI

and equivalence of outcomes made in the context of Ofcom's TSR. BT's competitors were all of the view that the concept of replicability sat uncomfortably with the newer concept of Equivalence and should be abandoned. This overriding view, naturally, conditioned those respondents' comments on the detail of Ofcom's proposal.

Price floors

- 7.5 Ofcom's proposal that any bespoke prices should observe a price floor defined by the transfer charges for network elements and the fully allocated cost of retail elements appeared to BT to be disproportionately constraining, and BT proposed that any price floor should be set on the basis of Long Run Incremental Cost ("LRIC"). The Royal Mail and the CMA also both argued that the basis of the price floor proposed by Ofcom was too constraining; the CMA, like BT, proposed that the floor should be based on LRIC, and the Royal Mail proposed that there should be no such ex ante floor. Telewest, while agreeing with the basic structure of the proposed price floor, warned that the floor needs to reflect reasonable competitor costs, particularly where BT enjoys scale and historical advantages. In contrast, UKCTA, while rejecting the underlying proposition that BT should be permitted to offer bespoke prices, also questioned whether Ofcom had given adequate consideration to the practicability of assessing such a price floor in specific cases. This view was reiterated by those UKCTA members which also submitted individual responses, and Cable and Wireless further echoed Telewest's view that the costs built into the price floor should be those of an efficient operator rather than, necessarily, those of BT.

Implicit price – cost tests

- 7.6 In the course of previous consultations on the question of bespoke pricing (most recently in the May 2004 Business Pricing statement) Ofcom had expressed the view that service bundles which include services from markets where BT has SMP should be required to pass an implicit price – cost test. The September 2005 Business Pricing consultation, however, expressed the view that where the services from markets where BT has SMP are deemed replicable such bundles should not be required to pass such a test at the individual product level.
- 7.7 BT, in its response to the September 2005 Business Pricing consultation agreed with this proposition, on the basis that, in the presence of replicability, efficient competitors should be capable of replicating all elements of any bundle. The Royal Mail, similarly, agreed that Ofcom should not presume that service bundles which fail an implicit price – cost test at the individual service level are unduly discriminatory but, rather, should assess the question on a case by case basis where concerns are raised. The other respondent reflecting the views of retail purchasers, the CMA, did not comment on this particular issue. UKCTA, in contrast, argued that the implicit price – cost test remains appropriate as smaller competitors may be unable to source some competitive services on terms equivalent to those which BT is capable of securing and, in any event, may not wish to supply a wide service bundle in competition with BT. Cable and Wireless (an UKCTA member), in its own response, reiterated the broad conclusion presented by UKCTA on this matter, on the basis that it believed services are not presently replicable, but Cable and Wireless agreed that, in the presence of genuine replicability, it would be inappropriate to apply the implicit price – cost test at an individual service level. Telewest shared the view of UKCTA that an implicit price – cost test should be conducted, in particular, in respect of prices for services which may be subject to volume and call profile uncertainties. Telewest also favoured tighter controls to ensure that volume and call profile assumptions are borne out in reality.

Price publication

- 7.8 It was Ofcom's proposal that BT should not be obliged to notify bespoke prices to Ofcom or to publish such prices after the event.
- 7.9 BT agreed with that proposal, noting that many customers would object to such detail being placed in the public domain. The Royal Mail, as a purchaser, shared the view that publication would not be appropriate, and recognised the risk of price shadowing which price publication could bring with it. The CMA, too, shared the view that bespoke prices should not be published, but proposed that sealed details should be lodged with Ofcom to facilitate swift investigation of any subsequent complaints. UKCTA too accepted the rationale that, in the presence of genuine Equivalence, BT should not be obliged to publish bespoke prices. However, UKCTA argued that such a move would be premature at this time, and proposed that, as a minimum, BT should be obliged to notify details to Ofcom; not with a view to Ofcom "approving" any such prices but, rather, with a view to increasing the likelihood that BT will comply with price tests. Energis (an UKCTA member) broadly echoed the view expressed by UKCTA, although Kingston Communications (also an UKCTA member) went further in calling for bespoke prices to be published after the event to facilitate compliance monitoring by competitors. Telewest made a specific proposal that BT should be obliged to notify to Ofcom prices and pricing assumptions to enable retrospective auditing, and that such information should be provided in a standard format akin to that used for disclosure of data to taxation authorities.

