

The replicability of BT's regulated retail business services

Consultation

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Contents

Section		Page
1	Summary	2
2	Introduction	4
3	Replicability criteria	6
4	Retail fixed line telephony calls	8
5	Exchange lines	17
6	Retail leased lines	24
7	Next steps	38
8	Responding to this consultation	40
9	List of relevant markets	46
Annex		Page
1	Ofcom's consultation principles	42
2	Consultation response cover sheet	43
3	Consultation questions	45

Section 1

Summary

- 1.1 There is at present a presumption that if BT bundles retail products that fall within markets in which it has been found to have significant market power ("SMP") with products from other SMP markets or products from markets in which it does not have SMP, that this will be presumed to be unduly discriminatory due to the capability it has of harming competition.
- 1.2 There are currently three retail products groups in which BT has been designated as having SMP¹:
 - calls;
 - exchange lines; and
 - leased lines.
- 1.3 Ofcom published a statement in May 2004, which considered whether BT should be permitted to offer discounted prices for bundles of business services, where some of the products in the bundle fell within markets in which BT holds SMP. The statement set out the circumstances in which Ofcom considered that it was appropriate to permit BT to offer discounted prices for bundles, which included a requirement that the products in the bundle be replicable. The statement concluded that many of the services in SMP markets were not replicable and that it would therefore not be appropriate to permit BT to bundle these products together and offer discounted prices for the bundle.
- 1.4 This document revisits that assessment, in light of the changes and improvements that BT has made to the wholesale products used by other communications providers to compete against BT in these markets, and seeks the views of respondents as to whether BT's retail business calls, exchange lines and leased lines products appear now to be replicable.
- 1.5 If Ofcom concludes that these retail products are now replicable, it proposes to no longer presume that BT is unduly discriminating if BT decides to offer bundles of retail business calls, exchange lines and leased lines products, either with each other or with other retail business products from markets in which BT does not have SMP. Providing that BT complies with the pricing tests set out in Section 2 below, BT will also be able to offer these bundles at discounted prices (relative to stand-alone prices). Ofcom would, however, be concerned about any saw-toothed discount scheme² and be likely to take the view that such discount schemes would not comply with the pricing tests.
- 1.6 Replicability is an ongoing concept and any failure on BT's part to maintain the replicability of retail products would lead to the bundling of SMP products again being presumed by Ofcom to be unduly discriminatory.

¹ The specific retail product markets in which BT has been identified as having SMP can be found in Annex 4

² Saw-toothed discount schemes are schemes under which a customer gets lower prices on all units once a certain spend threshold is reached, so that the (implicit) price of the product is negative over (material) ranges of output.

- 1.7 Ofcom's preliminary view is that BT's retail business calls, exchange lines and leased lines services are not currently replicable but that, provided BT addresses the few outstanding issues that Ofcom has identified with the carrier pre-selection, wholesale line rental and partial private circuits products, it may be possible to conclude that some or all of the retail products are replicable in the final statement that will follow this consultation.
- 1.8 Comments are invited on the proposals set out in this consultation document by 30 September 2005. Written comments will be made publicly available on Ofcom's website, except where clearly indicated to be confidential. Respondents are therefore asked to separate out any confidential material in a clearly marked annex. In the interests of transparency, respondents are asked to avoid confidentiality markings wherever possible.
- 1.9 BT has also requested that Ofcom consider allowing it to offer bespoke prices for retail business services. Ofcom is likely to be consulting separately on this question in the near future.

Section 2

Introduction

- 2.1 On 15 October 2003, Ofcom published a consultation on *BT's Pricing of Services for Business Customers* ("the October 2003 consultation")³, which considered whether BT should be permitted to offer discounted prices (relative to published stand-alone prices) for bundles of business services where bundles include some services which are from markets where BT has significant market power ("SMP").
- 2.2 There are three main groups of retail services that BT has been found to have SMP in following market reviews – inland voice calls⁴, fixed exchange lines⁵ and retail leased lines with bandwidths of 8Mbit/s or less⁶. As a result of the findings of SMP additional regulation was imposed on BT, including obligations not to unduly discriminate and to publish prices.
- 2.3 Previously, the bundling of services from markets in which BT holds SMP with those from markets in which it does not hold SMP has generally been presumed to be unduly discriminatory. The October 2003 consultation proposed there should not be a presumption that such bundling is unduly discriminatory, provided that the services within the bundle can be replicated, technically and commercially, by competitors, and provided that the following criteria apply:
- i. the bundle price is capable of passing a net revenue test;
 - ii. the implicit price of each element in the bundle is capable of passing an implicit price-cost test;
 - iii. eligibility for any level of discount for the overall bundle of services is not dependent on the customer spending a minimum sum on any individual service within the bundle;
 - iv. details of the bundled price or discount scheme are published; and
 - v. the bundled price or discount scheme is made available to all broadly comparable customers.
- 2.4 Having taken into account responses received to the consultation, Ofcom concluded in a statement published on 27 May 2004⁷ ("the May 2004 statement") that although the approach proposed in the October 2003 consultation, and outlined above, appeared reasonable, many services in retail business markets where BT has SMP were not currently replicable and that it was unlikely to be appropriate to allow any bundling of SMP and non-SMP products for at least 12 months.
- 2.5 Many of the respondents to the October 2003 consultation suggested that true replicability would be difficult to achieve as long as the wholesale products offered by

³ <http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/2003/price1003.pdf>

⁴ Review of Fixed narrowband retail services markets:

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

⁵ Ibid

⁶ Review of retail leased lines, symmetric broadband origination and wholesale trunk segments markets: <http://www.ofcom.org.uk/consult/condocs/llmr/statement/>

⁷ See: BT's Pricing of Services for Business Customers

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

BT to its competitors differed materially from those made available to its own downstream activities.

- 2.6 Ofcom considered this issue further in its Strategic Review of Telecommunications⁸ ("the TSR"), where it took the view that in order to promote effective and sustainable competition, equality of access to the infrastructure that competitors cannot effectively replicate (either because of cost or some other factor) and which causes an economic bottleneck was necessary.
- 2.7 Equality of access means that the dominant operator must provide access to its network infrastructure to competitors on the same or equivalent terms as it provides that access to its own retail activities. The TSR identified two models of equivalence that may apply and set out Ofcom's current thinking as to which of these models should be applied to specific wholesale product markets:
- Equivalence of input requires that competitors be provided with exactly the same set of regulated wholesale products, at the same prices and using the same systems and transactional processes, as the dominant provider's own retail activities; and
 - Equivalence of outcome requires that the wholesale products offered to competitors by the dominant provider be comparable to those used by its own retail activities. The product and processes need not be identical providing that any differences are not material.
- 2.8 BT has now approached Ofcom with a request that it reconsider allowing BT to bundle retail business calls, exchange lines and leased lines with each other and with products from non-SMP business markets. BT has suggested that the wholesale products that it has made available in the upstream markets (carrier pre-selection, wholesale line rental and partial private circuits) and the improvements that it has made to these products, now mean that competitors can replicate the retail business products, both technically and commercially, and therefore compete with BT's retail activities.
- 2.9 Ofcom has held a number of discussions with BT's competitors, through the UK Competitive Telecommunications Association ("UKCTA"), as to the issues that they consider to remain outstanding before BT's retail business calls, exchange lines and leased lines products could be considered to be replicable.
- 2.10 Section 3 considers the general replicability criteria that Ofcom proposes to assess requests from BT against while Sections 4-6 look in more detail at the issues highlighted by UKCTA, consider BT's comments on these issues and reach preliminary conclusions as to whether BT's retail business calls, exchange lines and leased lines products are replicable or not. Section 7 considers the next steps and Section 8 details how to respond to this consultation.

