

Fixed Narrowband Retail Services Markets

Identification and analysis of markets, making of market power determinations and setting of SMP conditions

Final Explanatory Statement and Notification

Published: 28 November 2003

Contents

Summary

Chapter 1 Background and consultation process

Chapter 2 Market definition: final decision

Chapter 3 Market power: final decision

Chapter 4 Remedies: final decision

Annex A List of representations received in response to the August 2003 consultation document

Annex B IDD: List of category A and category B routes

Annex C Charge Control Monitoring and Other Issues

Annex D Notification under section 79 and section 48(1) of the Communications Act 2003

Annex E Discontinuation notices under paragraph 9 of schedule 18 to the Communications Act 2003

Summary

A new regulatory regime

S.1 A new regulatory framework for electronic communications networks and services entered into force in the United Kingdom (the “UK”) on 25 July 2003. The basis for the new framework is five new EU Communications Directives that are designed to create harmonised regulation across Europe.

S.2 The new Directives require National Regulatory Authorities (“NRAs”), amongst other things, to carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions.

S.3 As part of this series of reviews, on 26 August 2003 Oftel published a consultation document *Review of Fixed Narrowband Retail Services Market Identification and analysis of markets, determination of market power and setting of SMP conditions – Explanatory Statement and Notification* (“the August consultation document”). That document invited comments on the Director-General of Telecommunications (the “Director”)’s proposals for defining the relevant services markets and the state of competition in those markets, and on the proposed regulatory remedies. The period of consultation closed on 26 September 2003.

S.4 As required by the Directives, the draft decision was also sent to the European Commission and to other NRAs as, in the Director’s opinion, the proposals may have affected trade between Member States. The final decision included in this document is also being communicated to the European Commission.

Summary of proposals

S.5 Having considered all responses to the August consultation document, the Director is setting out in the present document his final decision. This is summarised below.

Identification of markets

S.6 The Director has decided to define the following services markets as:

In the UK excluding the Hull area:

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;

- Residential local calls;
- Residential national calls;
- Residential calls to mobiles;
- Residential operator assisted calls;
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Business local calls;
- Business national calls;
- Business calls to mobiles;
- Business operator assisted calls
- Business IDD category A calls;
- Business IDD category B calls (on a route-by-route basis).

In the Hull area:

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls originating in the Hull area;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business calls to mobiles originating in the Hull area;
- Business operator assisted calls originating in the Hull area;
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area.

S.7 This market definition is unchanged from that proposed in the August consultation document. In identifying the above markets the Director has taken due account of the Commission's Recommendation of 11th February 2003 on Relevant Product and Service Markets within the electronic communications sector (the "Recommendation"). He has also taken due account of the Commission's *Guidelines on market analysis and the assessment of SMP* (the "SMP Guidelines").

Assessment of market power

S.8 Having analysed the above markets, and taken due account of the Recommendation and the SMP Guidelines and responses to the August

consultation document, the Director has decided that Significant Market Power (“SMP”) is held as follows:

In the UK excluding the Hull area, by British Telecommunications plc (“BT”) -

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls;
- Residential calls to mobiles;
- Residential operator assisted calls
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Business local calls;
- Business national calls;
- Business calls to mobiles;
- Business operator assisted calls.

In the Hull area, by Kingston Communications (Hull) plc (“Kingston”) -

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls originating in the Hull area;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business calls to mobiles originating in the Hull area;
- Business operator assisted calls originating in the Hull area;
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area.

S.9 The Director has decided that no person has SMP in the Business IDD category A calls market in the UK excluding the Hull area and the Business IDD category B calls market (on a route-by-route basis) in the UK excluding the Hull area.

S.10 This decision on SMP is unchanged from that proposed in the August consultation document.

Regulatory implications

S.11 Given the position of dominance held by BT and Kingston, ie their ability to behave to an appreciable extent independently of competitors, customers and ultimately consumers, the Director has decided to impose SMP conditions on them as follows;

BT to comply with an RPI – RPI charge control until 31 July 2006 in respect of the following markets:

In the UK excluding the Hull area -

- Residential analogue exchange line services;
- Residential local calls;
- Residential national calls;
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Residential calls to mobiles;
- Residential operator assisted calls.

BT to not discriminate unduly against particular persons or a particular description of persons in relation to services offered in the following markets:

In the UK excluding the Hull area -

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls;
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Residential calls to mobiles;
- Residential operator assisted calls;
- Business local calls;
- Business national calls;
- Business calls to mobiles;
- Business operator assisted calls.

BT to publish charges, terms and conditions and notify amendments to charges, terms and conditions within 24 hours of introducing those amendments in respect of the following markets:

In the UK excluding the Hull area -

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls;
- Residential calls to mobiles;
- Residential operator assisted calls;
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Business local calls;
- Business national calls;
- Business calls to mobiles;
- Business operator assisted calls.

Kingston to not discriminate unduly against particular persons or a particular description of persons in relation to services offered in the following markets:

In the Hull area –

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls originating in the Hull area;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business calls to mobiles originating in the Hull area;
- Business operator assisted calls originating in the Hull area;
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area.