Proposed limitation on application of changes

- 7.10 Ofcom proposed that, initially, any consent to offer bespoke prices should be limited to offers made to high spending customers (i.e. those spending at least £1 million per year with BT), on the basis that these are subject to close account management by senior BT staff and, therefore, it might be expected that BT will be more able to ensure compliance with ex ante conditions and competition law. Ofcom proposed that after BT has been able to demonstrate its ability to ensure such compliance in respect of bids made to this relatively small group of customers, Ofcom should consider removing the limitation so that bespoke offers may be made to all types of business customers.
- 7.11 BT accepted that an initial threshold should be set, but proposed that the account valuation should be based on total telecoms spend with all suppliers. The Royal Mail, too, saw some merit in the application of an initial threshold. The CMA recognised that some kind of "rolling regime" might be desirable, to test the impact on competition while relaxing the spend threshold. However, the CMA concluded that it was the consensus view of its members (purchasers of such services) that there should be no such threshold. BT's competitors, while often strongly sceptical of the appropriateness of any deregulation at this time, recognised that some form of threshold might be appropriate if any deregulation was to be implemented. UKCTA questioned why, given Ofcom's finding that the high spending business sector is no more competitive than other sectors, Ofcom was proposing to regulate this sector differently. UKCTA proposed that, in any event, any threshold should relate to spending on SMP services alone. Cable and Wireless (an UKCTA member) amplified that view by arguing that a threshold based on spend across a wide range of SMP and non-SMP services would encourage horizontal leverage and, therefore, any threshold should be based on the customer's spend on voice services. Several of BT's competitors also questioned how any given customer's spend would be assessed (for example, whether based on annual spend before or after the relevant bid).

Replicability for the purpose of bundling as well as bespoke pricing

- 7.12 The May 2004 Business Pricing statement concluded that if and when retail business exchange lines and inland calls are deemed replicable, then Ofcom should no longer presume that service bundles which include one or both of these services as well as non-SMP services are unduly discriminatory. The September 2005 Business Pricing consultation made further proposals relating to the offering of unpublished bespoke prices which, similarly, were conditional on these retail services being considered replicable. To ensure clarity, the September 2005 Business Pricing consultation also asked whether stakeholders agreed that, where business inland calls and business exchange lines are considered replicable for the purpose of allowing BT to offer mixed service bundles which include those services, then those services should also be considered replicable for the purpose of allowing unpublished bespoke prices; in other words, whether the same standard should trigger both forms of deregulation.
- 7.13 No respondents disagreed that the same standard should apply to the two forms of deregulation although, as noted above, the responses from UKCTA and from individual UKCTA members all strongly disagreed that “replicability” is an appropriate standard, preferring instead that any deregulation should be conditional on BT’s delivery of Equivalence.

Other issues

- 7.14 In responding to the questions asked by Ofcom in the September 2005 Business Pricing consultation, a number of other issues arose.
- 7.15 Several of BT’s competitors noted one of the findings of a survey of business users commissioned by Ofcom which, if taken at face value, would indicate that a large proportion of BT’s customers believe they have been able to negotiate with BT in respect of the price of inland calls and exchange lines, despite BT’s obligation to adhere to published prices. The same results were broadly replicated in a survey of CMA members. Ofcom noted in the September 2005 Business Pricing consultation that the limited evidence of these surveys alone should not be taken to indicate widespread breach of BT’s obligations to adhere to published prices. Nevertheless, the September 2005 Business Pricing consultation accepted that it may suggest that, in practice, regulation is not hindering BT from engaging in a semblance, at least, of normal commercial negotiation. UKCTA, in its response, urged Ofcom to investigate this finding further. Kingston Communications (also an UKCTA member) went further and called on Ofcom to investigate this finding before considering any deregulation.
- 7.16 There was also concern amongst some of BT’s competitors about the complex, and apparently confusing, interaction between several recent Ofcom publications, including (i) the July 2005 Replicability Assessment, (ii) the Undue Discrimination Guidelines, (iii) the consultation on whether the WLR service is now Fit for Purpose (Wholesale Line Rental – fit for purpose assessment published by Ofcom on 15 December 2005) and (iv) the September 2005 Business Pricing consultation. MCI and Your Communications both called for a more co-ordinated approach from Ofcom. As noted above, UKCTA also expressed concern about what it perceived as inconsistencies between the reliance on the term “replicability” in the September 2005 Business Pricing consultation and on the term “Equivalence” in the TSR.
- 7.17 The ability of Ofcom and/or BT’s competitors to audit BT’s compliance with remaining ex ante conditions and with competition law was a matter of concern to several of BT’s competitors. UKCTA warned that the economic tests proposed could be applied in a variety of ways, and asked whether Ofcom intended to publish explicit guidance,

and whether Ofcom intended to audit BT's bespoke prices. UKCTA also warned that customers will be very reluctant to provide bid information to BT's competitors, and sales staff will be reluctant to inconvenience customers by asking them to provide information to support a complaint about BT's behaviour. As such it may be very difficult for competitors to bring to Ofcom a case against BT, and Ofcom should accept a lower standard of evidence prior to opening an investigation. Kingston Communications (an UKCTA member) further proposed that sufficient data on BT's costs should be placed in the public domain to enable competitors to assess the likelihood that BT was continuing to observe price floors. Cable and Wireless (another UKCTA member) was concerned that it appeared that the onus to prove abuse of the new rules would rest with BT's competitors, which would not have access to detailed costing information. Energis (also an UKCTA member) proposed that the onus of proof should be placed clearly on BT. Telewest more specifically proposed that Ofcom should rigorously police any bespoke pricing schemes, which should be notified to Ofcom prior to contract signatures, and Ofcom should publish in the public domain aggregate data showing the total number of transgressions, contract value and penalties applied. Telewest proposed that penalties should be a minimum of 10% of contract value, rising to 10% of BT's share of a given market for repeated transgressions.