Question 1: Do respondents believe that the tests set out in the October 2003 consultation and May 2004 statement remain the correct tests to use when assessing whether BT should be permitted to bundle retail business SMP products or do the undertakings proposed in the TSR mean that some of the tests are no longer necessary?

⁸ See http://www.ofcom.org.uk/static/telecoms_review/index.htm

Section 3

Replicability criteria

Replicability and equivalence

- 3.1 The concepts of equivalence of inputs ("EoI") and equivalence of outcomes ("EoO") discussed by Ofcom in the TSR are means of ensuring that sufficiently robust wholesale products and services are made available by BT. Equivalence at the upstream level, in the form of either EoI or EoO, is therefore necessary to enable replicability to develop at the downstream retail level.
- 3.2 In order for a product or service to be considered replicable, it must be commercially and technically capable of being replicated making it possible for effective competition to take place, with other communications providers 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.
- 3.3 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 and affect BT's position of strength in those markets, and hence its ability to distort competition. On this basis, Ofcom considers that it is currently justified to maintain the non-discrimination obligations at the retail level and to require that any bundles of SMP products that are permitted be capable of passing net revenue and implicit price-cost tests.

Steps for assessing replicability

- 3.4 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.
- 3.5 BT's ubiquitous coverage means that any assessment of replicability needs to take account of the ability of competitors to compete on a national basis. As such, it is likely to be insufficient to assess whether competitors can use their own networks to provide the necessary wholesale inputs to enable retail products to be replicated as these networks are unlikely to be sufficiently ubiquitous to enable comparable coverage to be provided. Ofcom will therefore consider the extent to which the wholesale products made available by BT will enable competitors to replicate BT's retail products.
- 3.6 In considering whether a product group is replicable, it is therefore necessary to first 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.
- 3.7 As discussed at paragraphs 2.5 to 2.7 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. 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 commercially comparable retail products in terms of quality and price as BT. 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.

- 3.8 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. Sections 4-6 below consider 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 remain outstanding as regards these products and assessing whether they mean that the retail products are sufficiently replicable to allow BT to bundle them with other retail business products.
- 3.9 Ofcom considers replicability to be an ongoing concept, rather than a snapshot at a fixed point in time. If any of the retail products are found to be replicable, BT will need to ensure that they continue to remain so in order for it to be permitted to bundle those products. Any failure on BT's part to maintain the replicability of retail products would lead to the bundling of SMP products again being presumed by Ofcom to be unduly discriminatory. Ofcom would consider carefully any future complaints from communications providers about a lack of replicability in light of this consultation and any changes in the markets.

Question 2: Respondents are invited to comment on Ofcom's proposed criteria for assessing whether BT's retail business products are replicable.

Section 4

Retail fixed line telephony calls

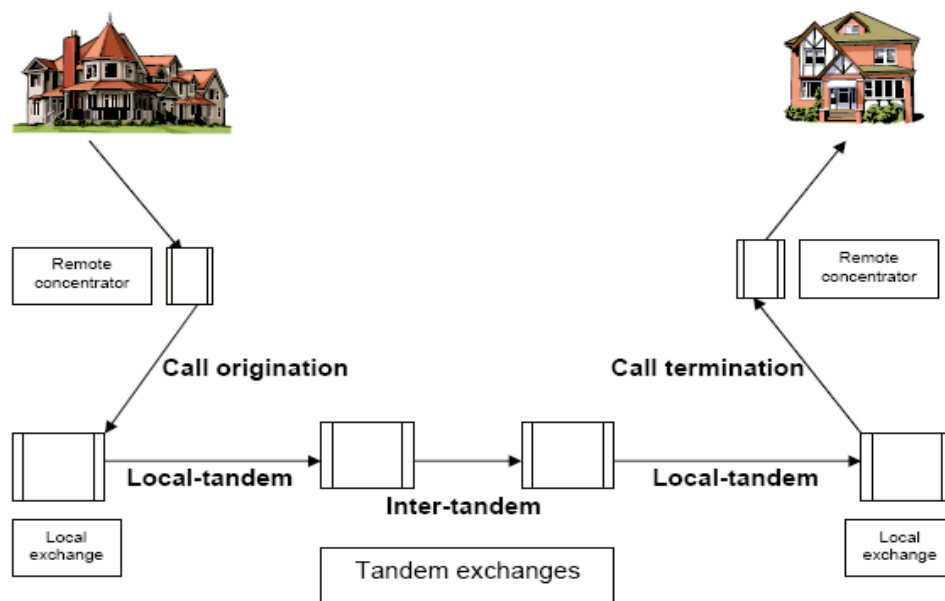
- 4.1 As noted in section 2 above, the markets covering retail business fixed line telephony calls are one of the product areas where regulation has been imposed at the retail level and for which criteria need to be set that could lead to deregulation.
- 4.2 In its review of fixed narrowband retail services markets, Oftel⁹ identified four different call markets in which BT was found to have to have SMP and imposed non-discrimination and price notification obligations on BT in these markets:

Calls originating 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 4.1 below):
- i. call origination;
 - ii. local-tandem conveyance and transit;
 - iii. inter-tandem conveyance and transit
 - iv. single transit; and
 - v. call termination.

⁹ Ofcom assumed the responsibilities of Oftel on 29 December 2003.

Figure 4.1: Call components



- 4.4 Ofcom identified each of these components as forming a separate market¹⁰ and concluded that BT had SMP in the first four markets and that each operator held SMP for call termination on its own network. Ofcom has subsequently carried out a further assessment of local tandem and inter-tandem conveyance and transit markets as part of its review of BT's network charge controls. This assessment has led Ofcom to propose that the market for inter-tandem conveyance and transit is now competitive and that regulation should be removed¹¹. Should Ofcom change its mind following representations made during the consultation period, Ofcom will need to look at whether this impacts on its replicability assessment.
- 4.5 These five components (or four if Ofcom adopts its proposals to remove regulation from inter-tandem conveyance and transit) are therefore those necessary to allow other communications providers to compete with BT in the provision of calls at the retail level to business customers.
- 4.6 As a result of finding that BT had SMP in the call origination market, Ofcom obliged BT to make available to its competitors a carrier pre-selection service to enable competition to be able to develop in the downstream retail calls markets.
- 4.7 Carrier pre-selection ("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 ("CPSOs") 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.

¹⁰ See Annex 4 for details of the markets

¹¹ *Explanatory statement and Notification of proposals on BT's SMP status and charge controls in narrowband wholesale markets*: <http://www.ofcom.org.uk/consult/condocs/charge/>

- 4.8 In addition to the CPS service, BT was also required to make available an IA service as a result of the finding that it has SMP in the call origination market described above. Indirect access ("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 pre-fix before each number they wish to dial.
- 4.9 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 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.
- 4.10 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, given the additional functionality of CPS, that it is appropriate to assess whether the CPS product allows replicability, rather than whether or not the IA product allows replicability.
- 4.11 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 almost five million CPS-enabled lines, but where there are still a number of outstanding issues. Ofcom is now seeking to decide which of these issues must be resolved in order for CPS to pass the replicability test for business customers, i.e. in order for CPS operators to be able to replicate the downstream retail business calls services.
- 4.12 The set of outstanding issues which the CPSOs believe are currently preventing replicability are as follows:
- (a) Order rejection levels
 - (b) Incompatible services
 - (c) Transfer charges for rejected orders
 - (d) Transfer charges in general
 - (e) Forecasting and forecasting penalties
 - (f) Customer database
 - (g) Churn management
 - (h) The 'local calls' issue
 - (i) CPS performance

These issues are considered in more detail in the following paragraphs.

Question 3: Have the outstanding issues in relation to CPS been correctly identified?

(a) Order rejection levels

- 4.13 BT's competitors have expressed concern at the high level of CPS orders that are rejected by BT. Approximately 15% of CPS orders submitted are currently rejected and CPSOs believe that this is hampering their ability to compete with BT at the retail level. The main reasons for CPS orders being rejected are 'invalid telephone numbers' and 'postcode matching' errors, which combined account for around 50% of all CPS order rejections.
- 4.14 BT considers that a reduction in the current level of rejections cannot be made by BT in isolation as the vast majority are the result of sales acquisition processes employed by the CPSOs. BT has suggested that there is a lack of understanding of the limitations of CPS amongst the sales people employed by CPSOs and that the BT Gateway is being used as a means of filtering out incompatible or invalid orders.
- 4.15 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. BT has proposed allowing CPSOs to use the existing Broadband pre-validation URL as a means of checking whether the number is valid or allowing CPSOs to check whether the end user is taking service from BT or the service provider of a wholesale access operator as a means of reducing the number of orders rejected for invalid telephone numbers. BT has, however, made clear that it would require CPSOs to use these processes to pre-validate numbers rather than simply using the BT Gateway as a filter for the order rejection levels to fall.
- 4.16 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 CLI that the CPSO is seeking to provide service to. BT has advised that there are large differences between the level of postcode matching errors experienced by CPSOs, with some averaging 1% and others nearly 14%. In general, the greater the volume of orders per month made by a CPSO, the lower the rejection rate for mismatched postcodes. BT has suggested that this indicates that CPSO behaviour and sales techniques have a large part to play.
- 4.17 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 considers that the current level of rejections appears to be too high. Ofcom considers that BT's proposals to allow CPSOs to pre-validate numbers before placing orders should assist those CPSOs that have concerns about their order rejection levels to reduce them. Ofcom additionally notes that the undertakings offered by BT pursuant to the Enterprise Act 2002 include a requirement that BT, in order to reduce address matching failures, make available to other communications providers, by 31 December 2005, access to the postcode address file used by BT.
- 4.18 Ofcom's preliminary view is that the introduction of measures to reduce order rejection levels can be dealt with on an ongoing basis and should therefore not at this stage be a bar to replicability and that, once an effective pre-validation process has been introduced and the postcode files are made available, retail calls should be considered replicable in this respect. Ofcom invites the views of respondents as to whether the introduction of the pre-validation process and availability of postcode

files is sufficient to address the concerns of CPSOs as regards order rejection levels and, if not, what further measures are necessary for retail business calls to be considered sufficiently replicable in this respect.

(b) Incompatible services

- 4.19 Concern has been expressed by CPSOs that the set of services that are incompatible with CPS, and which therefore result in order rejections, has 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.
- 4.20 BT has proposed to undertake further analysis of which types of incompatible service rejections are the most common and consider whether there is an alternative way of dealing with these services. BT has advised that it will look to publish a comprehensive list of retail products that are incompatible with CPS.
- 4.21 Ofcom believes that a specification listing all incompatible products must be made readily available to CPSOs and that it must be kept updated. Ofcom is of the view that providing this incompatible product list is made available during the consultation period, and for as long as it is kept updated, BT's retail call products can be considered to be replicable in this respect.

(c) Transfer charges for rejected orders

- 4.22 CPS operators 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 are concerned that BT does not appear to face a similar charge when dealing with its retail calls customers.
- 4.23 BT has 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.
- 4.24 Ofcom recognises that in many cases BT will have an existing relationship with the customer but nevertheless considers that there will be circumstances in which BT will experience rejected orders. For example, where a consumer has taken a Wholesale Line Rental ("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.
- 4.25 Ofcom therefore proposes 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.
- 4.26 Ofcom additionally recognises that concerns have been raised about the level of the transfer charge and the fact that certain retail costs have been included within it. However, this is a charge that Ofcom has set and decided is appropriate, and in this respect considers it to be replicable.
- 4.27 If BT provides a commitment during the consultation period that its retail activities will face similar transfer charges as are faced by CPSOs for rejected orders then Ofcom is minded to conclude that BT's retail business calls services are replicable in this respect, when the transfer charges are put into effect.

(d) Transfer charges in general

- 4.28 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.
- 4.29 BT has 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.
- 4.30 Ofcom is of the view that in order for BT's retail calls products to be considered replicable in this respect, BT must apply to its own retail activities the same transfer charge as a CPS operator faces for successful orders.

(e) Forecasting and forecasting penalties

- 4.31 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 setup orders.
- 4.32 BT has advised that it is considering the possibility of its retail activities being subject to the same forecasting and penalty regime for transfers back as that used by CPSOs.
- 4.33 Ofcom considers that applying the same forecasting and penalty regime to BT's retail activities for transfers back as is applied to CPSOs is required in order to ensure replicability in this respect. Ofcom is further of the 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.
- 4.34 In order for BT's retail business calls products to be considered replicable in this respect, BT must apply the same forecasting and penalty regime to its own retail activities as is faced by CPSOs. BT must additionally provide evidence to Ofcom's satisfaction to show that the forecasting penalties are based on reasonably incurred costs.

(f) Customer database

- 4.35 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).
- 4.36 BT has 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.
- 4.37 Ofcom acknowledges that BT's access to data may potentially give it an advantage, but believes that a distinction needs to be made between that information which relates to the underlying network (which is owned by BT's wholesale activities and

should be made available to all customers of BT's wholesale activities on an equal basis) and that information which relates to individual consumers (which belongs to BT's retail activities, and whose release would raise confidentiality and data protection issues).

- 4.38 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 proposed non-discrimination guidelines¹² 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. The undertakings offered by BT pursuant to the Enterprise Act 2002 additionally cover the use of customer information by BT and the circumstances under which information can be passed between different divisions of BT.

(g) Churn management

- 4.39 There is a general view that CPS operators 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.
- 4.40 BT has asked CPSOs to try and 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.
- 4.41 Ofcom recognises this issue and believes that the homemovers process made available to CPS operators, 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 is of the preliminary view, therefore, that an effective homemovers process for CPS operators must be introduced before retail business calls can be considered to be replicable in this respect.

(h) The 'local calls' issue

- 4.42 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 does not have to route such calls via a point of interconnection with another network. This issue has now been addressed by the introduction of the CPS 'Same and Adjacent DLE' Calls product¹³. This provides equivalence in relation to local calls, but only for those operators that have points of interconnection at BT DLEs. 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 DLE interconnection is no longer feasible or commercially sustainable.
- 4.43 BT has 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.

¹² Undue discrimination by SMP Providers: <http://www.ofcom.org.uk/consult/condocs/undsmpr/>

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

- 4.44 Ofcom's view is 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.