Section 8

Ofcom's conclusions on appropriate regulation in the presence of replicability

Ofcom's conclusions concerning replicability and bespoke pricing

- 8.1 Having considered responses to the September consultation exercise, Ofcom remains of the view that when BT's retail business exchange lines and inland calls can be considered replicable, BT should be permitted to depart from its published prices, in certain defined circumstances and subject to certain safeguards. Ofcom recognises the concerns of BT's competitors that these services are not yet replicable and has specified in Section 4 and 5 above the deficiencies in the wholesale services which cause the retail services not to be replicable. Ofcom has concluded, however, that when those specific defects have been rectified, BT should be permitted to depart from its published price list in certain circumstances.

Consistency with the Telecoms Strategic Review

- 8.2 Ofcom acknowledges that the concept of replicability is distinct from the concepts of EOI and equivalence of outcome which were developed in the context of the TSR and in respect of which BT has given the Undertakings. As respondents to the September 2005 Business Pricing consultation noted, the concept of replicability predates the TSR, and it arose in the specific context of discussion of the triggers for lightening regulation in business retail markets. This debate was first formalised in the consultation *BT's pricing of services for business customers* published by Oftel on 15 October 2003³⁵. Having reviewed responses to that consultation exercise and held further discussions with interested parties, Ofcom (which, in the meantime, had assumed its powers under the Communications Act 2003) concluded in the May 2004 Business Pricing statement, that when BT's retail business exchange line and inland call services could be deemed to be replicable, Ofcom should no longer presume that mixed service bundles which include these service and, if BT so wishes, services from other markets where BT does not have SMP, are unduly discriminatory. Thus, a public commitment was made by Ofcom to make particular changes to regulation of BT's retail services when these services could be considered "replicable".
- 8.3 The concluding statement on the TSR, *Final Statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002* ("TSR Statement"), published by Ofcom on 22 September 2005³⁶, noted that the May 2004 Business Pricing statement had set out the circumstances in which Ofcom considered that it would be appropriate to allow BT to offer discounted prices for bundles of services. That concluding TSR Statement also noted that Ofcom was consulting again on whether, amongst other services, BT's retail business exchange lines and inland call services are now replicable (the July 2005 Replicability Assessment) and also on whether deregulation contingent on

³⁵ http://www.ofcom.org.uk/consult/condocs/pricing_business_customers/ofcom_statement/

³⁶ http://www.ofcom.org.uk/consult/condocs/statement_tsr/

replicability should be extended to include consent to offer unpublished bespoke prices (the September 2005 Business Pricing consultation).

- 8.4 The extent of deregulation which Ofcom has proposed should be contingent on replicability of the relevant retail services (i.e. deregulation removing the presumption of undue discrimination when bundling these services with other services and the offering of bespoke unpublished prices subject to compliance with an ex ante price floor) falls far short of full deregulation in favour of a reliance on regulation of upstream wholesale markets, which is the goal identified by the TSR. As such deregulation contingent on replicability should be seen as an intermediate step on the deregulatory path identified by the TSR.

Consistency with the guidelines on undue discrimination

- 8.5 Several respondents to the September 2005 Business Pricing consultation also questioned the consistency of the proposals contained in that document with Undue Discrimination Guidelines and the WLR 'fit-for-purpose' statement, published for consultation on 7 October 2005). Ofcom recognises that a large number of parallel consultation exercises places considerable demands on stakeholders. However it is Ofcom's view that both of these documents are consistent with the proposals contained in the September 2005 Business Pricing consultation.
- 8.6 The new guidelines on undue discrimination are intended to set out the approach which Ofcom expects to take when investigating potential contraventions of prohibitions of undue discrimination. They concentrate on non-price behaviour, and Ofcom will continue to look at complaints about price discrimination on a case by case basis. These parameters (including any specified price floor) would condition BT's ability to offer unpublished prices, but they would not modify or supersede the approach set out in the guidelines on undue discrimination, which would indeed apply in the event of concerns that an unpublished price may be unduly discriminatory. Similarly, the decision published in the May 2004 Business Pricing statement that, in the presence of replicability, Ofcom will no longer *presume* that the bundling of retail business exchange lines and inland calls with non SMP services is unduly discriminatory, was intended to remove that long standing *presumption*, but it was not intended to imply that such bundles will never be considered unduly discriminatory. BT would still need to comply with the relevant ex ante SMP conditions, e.g. undue discrimination, and competition law.

Consistency with the assessment of whether WLR is 'fit-for-purpose'

- 8.7 The assessment of whether BT's analogue Wholesale Line Rental service is 'fit-for-purpose' was conducted against a product specification and process implementation plan published 3 years ago in March 2003, and was concerned with a specific commitment made by Oftel in 2002 to relax the regulatory controls on *residential* retail prices when BT's analogue Wholesale Line Rental service can be considered 'fit-for-purpose'. BT triggered the assessment on 8 July 2005 by writing to Ofcom stating that it considered the analogue Wholesale Line Rental service had met the 2003 requirements. As such, the exercise addressed in the WLR 'fit-for-purpose' statement was narrowly concerned with whether BT has met triggers expressly defined with a view to determining when residential price controls should be relaxed. Ofcom recognises that this exercise and the separate assessment of whether retail business exchange line service (and inland calls and leased lines) are replicable are both, ultimately, concerned with whether WLR enables others to compete with BT in the provision of exchange line services. Nevertheless, for historical reasons, the

assessment criteria in each case are very different, and the conclusion in each case will trigger distinct changes to regulation.

A consistent set of deregulatory proposals for business retail services

8.8 The July 2005 Replicability Assessment considered whether BT's retail business exchange lines, retail inland calls and retail leased lines are now replicable. The purpose of that assessment was to determine whether it is any longer appropriate to presume that mixed service bundles which include those service are unduly discriminatory. The May 2004 Business Pricing statement had concluded that where these retail services are deemed replicable that presumption should be dropped, provided that the following safeguards are observed:

- the bundle is capable of passing a net revenue test;
- the implicit price of each element in the bundle is capable of passing an implicit price - cost test (non SMP services being treated as a single service for this purpose);
- eligibility for any level of discount for the overall bundle is not dependent on the customer spending a minimum sum on any given service within the bundle;
- details of the bundle are published; and
- the bundled price or discount scheme is made available to all broadly comparable customers.

8.9 The July 2005 Replicability Assessment had noted (paragraph 7.5) that Ofcom was likely to consult on the question of bespoke pricing in the near future. The September 2005 Business Pricing consultation subsequently proposed that additionally, where retail business exchange lines and retail business inland calls are deemed replicable, Ofcom should grant consent to BT offering unpublished bespoke prices for these services. That document did not propose that the consent should extend to retail leased lines as the Universal Service Directives requires that all prices for the minimum set of leased lines (broadly speaking, those with a bandwidth at or below 2Mbit/s) should be published. The markets for retail high bandwidth leased lines are not regulated.

Ofcom's conclusions on the proposed price floor

8.10 The September 2005 Business Pricing consultation proposed that any consent to BT offering unpublished bespoke prices for services from markets where BT has SMP should be conditional upon BT observing a price floor in respect of those services, set by reference to the transfer charges for the network components plus BTs retail costs established on a fully allocated basis. As the September 2005 Business Pricing consultation explained, the objective in proposing this ex ante price floor was specifically to limit BT's freedom to load common costs onto services offered to customers who have no choice but to place their business with BT, while reducing prices to incremental cost where BT faces competition. The September 2005 Business Pricing consultation noted that where an unconstrained dominant supplier can act in this way, it may be very difficult for competitors to compete if they do not have an ability to allocate common costs in this way. Replicability should prevent BT from engaging in extreme forms of targeting, as it should facilitate a degree of competition in all parts of the market. However, as noted in paragraph 4.22 of the September 2005 Business Pricing consultation, BT continues to enjoy large economies of scale and other advantages arising from its legacy presence, and some degree of unevenness in competitive conditions will remain.

- 8.11 In its response to the September Business Pricing 2005 consultation, BT accepted the principle of an ex ante price floor but argued that retail costs should be recovered on a Long Run Incremental Cost (LRIC) basis rather than a Fully Allocated Cost (FAC) basis. BT claimed that a FAC approach was inconsistent with Ofcom precedents and with competition law principles and, in practice, would not provide any material additional pricing flexibility as, BT claimed, many of its published charges are already at a level close to the sum of network transfer charges and retail FAC.
- 8.12 Ofcom has held further discussions with BT on this question, and has considered further data supplied by BT. Ofcom continues to maintain the view that the use of retail FAC, rather than LRIC as proposed by BT, is appropriate. Although in the telecoms sector, LRIC is the floor below which a charge is presumed to be anti-competitive, it is not in general sufficient for a price to be above LRIC to demonstrate that it is not anti-competitive. In the case of a multi-product firm with significant common costs such as BT, it is also necessary for the prices of each combination of products to be sufficient to recover the costs which are incremental to that combination but not to any individual product within it, that is, common costs. It may also be necessary to consider other factors such as whether low prices are targeted at particular rivals.
- 8.13 In theory, a series of combinatorial tests could be conducted which, if passed, would ensure that all prices covered incremental costs and that in aggregate they were sufficient to cover common costs. However, because of the potentially large number of bespoke prices and their unobservability, it is not practical to carry out the relevant combinatorial tests for each such price. In addition, even if the combinatorial tests were satisfied, a pattern of pricing whereby bespoke contracts tended to be priced at or close to LRIC with common costs recovered elsewhere could itself be suggestive of anti-competitive pricing. In these circumstances, and as a first step in relaxing regulation, Ofcom's view is that it is reasonable to require bespoke prices to be above FAC. The effect of this of course is not to prevent lower prices being offered, but to ensure that any such prices are transparent and not targeted at an unduly narrow set of customers in a way which could be anti-competitive. Furthermore, while the level of certain published special offers for exchange line and call services may already be close to the proposed price floor, that is not the case with the generality of prices offered to any segment of the business market. Therefore Ofcom believes this will be a significant new freedom for BT.
- 8.14 Ofcom has noted the concerns of the CMA and the Royal Mail that the proposed price floor may be over-constraining but, having reviewed BT's pricing and costing data, has concluded that the proposed price floor will provide material flexibility for BT to offer customers bespoke prices below present published levels.
- 8.15 Ofcom has also noted the concerns of many of BT's competitors that the costs which they face may differ from those faced by BT, as a consequence of BT's economies of scale. Ofcom has addressed these concerns, in part in its assessment of the pricing and design of the wholesale services on which such competitors rely, and also by proposing that BT's freedom to flex its pricing should be constrained by an ex ante price floor.
- 8.16 Ofcom has concluded, therefore, that any consent to BT offering unpublished bespoke prices for services from markets where it has SMP should be conditional on those prices observing a price floor equivalent to BT's non discriminatory transfer charges for wholesale services plus its Retail FAC. This explicit price floor does not apply to prices which are published and available to all broadly comparable