(i) CPS performance

- 4.45 It is also 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 ("KPIs") on a voluntary basis, including:
- o The percentage of BT handshakes sent within one hour of the CPS Operators file being received (target 90%).
 - o The percentage of electronic orders accepted or rejected within 1 day of receipt (target 90%).
 - o The percentage of orders switched on the switchover date (target 90%).
 - o The percentage of orders that are rejected (no agreed target).
- 4.46 Where there is a Service Level Agreement ("SLA") target, this target is generally met in practice. The CPSOs believe that the SLA targets are not particularly demanding, being typically set at the 90% level and are concerned that no target has been set for the percentage of orders that are rejected.
- 4.47 BT has proposed increasing the above SLA targets from 90% to 98%, but has rejected the suggestion that an SLA on rejection levels is appropriate. BT has argued that rejection levels are outside of BT's control and that, as such, it is not appropriate to impose an SLA. BT suggests that no other product offers rejection level SLAs.
- 4.48 Ofcom accepts BT's argument that the level of CPS order rejections is not entirely within its control and is of the view that it would not be appropriate to impose an SLA on BT in relation to order rejections.
- 4.49 Ofcom is seeking 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.

Conclusions

- 4.50 Ofcom is of the view that there are a number of small 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.
- 4.51 Ofcom has set out above proposed solutions to these issues and is of the view that these solutions could be implemented during the course of the consultation period on its replicability proposals.

The replicability of BT's regulated retail business services

- 4.52 If BT satisfactorily addresses these outstanding issues during the consultation period, Ofcom would be minded to conclude that BT's retail business calls products are replicable.

Question 4: *Do respondents agree with Ofcom's assessment of the replicability of retail business fixed line telephony calls?*

Section 5

Exchange lines

- 5.1 Oftel's review of *Fixed Narrowband Retail Services Markets*¹⁴ 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:
- i. business analogue exchange line services;
 - ii. business ISDN2 exchange line services; and
 - iii. business ISDN30 exchange line services.
1. Oftel's *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*¹⁶ ("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 wholesale line rental to enable competition to develop in the downstream exchange line markets.
- 5.2 Wholesale line rental ("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.
- 5.3 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 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").
- 5.4 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 KPIs), and (iii) an assessment of the actual market impact of the WLR product.
- 5.5 Ofcom considers that this 'fit-for-purpose' test represents a strong form of equivalence of outcomes. Ofcom has stated in the TSR¹⁸ that it believes WLR should move to an equivalence of inputs model, but is not currently proposing to require this as part of the replicability test for business exchange lines. Equivalence of inputs is a very stringent requirement and is not a necessary condition for replicability. The undertakings proposed by BT pursuant to the Enterprise Act 2002 set a timetable for the implementation of equivalence of inputs for WLR. Ofcom

¹⁴ www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/fixednarrowbandrsm.pdf

¹⁵ See Annex 4 for a complete list of the relevant markets.

¹⁶ http://www.ofcom.org.uk/legacy_regulators/oftel/narrowband_mkt_rvw/nwe/?a=87101

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

¹⁸ See http://www.ofcom.org.uk/static/telecoms_review/index.htm

considers that it would be disproportionate at this stage to require BT to move to this model before it is permitted to bundle retail business exchange line products with other retail business products. Equivalence of inputs may, however, be necessary before the retail business exchange line markets could be considered to be effectively competitive.

- 5.6 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 read across between the two tests. In particular, the measure of market impact contained in the 'fit-for-purpose' test is not really 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 are relevant for assessing replicability.
- 5.7 Additionally, the 'fit-for-purpose' test, as currently specified, only includes analogue lines within its scope because at the point when the 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.
- 5.8 Ofcom therefore proposes 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.
- 5.9 It is not intended that the assessment of replicability in this consultation document pre-empt the 'fit-for-purpose' test. This consultation is solely focussed on business lines and does not assess whether residential lines are replicable. Additionally, the relaxation in BT's obligations that would follow from retail business exchange lines being found to be replicable would be to allow bundling to take place. Any relaxation of other regulation, such as the retail price control, would be considered in the context of the 'fit-for-purpose' test.

Question 5: *Should business analogue exchange lines, business ISDN2 exchange lines and business ISDN30 exchange lines be regarded as replicable if the functional specification and operational effectiveness elements of the WLR 'fit-for-purpose' test are passed?*

The replicability test

- 5.10 The WLR functional specification set out a number of requirements relating to the products and service wrap that BT was required to make available to service providers ("SPs"). These requirements fall into the following broad categories:
- a. Line types
 - b. Supplementary services
 - c. Ordering processes
 - d. Service Provider forecasts and rationing

- e. Consumer protection
- f. Maintenance and fault management
- g. Engineer visits
- h. Billing, debt management, fraud and security
- i. KPIs

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.

(a) Line types

5.11 In order for business exchange lines to be considered replicable, BT must ensure that the following line types are available for rental on wholesale terms:

- i. business single analogue exchange line;
- ii. business multiple single exchange lines (i.e. multiple individual lines with different directory numbers installed on the same site);
- iii. 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);
- iv. business ISDN2 exchange lines; and
- v. business ISDN30 exchange lines.

BT must also make private payphone exchange lines and out-of-area exchange lines available.

5.12 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 a service provider ("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.

5.13 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.

5.14 BT must not reject WLR orders due to the presence of the following services on the line unless there is no practicable alternative:

- i. customer premises equipment rented from BT
- ii. services provided over the same copper loop but using different frequencies, e.g. 'Redcare' and broadband

- iii. 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.

- 5.15 Where services provided by BT over an exchange line are incompatible with WLR, Ofcom will designate which service takes precedence and where WLR is deemed to take precedence, BT will cease the incompatible service and transfer the exchange line, informing the consumer of this via a mandatory Transfer Letter. Where WLR does not take precedence, BT may cancel the WLR transfer order.
- 5.16 Ofcom is satisfied that BT has made available the various WLR line types set out in the WLR functional specification and understands 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 is also minded to conclude that the requirements as regards order rejections and incompatible services have been complied with.

(b) Supplementary services

- 5.17 BT must also make available over these wholesale exchange lines, 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.
- 5.18 BT must make available the following network services available within WLR in order to enable SPs to manage their customers:
- i. Indirect access call barring
 - ii. Route 15x to SP
 - iii. Route to credit control
 - iv. Outgoing call barring
 - v. Call mapping
 - vi. Direct Dialling In
- 5.19 Ofcom understands that BT has made the network services and supplementary services described above available within the WLR portfolio. Ofcom is therefore minded to conclude that BT's retail business exchange lines are replicable in this respect.

(c) Ordering processes

- 5.20 BT must implement operational processes in an efficient manner, minimising its overheads and introducing process automation. BT must manage interactions with other wholesale services (e.g. CPS) in an efficient manner.
- 5.21 The processes for ordering, provisioning and transferring lines must provide SPs with the opportunity to offer an equal level of customer service to that offered by BT's retail activities.

- 5.22 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.
- 5.23 BT is required to provide an electronic ordering gateway ("the Gateway") with both manual (low volume) and XML-based (high volume) interfaces. The full range of order types, line types and supplementary services must be supported by both types of 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. BT shall support order types that allow an SP to provision a new line, transfer and existing line, cancel an order, change the status of an existing line and cease a line.
- 5.24 When rejecting a WLR order, 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.
- 5.25 BT must ensure that SPs can submit orders for WLR and CPS on the same line, managing 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 must ensure that there is no longer than a one-day gap between WLR and CPS activation.
- 5.26 BT must ensure that any WLR transfer is done so seamlessly so as not to interrupt or change an existing CPS service.
- 5.27 BT must adopt a home-movers process that enables SPs the same opportunity to retain customers who are moving home as is available to BT's retail activities.
- 5.28 BT has implemented the processes described above, though Ofcom is aware that there are operational issues relating to the availability of the ordering Gateway and its general reliability. Ofcom is of the view that until the reliability and availability of the ordering Gateway has been improved, it is unlikely to be appropriate to consider BT's retail business exchange lines to be replicable.
- 5.29 Ofcom is aware that BT is undertaking work to improve the availability of the Gateway and proposes to monitor the Gateway's availability and reliability during the consultation period. Ofcom will then reach a conclusion in the final statement as to whether the availability and reliability has improved sufficiently to enable it to conclude that BT's retail exchange lines can be considered to be replicable. Ofcom would invite 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.

(d) Forecasting and rationing

- 5.30 BT shall ensure that its systems have sufficient capacity to deal with the number of WLR orders.
- 5.31 Ofcom is aware that there are ongoing discussions between BT and the industry regarding the forecasting requirements for WLR. Ofcom considers that this is a matter that can be dealt with on an ongoing basis and should therefore not at this stage be a bar to replicability.

(e) Consumer protection

- 5.32 Where BT is the losing Provider, it must ensure that its losing Transfer Letter contains no marketing or 'save' content. End users have ten working days from when they ask their gaining Provider to transfer them, to the transfer taking place.
- 5.33 BT is required to provide the same malicious call protection on WLR lines as it provides to its retail activities.
- 5.34 The issue of what BT, when it is a losing Provider, includes in its CPS Transfer Letter has been agreed between BT and Ofcom. As to what it is permitted to include in its WLR losing Transfer Letter, Ofcom in its recent WLR Notification¹⁹ has set out what it considers is acceptable. Ofcom therefore does not consider any additional issues need to be addressed as concerns replicability in this area.

(f) Maintenance and fault management

- 5.35 BT is required to provide the same quality of service for a WLR line as for an exchange line with the same SLA operated by its own retail activities. The same level of service categories (currently standard care, total care, prompt care and priority service) as are available to BT's retail activities should be made available to SPs.
- 5.36 BT must 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 must also make available the same line diagnostic tests as are available to its retail activities and provide these an appropriate electronic interface.
- 5.37 The KPI reports provided by BT suggest 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 service²⁰. As discussed above, Ofcom is aware that there are problems with accessing the Gateway to log and monitor faults and will 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.

(g) Engineer visits

- 5.38 BT is required to provide SPs with the same ability to book appointments for engineer visits as that available to its retail activities. Requests for a specific appointment time must be able to be made via an electronic gateway and an immediate response must be provided listing the available appointments closest in time to that requested, from which the SP can select the preferred appointment.
- 5.39 BT engineers on site visits must comply with guidelines issued by Ofcom for the management of such visits.

¹⁹ See:

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

²⁰ For details of BT's published KPIs, see

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

- 5.40 Ofcom is of the view that BT currently appears to be complying with the requirements set out in the WLR functional specification and Ofcom's guidelines as regards engineer visits and proposes to conclude that BT's retail business exchange lines are replicable in this respect.

Bill, debt management, fraud and security

- 5.41 BT is required to provide SPs with billable quality Call Data Records ("CDRs") on a daily basis and in an electronic format, separated by a small time gap from the date of the actual calls. BT shall bill on a monthly basis for line rental, additional services and transaction charges.
- 5.42 BT is additionally 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.
- 5.43 For 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.
- 5.44 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.
- 5.45 Subject to consultation responses to the contrary, Ofcom is of the view that BT appears to have adequately implemented these requirements and proposes to take the view that BT's retail exchange lines are replicable in this respect.

(i) KPIs

- 5.46 BT is required to provide transparency of its operational performance in relation to WLR business processes by publishing KPIs, as defined by Ofcom. Data shall be published in sufficient detail to show whether SPs are receiving a comparable quality of service to that provided to BT's retail activities.
- 5.47 Although there was a delay on BT's part in providing retail comparators to its competitors, these have now been made available and SPs are able to compare the level of service that they receive when purchasing WLR with that which BT provides to its own retail activities when providing retail exchange lines. Ofcom is therefore minded to conclude that BT's retail exchange lines are replicable in this respect.

Conclusions

- 5.48 Subject to BT improving the availability of the electronic Gateway that allows orders and fault reports to be logged or other issues being raised during the consultation, Ofcom is minded to conclude that the business WLR products offer the requisite level of service to enable SPs to replicate BT's retail business exchange line products.

Question 6: *Do respondents agree with Ofcom's assessment of the replicability of retail business exchange line products?*

Section 6

Retail leased lines

6.1 Ofcom's *Review of retail leased lines, symmetric broadband origination and wholesale trunk segments markets*²¹ ("the leased lines market review") identified a market for retail low band width 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)²².

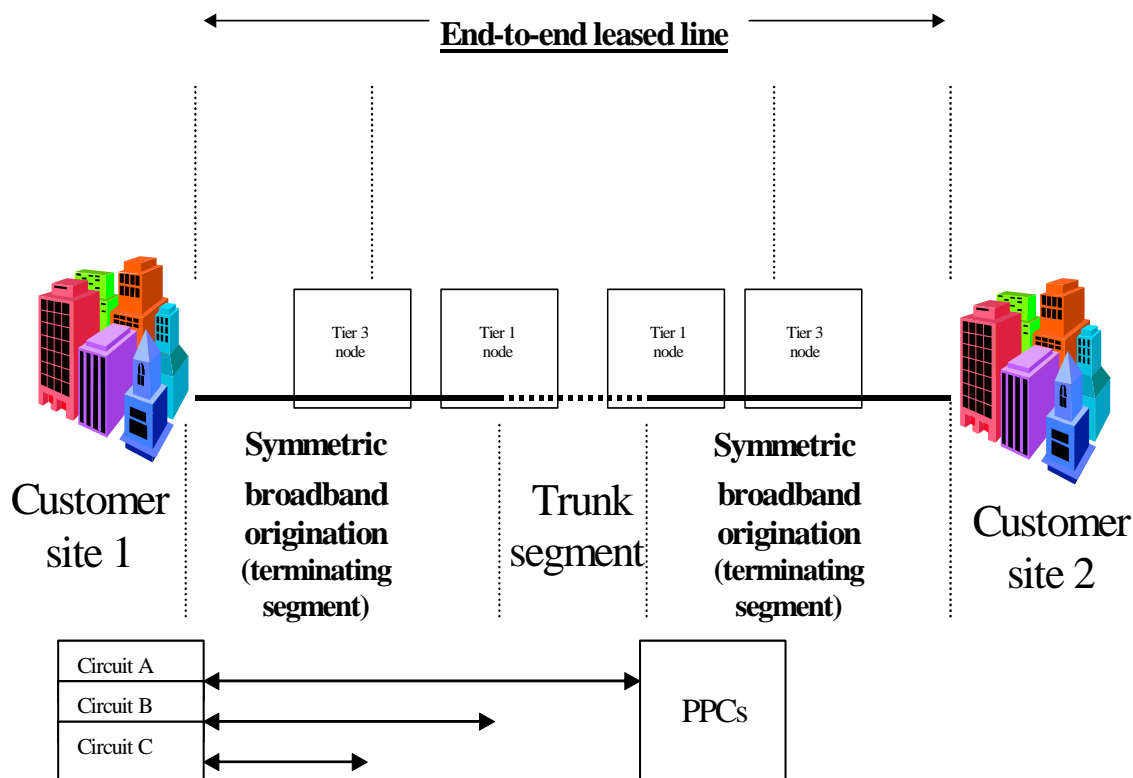
6.2 Ofcom further identified in the leased lines market review a number of wholesale leased lines markets, including those for:

- i. wholesale low bandwidth traditional interface symmetric broadband origination (up to and including 8Mbit/s) in the UK (excluding the Hull area); and
- ii. wholesale trunk segments at all bandwidths in the UK.