customers; the reasonableness of such prices would be assessed against the usual range of competition law criteria and guidelines on the application of ex ante regulation. Indeed, the ex ante prohibition of undue discrimination, and the Competition Act, will still apply to bespoke unpublished prices for services from markets where BT still has SMP.

Ofcom's conclusion on implicit price – cost tests

- 8.17 As noted in paragraph 7.6 above, the May 2004 Business Pricing statement had concluded that where BT chooses to bundle replicable services from markets where it has SMP with services from other markets, the service bundle should be required to pass an implicit price – cost test at the level of each individual service (non SMP services being treated as a single service for this purpose). The test considers whether a competitor which is unable to supply all the SMP elements of the bundle still stands a reasonable chance of winning a contract to supply a subset of the bundle elements alone. For this to be feasible, the total cost of purchasing (i) any one or more of the SMP elements at standard (non bundled) prices from the dominant supplier plus (ii) all other elements from the smaller competitor (at a price no lower than incremental cost) must be no higher than the cost of buying the complete bundle from the dominant supplier at the discounted price. Therefore the implicit price – cost test assesses whether, if the total discount represented by the entire service bundle (relative to standalone prices) is applied to each element individually (with the exception of non SMP element which are taken as a single entity), the resultant discounted price for each element is above cost. If the cost is greater than the price discounted in this way, the test is failed.
- 8.18 The September 2005 Business Pricing consultation noted, however, that it could be argued that where it is possible for competitors to replicate the SMP elements (and one assumes that, by definition, non SMP elements can be sourced competitively) then the implicit price-cost test for each service is no longer required and that any comparison of prices and costs should take place at the level of the bundle as a whole. The September 2005 Business Pricing consultation invited stakeholders to comment on this issue, both in the context of bespoke unpublished bundles and also in the context of published service bundles which are made available to all broadly comparable customers (the issue addressed in the May 2004 Business Pricing statement, where Ofcom had concluded that bundles should be required to pass an implicit price – cost test at the level of each service.)
- 8.19 While BT agreed that an implicit price – cost test is not relevant either in the case of published mixed bundles or unpublished bespoke bids, some of BT's competitors (as noted in paragraph 7.7 above) were concerned that, even where BT's regulated services are deemed to be replicable, some competitors may be unable to source some of the non SMP elements of a bundle on terms equivalent to those which BT can secure.
- 8.20 Ofcom recognises that in the absence of an implicit price-cost test, suppliers who only wish to supply part of a range of services may (though not necessarily will) not be able to do so commercially. Ofcom's view, however, is that, given that replicability ensures that competition across the full range of services is possible, it would not be proportionate for it additionally to require the same of all possible sub-bundles. Having reviewed responses to the consultation exercise, Ofcom has concluded that, provided services from SMP markets are genuinely replicable by others, then it is not proportionate to require service bundles to pass an implicit price - cost at the level of individual services. Ofcom maintains this view in respect of both published service bundles offered to all broadly comparable customers and unpublished bespoke

bundles. Given the conclusions summarised in paragraph 8.14 above, when comparing costs and prices at the level of the complete bundle, the cost of the complete bundle, in the case of bespoke offers, would be assessed using the retail FAC of the SMP services.

Ofcom's conclusion on price publication

- 8.21 As noted in paragraph 7.9 above, there was broad agreement from most stakeholders that, in the presence of genuine replicability, it would not be proportionate to require BT to publish its bespoke prices; the risk of price shadowing by competitors, which has long been a concern for Ofcom, was widely recognised. Ofcom has therefore concluded that consent to offer bespoke prices not available to all broadly comparable customers should not be made conditional on those prices being published. BT would, however, remain subject to the ex ante prohibition of undue discrimination and to the Competition Act.

Ofcom conclusion on the extent of the initial consent to offer bespoke prices

- 8.22 As noted in paragraph 7.11 above, the September 2005 Business Pricing consultation proposed that, initially, any consent to offer bespoke unpublished prices should be limited to bids made to customers spending more than £1 million per year with BT; not because Ofcom believes this sector is more competitive than others, but because such customers are already subject to close senior account management within BT and, consequently, BT may be more able to ensure compliance with pricing obligations and record keeping. The September 2005 Business Pricing consultation envisaged that this limitation would be lifted when Ofcom is satisfied that BT has management systems in place which can adequately manage bespoke pricing to the wider business sector.
- 8.23 As noted in paragraph 7.11 above, BT, in its response to the consultation exercise, argued that the £1 million threshold should be defined by reference to the customer's total spend on telecommunications, irrespective of the present supplier(s). How that sum would be assessed was not made clear. BT's competitors, in contrast, argued that the figure should relate to spending by the customer on specific services from markets where BT has SMP. As Ofcom explained in the September 2005 Business Pricing consultation, the precise level of the threshold is not important and the figure of £1 million was proposed by Ofcom in the light of information supplied by BT about the manner in which such accounts are managed at a national level. Ofcom does not accept that BT's proposal that the level should be assessed on the basis of the customer's total spend with all suppliers is workable and, in any event, such an approach would not be consistent with Ofcom intention that the threshold should reflect the level of BT's account management. On the other hand, Ofcom believes that the proposal from some of BT's competitors that the threshold should only relate to spending on the services for which BT is reliant on consent to offer bespoke prices, similarly fails to maintain the link with the extent of senior BT account management.
- 8.24 Ofcom has concluded that consent to offer unpublished bespoke prices should initially be limited to bids made to customers whose spending with BT (on all communications services) is in excess of £1 million per year. Ofcom will expect BT to calculate each customer's annual spending on a forward looking basis, based on the value of the bespoke bid (i.e. assuming that BT is awarded a contract for the complete offer) plus the value of any other existing, continuing, business which is not included within the proposed new contract. The "customer" in any specific instance would be the legal entity with whom BT has contracted. While Ofcom is not seeking

to impose unnecessary bureaucratic constraints and limitations, it will be important to ensure that all parties understand the basis on which the threshold will be assessed; Ofcom does not intend that BT should take into account spending by other members of a group of companies or a wider community of, for example, public sector organisations, unless BT has contracted with the holding company or a centralised public sector purchasing authority.

- 8.25 Ofcom expects to review the operation of BT's systems for managing bespoke pricing after 12 months, with a view to removing the spending threshold if Ofcom is satisfied that BT is capable of ensuring compliance with remaining regulatory and competition law obligations in respect of bespoke pricing to the wider business sector.

Ofcom's conclusions on notification of pricing data to Ofcom

- 8.26 Closely related to the question of price publication is the question of whether unpublished prices should be notified to Ofcom. While many of BT's competitors accepted that bespoke prices should not be required to be published at large, many argued that BT should be obliged to lodge such prices with Ofcom, either to facilitate any subsequent investigations triggered by specific concern or to enable routine or random compliance checks. Ofcom fully recognises the importance of ensuring that BT maintains adequate records not only of the prices, terms and conditions offered on a bespoke and unpublished basis, but also full details of BT's own assessment of how the bid complies with ex ante conditions (such as price floors) and also with competition law. The bid price alone is unlikely to have much value to Ofcom if not accompanied by costing data. It will also be important to ensure that BT is able to demonstrate compliance with its obligations in the light of actual consumption of different service elements in a bundle; clearly, the proportions of different services (for example different call types) which a customer consumes during the contract life cannot be forecast with full accuracy.
- 8.27 The extent of the data which Ofcom would need in order to conduct a compliance investigation is potentially so wide that Ofcom does not consider it appropriate that the data be lodged with Ofcom in advance of concerns being raised. Ofcom has discussed with BT the precise nature and format of the data which Ofcom expects BT to hold, and BT recognises the inevitability that the new pricing flexibility will be viewed by some with suspicion and this is likely to result in investigations being mounted from time to time.
- 8.28 BT has committed to maintain for the lifetime of the contract (or for a minimum of two years if this is a longer period) full details of each bespoke contract, including all documents which modify the initial agreement.
- 8.29 When offering on a bespoke basis a product in a retail market in which it has been found to have SMP BT will document its costing and pricing assumptions in sufficient detail to demonstrate the basis on which it will comply with its obligations (see above), and will record those assumptions in a standard format signed off in accordance with the governance rules in BT's standing instructions agreed by the relevant senior management team. This data will be retained for the same period as the minimum duration of the contract. In the event that the bid is unsuccessful, BT will retain the proposal and supporting documentation for a minimum of 12 months from the date on which the bid is submitted.
- 8.30 BT will also monitor the impact of bespoke pricing on its revenue and margins and will report the revenue and gross margin for bespoke bids to its Retail Pricing Board

(or relevant successor) on a quarterly basis and profitability annually. This information will be documented and retained for a minimum of one year for inspection by Ofcom on request.