Ofcom concluded that BT has SMP in these two wholesale markets.

6.3 As a result of these findings of SMP in the wholesale leased lines markets, Ofcom required BT to provide partial private circuits ("PPCs") (see Figure 6.1 below) to enable competition to develop in the downstream low bandwidth retail leased lines market.

Figure 6.1: leased line components



²¹ <http://www.ofcom.org.uk/consult/condocs/llmr/>

²² Details of the relevant markets are contained in Annex 4, below.

- 6.4 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 disputes²³.
- 6.5 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:
- a. Routing inefficiencies
 - b. Pricing differences
 - c. Higher equipment costs
 - d. Forecasting
 - e. Inequality of information
 - f. Migration
 - g. PPC contract complexity
 - h. Reasonableness of contract terms
 - i. Billing accuracy
 - j. Exclusion of certain services from the charge control
 - k. PPC performance
 - l. Circuits to other jurisdictions

These issues are considered in more detail in the following paragraphs.

Question 7: *Has Ofcom correctly identified all the outstanding issues in relation to PPCs?*

(a) Routing inefficiencies

- 6.6 The model of a retail leased line that is set out in Figure 6.1, 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 leased lines via a Tier 1 node, but will instead optimise the routing on a case-by-case basis.
- 6.7 BT's competitors have 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

²³ 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.

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.

- 6.8 BT has 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.
- 6.9 BT has 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.
- 6.10 BT's competitors have 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. However, 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.
- 6.11 BT has 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 has noted that at least one competitor has already built out to 180 of these exchanges for voice interconnect. Alternative network operators ("Altnets") have 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.
- 6.12 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.
- 6.13 Ofcom recognises 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 is therefore seeking the views of respondents as to whether there is actually a replicability issue as regards routing inefficiencies and, if so, whether it is material.
- 6.14 If Ofcom concludes 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 proposes to allow BT to bundle retail leased lines with other retail business products. If, however, Ofcom concludes that this is a material issue, it would be necessary to assess the reasons for the lack of replicability.
- 6.15 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 allow BT to bundle retail leased lines 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 prevent BT from bundling retail leased lines until the issue had been addressed.

(b) Pricing differences

- 6.16 BT's competitors have 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.
- 6.17 BT has 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 logical 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.
- 6.18 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.
- 6.19 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.
- 6.20 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.
- 6.21 Ofcom is, therefore, currently 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 BT should be permitted to bundle products, though would be material if bespoke pricing was being considered. Because BT would still be required to offer the bundled prices to all broadly comparable groups of consumers and ensure that the price for the bundle passed net revenue and implicit price-cost tests, there is little scope for BT to be able to exploit any differences arising from the way in which it prices PPCs and retail leased lines. The same would not be the case if BT was permitted to bespoke price. The differences in the pricing methodologies, when coupled with the ability to bespoke price, would provide BT with far greater opportunity to target consumers in areas where it faces greater competition with prices that its competitors may be unable to match because of the differences in pricing methodologies, potentially causing competition concerns.

(c) Higher equipment costs

- 6.22 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 multiplexor.
- 6.23 BT has 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.
- 6.24 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.
- 6.25 Ofcom is 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 proposes, therefore, to conclude that retail leased lines are replicable in this respect.

(d) Forecasting

- 6.26 Altnets using PPCs have to submit a forecast of the number of orders they expect to submit in order to be able to 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.
- 6.27 Ofcom would consider a punitive forecasting regime to be a significant bar to replicability.
- 6.28 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 has advised that its retail activities would be prepared to follow comparable forecasting procedures as 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.
- 6.29 BT has 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 has 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.

- 6.30 Altnets have 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 has 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.
- 6.31 Ofcom is 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 is not proposing that BT be required to provide equivalence of inputs as regards retail leased lines, only equivalence of outcomes. Ofcom therefore believes 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, BT must provide evidence to Ofcom during the consultation period to show that the forecasting penalties only reflect genuinely incurred costs.

(e) Inequality of information

- 6.32 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 have 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-dates 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.
- 6.33 BT has 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.
- 6.34 BT claims 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.
- 6.35 Altnets claim that anecdotal evidence does 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 believe that in order to ensure replicability, BT should provide access to the customer data that predates August 2001.
- 6.36 BT has, 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 has proposed to review its processes to ensure that the same approach is adopted for PPCs in similar circumstances.

- 6.37 Ofcom is of the view that operators using PPCs should have a similar level of visibility of relevant data as BT's retail activities. Ofcom does 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.
- 6.38 Ofcom considers 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 forms 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 has 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 proposes to conclude that the retail leased lines are replicable in this respect.

(f) Migration

- 6.39 Several operators have 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.
- 6.40 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 and BT is currently considering this request.
- 6.41 Ofcom is currently 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 proposes 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.

(g) PPC contract complexity

- 6.42 A variety of concerns have 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 has recognised that contracts issues are dealt with in the undertakings offered by BT under the Enterprise Act 2002 and has proposed that only the PPC-specific terms of the PPC contract be considered here.
- 6.43 BT has 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 has recently agreed with operators.
- 6.44 Ofcom is of the view that there should be scope for simplifying the current range of contracts, but recognises 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.

- 6.45 The undertakings offered by BT under the Enterprise Act 2002 contain 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. Ofcom considers that this mechanism will provide an appropriate framework in which to address the complexity of the PPC contract and does not, therefore, propose to conclude the resolution of this issue is sufficiently material as to prevent replicability from being found in this respect.

(h) Reasonableness of contract terms

- 6.46 Some concerns have also been 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 argue that the current contractual terms in these areas are onerous when compared with other wholesale products.
- 6.47 BT has disputed that the current credit vetting, payment terms and interest for late payment clauses in the PPC contract differ from its general policies over the entire wholesale product portfolio. BT has sought further clarification from operators as to the specific issues that they have with the PPC terms.
- 6.48 Ofcom's view is that the PPC contract should be no more onerous in respect of the terms listed above than that for other wholesale products, but considers that any necessary changes can be achieved through a process of commercial negotiation, with the ability to bring a dispute to Ofcom for resolution remaining as a backstop. Ofcom does not therefore consider that this issue is a bar to replicability.

(i) Billing accuracy

- 6.49 Operators have 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 have been raised as to whether this is fit for purpose for a wholesale product such as PPCs.
- 6.50 BT acknowledges 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 argues that this is 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.
- 6.51 BT has undertaken a process to validate the radial distance of its entire PPC inventory (around 64,000 circuits) and has any corrected postcode errors that were identified as well. On the basis of this revised information, BT has 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.
- 6.52 BT believes that this should mean that PPC bills are now accurate. Operators believe that it is currently too early to assess whether the changes made by BT have been successful at eradicating billing errors and continues to believe that a billing SLA is necessary.
- 6.53 Ofcom is of the 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.

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

(j) Exclusion of certain services from the charge control

- 6.55 Concern has been expressed by some operators that ISH extension services and path protected services are excluded from the scope of the PPC charge control.
- 6.56 BT has advised that it is currently carrying out a review of the costs of these services and that it will make any necessary price changes as soon as possible.
- 6.57 Ofcom is 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 is 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.

(k) PPC performance

- 6.58 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 have been expressed by operators using PPCs in relation to BT's operational performance.

(i) Inadequacy of comparators

- 6.59 There is a general concern that the current KPI comparators are insufficient to permit detection of any undue discrimination. In particular, operators consider 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 have 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.
- 6.60 BT has commented that it has 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 has also expressed a willingness to consider other comparators that Altnets may find useful and are awaiting a response from them on this.
- 6.61 In relation to provision performance, BT has 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.

- 6.62 Ofcom has 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 does not believe that further performance enhancements are required in this respect. The current KPIs²⁴ already generally indicate that BT's performance in respect of PPC provision and repair is better than that for its retail leased lines.
- 6.63 UKCTA has 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.
- 6.64 UKCTA has also set out a list of further KPIs that it believes are 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 include 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.
- 6.65 UKCTA has 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.
- 6.66 Ofcom does 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.
- 6.67 Compensation is already available where BT fails to meet the provisioning requirements set out in the Service Level Agreement, 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.

²⁴ See:

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

- 6.68 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 significant market power in many of these markets. Ofcom 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. Ofcom sees no reason to deviate from this position now and notes that BT has voluntarily agreed to provide retail comparators for the key metrics of provision and repair.
- 6.69 Ofcom is 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.
- 6.70 As regards the new KPIs proposed by UKCTA, Ofcom is currently of the view that further KPI requirements are 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.
- 6.71 The tests and assessment set out in this section seek to identify whether BT's retail leased lines products are replicable or not and Ofcom does not consider that it is 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 proposed by BT in the undertakings under the Enterprise Act 2002²⁵, Ofcom does not consider that it is necessary to impose further KPIs on BT at this stage and that this issue is not a bar to replicability. 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.

(ii) Lack of availability of enhanced SLAs

- 6.72 Operators have raised concerns that BT is able to offer enhanced SLAs to particular types of retail customer (for example the NHS and NATO) but the current PPC SLAs do not permit these enhanced care levels to be replicated.
- 6.73 BT has advised that it does not provide enhanced SLAs on wholesale leased lines to its retail activities that are not available on PPCs and has suggested that there are two different issues here, the first relating specifically to NATO and the second relating to service wraps offered on retail leased lines.
- 6.74 BT has argued that it is not the lack of enhanced SLAs that is 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 considers the granting of such security accreditation to be

²⁵ See http://www.ofcom.org.uk/static/telecoms_review/index.htm

a matter for NATO and does not consider this to be a replicability issue. In addition, Ofcom considers that the number of circuits purchased by NATO to be sufficiently small as not to be material to its consideration of replicability.

- 6.75 BT has 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.
- 6.76 BT has, 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 Realm²⁶. Priority Prompt and Total Care²⁷ 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.
- 6.77 Ofcom is 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 are unable to offer comparable services unless they are also provided with similar levels of service. Ofcom is therefore of the view that BT should make a comparable priority care service available for PPCs that fall in the category of being essential 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.

(iii) Jeopardies

- 6.78 Altnets have expressed concern in relation to the volume of jeopardies (which is seen as too high), and the process of notifying jeopardies (which is seen as being too late).
- 6.79 BT has 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.
- 6.80 Altnets have advised that they need to understand better how BT goes about fault fixing and the data systems available to it before they can conclude whether or not they have comparable access to BT's retail activities.
- 6.81 Ofcom is currently of the view that the fault notification processes available to Altnets mean that they are not placed at a material disadvantage to BT's own retail activities in this respect and therefore proposes to conclude that retail leased lines are replicable in this respect.

(iv) Escalation

²⁶ The circuits falling within this category have been agreed with Ofcom and are contained on a list held by BT.

²⁷ See <http://www.serviceview.bt.com/list/current/docs/Maintenance.boo/02015.htm>

- 6.82 Altnets have also expressed concern that they do not have access to more senior engineering staff within BT to expedite work, whereas BT's retail activities appear 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.
- 6.83 BT has 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 has 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.
- 6.84 Ofcom is 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 proposes to conclude that retail leased lines are replicable in this respect.

(v) CMCs

- 6.85 Concern has 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.
- 6.86 Altnets have 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.
- 6.87 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 CMC through PPC charges.
- 6.88 Altnets have 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.
- 6.89 It is not clear to Ofcom at this stage as to whether Altnets have a genuine need to purchase additional project management or not but Ofcom does not consider that this is 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 does not consider, at this stage, that it is necessary to introduce a new KPI to assess this issue, as has been suggested by UKCTA, but instead proposes to monitor the level of service provided by the different CMCs. Over time, this will 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 will consider whether this amounts to a breach of BT's obligation not to unduly discriminate. Ofcom does not consider this issue to be a bar to replicability.

(vi) Major outage notification

- 6.90 Altnets have expressed concern about poor notification of major outages, in particular the processes for planned outages. Altnets have complained that planned outages are scheduled for times of the day that are inconvenient to them and their customers.
- 6.91 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.
- 6.92 Ofcom is 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 proposes to conclude that retail leased lines are replicable in this respect.

(I) Circuits to other jurisdictions

- 6.93 Altnets have raised issues about their ability to obtain cost effective circuits to Hull, the Channel Islands and the Isle of Man.
- 6.94 BT is under no UK regulatory obligation to provide leased lines in the Hull area, the Channel Islands or the Isle of Man. Ofcom has not designated BT as having SMP in these areas and therefore can impose no obligations on BT to provide circuits into these areas.

Conclusions

- 6.95 Ofcom is of the view that there are a number of issues that remain outstanding as regards the PPC products that, collectively, mean that BT's retail business leased lines products cannot currently be considered to be replicable.
- 6.96 Ofcom has set out above proposed solutions to some of these issues and is of the view that these solutions could be implemented during the course of the consultation period on its replicability proposals.
- 6.97 If BT satisfactorily addresses these outstanding issues during the consultation period, Ofcom proposes to conclude that BT's retail business leased lines products are replicable.

Question 8: *Do respondents agree with Ofcom's assessment of the replicability of retail leased lines?*

Section 7

Next steps

7.1 The provisional conclusions reached by Ofcom in Chapters 4-6 above are that BT's retail business calls, exchange lines and leased lines services are not currently replicable but that, provided that BT addresses the few outstanding issues with the wholesale CPS, WLR and PPC products that Ofcom has highlighted in the previous sections, it may be possible to conclude that some or all of the products are replicable in the final statement. In summary, these outstanding issues are:

CPS:

- i. Introduction of an effective pre-validation process and provision of postcode address files.
- ii. Publication of, and commitment to maintain, an up-to-date incompatible product list.
- iii. Application of similar transfer charges as are faced by CPSOs for successful and rejected orders, to BT's retail activities.
- iv. Application of the forecasting and penalty regime to BT's own retail activities.
- v. Evidence to show that forecasting penalties are based on reasonably incurred costs and are not punitive.
- vi. Introduction of a comparable homemovers process for CPSOs as is currently available to BT's retail activities.
- vii. (New SLA targets – Ofcom to conclude on whether targets are sufficiently challenging after considering CPSO responses.

WLR:

- i. Provide evidence that the reliability and availability of the Gateway has sufficiently improved.