- 8.31 In the light of BT's commitment to maintain detailed pricing and costing data, Ofcom has concluded that it is not appropriate to require BT to file such data with Ofcom as a matter of routine. Ofcom will review this position in the light of experience; if BT either fails to produce satisfactory evidence on a timely basis, or if investigations indicate widespread breach of ex ante conditions or competition law, Ofcom will reconsider the suitability of these arrangements and, more broadly, the consent to offer bespoke unpublished prices.

BT competitors wishing to bring a dispute to Ofcom

- 8.32 As noted in section 7 above, BT's competitors have questioned their ability, in the absence of price publication obligations, to gather sufficient evidence to bring a complaint to Ofcom either about alleged breach of the qualifying criteria for offering bespoke prices or, more broadly, in respect of alleged breaches of the ex ante prohibition of undue discrimination or breach of competition law.
- 8.33 Ofcom recognises that customers will be reluctant to involve themselves in disputes, and sales staff will not wish to inconvenience customers by asking them to assist directly in bringing complaints to Ofcom. Nevertheless, Ofcom does believe that, to some extent, normal commercial intelligence activity can be relied on to provide a reasonable level of information about the pricing strategy of BT and, indeed, other competitors. This is already the position in those business retail markets where ex ante regulation has been withdrawn in favour of a reliance on regulation of upstream wholesale markets.
- 8.34 Where competition law is relied on, in the absence of sectoral ex ante regulation, similar concerns may arise, but has not been Ofcom's experience that this has prevented competitors from presenting sufficient pricing information to enable Ofcom to determine whether it should open an initial investigation. Furthermore, in respect of Kingston Communications' proposal that data on BT's costs should be placed in the public domain to facilitate comparison of costs and prices, it is Ofcom's view that there is already some information in BT's published regulatory accounts relating to BT's cost stacks. Furthermore, it is unclear to Ofcom how UKCTA's proposal, that the onus should rest with BT to prove that its bespoke prices meet agreed economic tests, could be made to work. In any event, it is unclear how, in practice such an approach would change the way in which investigations would be mounted; BT has agreed to maintain specified pricing and costing data for an agreed length of time and, whether the onus of proof rests with BT or its competitors, a similar approach to verification by Ofcom would be taken in both cases.
- 8.35 Ofcom recognises, however, that BT's freedom to offer unpublished prices will remove from BT's competitors a transparent means of determining the level of any bid (in respect of services from markets where BT has SMP). This will, inevitably, mean that it will be more difficult for BT's competitors to gather sufficient data to determine whether a price offered is anti competitive. Ofcom intends, therefore, to conduct audits of BT's unpublished bespoke offers and will liaise with BT's competitors to identify suitable cases for audit.

Overall conclusion

- 8.36 Having considered responses to the September 2005 Business Pricing consultation, Ofcom has concluded that when BT's business retail exchange line services and inland call services are deemed to be replicable, BT should be permitted to offer bespoke unpublished prices for these services, whether supplied as part of a wider service bundle or on a stand alone basis. However, consent to offering unpublished prices for these services will be made conditional on BT observing, in respect of unpublished prices, a price floor equal to the non discriminatory transfer charges for the relevant network components plus BT's retail costs established on a fully allocated basis. Initially, consent will be limited to offers made to customers with an annual spend with BT in excess of £1 million per year (assessed on the basis of spend during the previous 12 months plus anticipated spend in the next 12 months consequent on BT being awarded the contract for which it is bidding with a bespoke unpublished price). Ofcom expects to review this threshold within 12 months of services being deemed replicable to assess whether BT could be relied on to manage compliance with the price floor and other ex ante and competition law obligations if the spend threshold was withdrawn.
- 8.37 As already announced in the May 2004 Business Pricing statement, when BT's business retail exchange line and inland call services are deemed to be replicable, Ofcom will also no longer presume that published service bundles which include these services with services from markets where BT does not have SMP are unduly discriminatory. Contrary to the view expressed in the May 2004 Business Pricing statement, for the reasons given in the September 2005 Business Pricing consultation, Ofcom no longer believes that this view should be conditional on such service bundles passing an implicit price – cost test at the individual service level. Therefore, where the relevant services have been deemed replicable, there will be no presumption that published service bundles which do not pass an implicit price cost test are unduly discriminatory. For the avoidance of doubt, Ofcom wishes to emphasise that it does not presume that the price floor referred to in paragraph 8.32 above, need apply to published service bundles available to all broadly comparable customers; whether such prices are unduly discriminatory, will be judged on a case by case basis .
- 8.38 As noted in Section 4 and 5 above, Ofcom does not yet agree that BT's business retail exchange or inland call services are replicable, and Ofcom has set out a series of defects which have still to be addressed.