PPCs:

- i. Provide evidence that any forecast penalties reflect genuinely incurred costs and are not punitive.
- ii. Implement process changes to ensure that PPC orders are treated in the same manner as retail leased line orders, where incorrect details are provided in orders.
- iii. Introduce migration scheme from retail leased lines to PPC, including the ability to redesignate muxes at a reasonable charge.
- iv. Provide evidence that billing accuracy problems have been addressed and resolved.
- v. Provide CMC performance data.

- vi. Introduction of comparable priority care level for PPCs as is available for retail leased lines
- 7.2 Respondents are invited to provide comments on the proposals contained in this consultation document and have until 30 September 2005 to do so. After this, Ofcom will consider the responses received with a view to reaching a final decision as to whether any or all of BT's retail business calls, exchange lines and leased lines services can be considered to be replicable.
- 7.3 As outlined in Chapter 2 above, if Ofcom reaches the conclusion that some or all of the retail business services are replicable, Ofcom would no longer presume that the bundling of these retail business services, both with each other and with other non-SMP retail services, is unduly discriminatory, provided that the bundles of services met the other criteria listed in the October 2003 consultation, i.e. that:
- i. the bundle price is capable of passing a net revenue test;
 - ii. the implicit price of each element in the bundle is capable of passing an implicit price-cost test;
 - iii. eligibility for any level of discount for the overall bundle of services is not dependent on the customer spending a minimum sum on any individual service within the bundle;
 - iv. details of the bundled price or discount scheme are published; and
 - v. the bundled price or discount scheme is made available to all broadly comparable customers.
- 7.4 Where all elements of the bundle are capable of being replicated, technically and commercially, by competitors and the other criteria set out above are met, it is unlikely that bundling per se will have the capability of harming competition. Competitors have the network elements at their disposal to be able to offer comparable bundles of services to consumers, in terms of service quality and price, meaning that there could be no presumption of undue discrimination on BT's part as regards the services made available to competing operators and its own retail activities.
- 7.5 BT has also requested that Ofcom consider allowing it to offer bespoke prices for retail business services. Ofcom is likely to be consulting separately on this question in the near future.

Section 8

Responding to this consultation

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on Friday, 30 September 2005**.

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to first martin.hill@ofcom.org.uk.

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Martin Hill
Competition and Markets
3rd Floor
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3333

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

Further information

If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Martin Hill on 020 7783 4334.

Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Ofcom reserves its power to disclose certain confidential information where this is necessary to fulfil its functions, although in practice it would do so only in limited circumstances.

Please also note that copyright and all other intellectual property in responses will be assumed to be assigned to Ofcom unless specifically retained.

Next steps

Following the end of the consultation period, Ofcom intends to publish a final statement around November 2005.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow, including on the length of consultations.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, please contact Tony Stoller, Director of External Relations, who is Ofcom's consultation champion:

Tony Stoller
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
Tel: 020 7981 3550
Fax: 020 7981 3630
E-mail: tony.stoller@ofcom.org.uk

Annex 1

Ofcom's consultation principles

Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

- A1.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

- A1.3 We will be clear about who we are consulting, why, on what questions and for how long.
- A1.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
- A1.5 We will normally allow ten weeks for responses to consultations on issues of general interest.
- A1.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.
- A1.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

- A1.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 2

Consultation response cover sheet

- A2.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A2.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A2.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: The replicability of BT's regulated retail business services

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

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Organisation

☐

Part of the response

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If there is no separate annex, which parts?

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

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☐

Name

Signed (if hard copy)

Annex 3

Consultation questions

Question 1: Do respondents believe that the tests set out in the October 2003 consultation and May 2004 statement remain the correct tests to use when assessing whether BT should be permitted to bundle retail business SMP products or do the undertakings proposed in the TSR mean that some of the tests are no longer necessary?

Question 2: Respondents are invited to comment on Ofcom's proposed criteria for assessing whether BT's retail business products are replicable.

Question 3: Have the outstanding issues in relation to CPS been correctly identified?

Question 4: Do respondents agree with Ofcom's assessment of the replicability of retail business fixed line telephony calls?

Question 5: Should business analogue exchange lines, business ISDN2 exchange lines and business ISDN30 exchange lines be regarded as replicable if the functional specification and operational effectiveness elements of the WLR 'fit-for-purpose' test are passed?

Question 6: Do respondents agree with Ofcom's assessment of the replicability of retail business exchange line products?

Question 7: Has Ofcom correctly identified all the outstanding issues in relation to PPCs?

Question 8: Do respondents agree with Ofcom's assessment of the replicability of retail leased lines?

Annex 4

List of relevant markets

A4.1 Identified below are the relevant retail business markets in which BT has been designated as having SMP and the associated wholesale markets that provide inputs into those retail markets.

Retail business calls

A4.2 *The Fixed narrowband retail services markets*²⁸ review ("the retail narrowband review") identified four business calls markets in which BT was found to have SMP. These were:

In the United Kingdom excluding the Hull area:

- Business local calls
- Business national calls
- Business calls to mobiles
- Business operator assisted calls

A4.3 *The Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*²⁹ ("the wholesale narrowband review") identified the following markets in which BT has SMP that provide inputs into the retail business calls markets:

For the United Kingdom excluding the Hull area:

- call origination on fixed public narrowband networks
- local-tandem conveyance and transit on fixed public narrowband networks
- inter-tandem conveyance and transit on fixed public narrowband networks³⁰
- single transit on fixed public narrowband networks

A4.4 A further wholesale market that provides inputs into the provision of retail business calls was identified in the Review of fixed geographic call termination markets³¹, with BT being found to have SMP in the market for:

Fixed geographic call termination provided by British Telecommunications plc, whose registered company number is 1800000, including any subsidiary or holding company of it, or any subsidiary of that holding company

²⁸ See: www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/fixednarrowbandrsm.pdf

²⁹ See

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

³⁰ It should be noted that Ofcom is currently consulting as to whether or not the inter-tandem conveyance and transit market is now competitive: see Explanatory statement and Notification of proposals on BT's SMP status and charge controls in narrowband wholesale markets:

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

³¹ See http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/Eureviewfinala1.pdf

Retail business exchange lines

A4.5 The retail narrowband review also identified three business exchange line markets in which BT was found to have SMP. These were:

For the United Kingdom excluding the Hull area:

- business analogue exchange line services
- business ISDN2 exchange line services
- business ISDN30 exchange line services

A4.6 The wholesale narrowband review also identified the following markets in which BT has SMP that provide inputs into the retail business exchange lines markets:

For the United Kingdom excluding the Hull area:

- wholesale business analogue exchange line services
- wholesale business ISDN2 exchange line services
- wholesale ISDN30 exchange line services

Retail leased lines

A4.7 *The Review of retail leased lines, symmetric broadband origination and wholesale trunk segments markets*³² ("the leased lines market review") identified one retail leased line market in which BT was found to have SMP:

The provision of traditional interface retail leased lines up to and including a bandwidth capacity of eight megabits per second within the United Kingdom but not including the Hull area

A4.8 The leased lines market review also identified two wholesale markets in which BT has SMP that provide inputs into the retail leased lines market:

The provision of traditional interface symmetric broadband origination with a bandwidth capacity of up to and including eight megabits per second within the United Kingdom but not including the Hull area

The provision of wholesale trunk segments at all bandwidths within the United Kingdom

³² See <http://www.ofcom.org.uk/consult/condocs/llmr/statement/>