Section 9

Summary of Ofcom's conclusions on replicability

Introduction

9.1 In this section Ofcom summarises the issues it believes are still outstanding with respect to CPS, WLR and PPCs and which act as barriers to a finding of replicability in the corresponding retail products of business inland calls, business exchange lines and retail leased lines of 8Mbps bandwidth and below. These conclusions are listed here as a convenient summary to Sections 4, 5 and 6 of this statement.

Conclusions with respect to CPS

9.2 Ofcom is of the view that there are some issues that remain outstanding as regards the CPS product that, collectively, mean that BT's retail business calls products cannot currently be considered to be replicable.

9.3 In Ofcom's opinion the remaining issues are:

- provision of a bulk facility on the standalone address matching tool;
- payment by BT Retail of transfer charges for rejected orders;
- implementation of a homemovers process (including change of address, new number);
- CPS SAD CDR availability and quality; and
- successful completion and implementation of the bulk migration facility.

9.4 These conclusions are a repeat of those in Section 4.

Conclusions with respect to WLR

9.5 Ofcom is of the view that there are some issues that remain outstanding as regards the analogue WLR, ISDN2 WLR and ISDN30 WLR products that, collectively, mean that BT's retail business exchange lines products cannot currently be considered to be replicable.

9.6 In Ofcom's opinion the remaining issues are:

- provision of call mapping on UXD5 exchanges to facilitate services such as 1571 voicemail;
- make available pre-validation to reduce order rejections;
- eliminate the disparity in provisioning times between WLR and BT Retail exchange lines;
- commitment to provide parity with respect to forecasts for the WLR3 product;
- improved and consistent eCo repair availability; and
- delivery of improved access to appointment books in line with BT's relevant undertaking.

9.7 These conclusions are a repeat of those in Section 5.

Conclusions with respect to PPCs

9.8 Ofcom is of the view that there are a number of issues that remain outstanding as regards the PPC product that, collectively, mean that BT's retail business leased lines products cannot currently be considered to be replicable.

9.9 In Ofcom's opinion the remaining issues are:

- address cost disparities between retail leased lines and PPCs as a result of the PPC pricing model;
- implementation of revised forecasting penalties;
- implementation of an option to re-designate/grandfather muxes on cost-oriented terms;
- successful conclusion of the Master Services Agreement or PPC contract review process;
- prove adequate billing accuracy and bill verifiability;
- implement relevant price changes for ISH extension circuits;
- introduce KPIs to allow the performance of the BT Retail CMC to be compared to the wholesale CMCs;
- availability of Priority Prompt and Total Care SLAs on PPCs designated for use in safety of life or defence of the realm applications; and
- potential double payment for equipment cancelled after the FOC point and subsequently deployed in fulfilment of another order.

9.10 These conclusions are a repeat of those in Section 6.

Annex 1

Retail markets in which BT has SMP and where Ofcom proposes to grant conditional consent to departures from the published price list

Introduction

A1.1 In the United Kingdom excluding the Hull area:

- (i) Business analogue exchange line services;
- (ii) Business ISDN2 exchange line services;
- (iii) Business ISDN30 exchange line services;
- (iv) Business local calls;
- (v) Business national calls;
- (vi) Business calls to mobiles; and
- (vii) Business operator assisted calls.

Annex 2

Relevant SMP conditions which presently apply to BT in the markets listed in Annex 1

Condition D2 – Requirement not to unduly discriminate

D2.1 The Dominant Provider shall not unduly discriminate against particular persons or a particular description of persons in relation to services offered.

D2.2 Nothing done in any manner by the Dominant Provider shall be regarded as undue discrimination under this Condition if and to the extent that the Dominant Provider is required or expressly permitted to do such thing in that manner by or under any condition set under section 45 of the Act which applies to the Dominant Provider.

Condition D3 – Requirement to publish charges

D3.1 Except in so far as the Director may otherwise consent in writing, the Dominant Provider shall publish charges, terms and conditions and act in the manner set out below.

D3.2 The Dominant Provider shall publish charges, terms and conditions, including bundled charges, terms and conditions (whether or not those bundles include charges, terms and conditions for services supplied in markets to which this Condition does not apply).

D3.3 The Dominant Provider shall publish any amendments to the charges, terms and conditions published under paragraph D3.2, including charges, terms and conditions for any new services, within 24 hours of the time that the amendment comes into effect.

D3.4 Publication referred to in paragraphs D3.2 and D3.3 shall be effected by placing a copy of the information on any relevant website operated or controlled by the Dominant Provider.

D3.5 The Dominant Provider shall send to the Director a written notice of any amendment to the charges, terms and conditions published under paragraph D3.2 (including charges, terms and conditions for any new services) within 24 hours of the time that the amendment comes into effect and shall send a copy of the notice to any person who may reasonably request such a copy.

D3.6 Where it would be impractical for the Dominant Provider to publish under paragraphs D3.2, D3.3 or D3.5 any charge or amended charge, the Dominant Provider shall instead publish the method to be adopted for determining that charge or amended charge.

D3.7 The Dominant Provider shall provide services at the charges, terms and conditions published under this Condition, and shall not depart there from either directly or indirectly.