Kingston to publish charges, terms and conditions and notify amendments to charges, terms and conditions within 24 hours of introducing those amendments in respect of the following markets:

In the Hull area -

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls originating in the Hull area;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business calls to mobiles originating in the Hull area;
- Business operator assisted calls originating in the Hull area;
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area.

S.12 These decisions are unchanged from that proposed in the August consultation document.

S.13 The new Directives allow Member States to carry forward some existing regulation until the market reviews have been completed and any new conditions put in place. As NRAs were not able to notify draft proposals to the European Commission before 25 July 2003, the Director issued continuation notices to relevant communications providers to maintain some of the regulatory regime that existed before that date. For the markets that are the subject of this document, specified licence conditions were made to continue in force by continuation notices given to BT and Kingston on 23 July 2003 (the 'Continuation Notices'). The Continuation Notices came into effect on 25 July 2003.

S.14 As the Director has now concluded that the above conditions should apply, present regulatory requirements on BT and Kingston set out in the Continuation Notices in respect of the fixed narrowband retail markets defined in this document will be discontinued. Discontinuation Notices to that effect are at Annex E to this document. More details of the regulation to be removed, and how this will be done, are contained in Chapter 4 of this document.

Chapter 1

Background and consultation process

Scope of this review and the extent of existing regulation

1.1 In this review the Director has considered the markets for fixed retail narrowband exchange line and calls services in the UK. BT and Kingston were designated as operators with SMP in such markets under the Revised Voice Telephony Directive (98/10/EC) and have been subject to regulatory controls in such markets. BT and Kingston are currently obliged to publish their prices and prohibited from discriminating unduly against particular customers. BT is also subject to a price control on its retail residential services.

The basis for market reviews

1.2 The review of competition completed by this document is a requirement of a new European regulatory framework for electronic communications networks and services, which entered into force on 25 July 2003. The framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers. The basis for the new regulatory framework is five new EU Communications Directives:

- Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services ("the Framework Directive");
- Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities ("the Access Directive");
- Directive 2002/20/EC on the authorisation of electronic communications networks and services ("the Authorisation Directive");
- Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, ("the Universal Service Directive") and;
- Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector ("the Privacy Directive").

1.3 The new Directives require National Regulatory Authorities ("NRAs") such as Ofcom to carry out reviews of competition in communications markets to ensure that regulation remains appropriate in the light of changing market conditions. This document concludes for the retail fixed narrowband services market the review process that the Director had commenced in anticipation of the new regime.

1.4 The first of the four of the new Directives listed above were implemented in the UK on 25 July 2003. This was achieved via the Communications Act 2003

("the Act"). The Act provides for functions, powers and duties to be carried out by Ofcom, which include those flowing from those four EC Communications Directives. Certain existing functions are also transferred to Ofcom. However, Ofcom will not assume full functions under the Act until later this year. Accordingly, transitional arrangements are in place to enable the Director to carry out certain functions until they are transferred to Ofcom later in the year. Therefore, references in those provisions of the Act to Ofcom are, for the present time, to be read as references to the Director and this document refers to the Director rather than Ofcom.

1.5 The August consultation document provides, in Chapter 1, more comprehensive details of:

- the purpose and objective of these new Directives;
- Oftel's powers to conduct market reviews; and
- the detailed procedural requirements and the guidance that Oftel has taken into account in conducting this review, in order to identify markets and to assess whether any providers have SMP.

Consultation processes

1.6 Oftel's consultation process for this market review began with a document *Review of Fixed Narrowband Retail Markets* published on 17 March 2003 ("the March consultation document")

http://www.oftel.gov.uk/publications/eu_directives/2003/eu_retail/index.htm .

That document invited comments on proposals for identification of relevant markets, market power determinations in those markets, and on the remedies which might be applied.

1.7 A second stage of consultation began on 26 August 2003. The August consultation document updated the analysis and proposals, based on market developments and responses to the first stage of consultation. The August consultation document contained a Notification under sections 80 and 48(2) of the Act, setting out the Director's proposed market definitions, his proposed market power determinations in respect of BT and Kingston and his proposals for remedies in markets where SMP was proposed to be held by BT and Kingston. The August consultation document also set out the Director's reasoning for those proposals. This second stage of consultation, which closed on 26 September, invited representations from UK stakeholders, the European Commission and other NRAs , in accordance with Articles 6 and 7 of the Framework Directive.

1.8 In accordance with Article 7 of the Framework Directive, NRAs must send the European Commission a summary notification form of their draft proposals. Oftel's notifications are published on the European Commission's website at <http://forum.europa.eu.int/Public/irc/infso/ecctf/library?l=/uk&vm=detailed&sb=Title>.

Summary of the latest consultation

1.9 This statement should be read in conjunction with the March consultation document and the August consultation document for the full reasoning for the Director's final decisions.

1.10 There were seven responses to the August consultation document, including one from the European Commission and one from another NRA. Annex A lists the respondents; their views are summarised in Chapters 2 and 3.

1.11 The Director has considered the responses carefully and taken utmost account of the points made when setting out in this document his final decisions on market definition, SMP and remedies. Where new and substantive points are made, they are addressed in Chapter 2 and 3 below. Where other points were repeated from the first stage of consultation, and have thus been considered already in Oftel's analysis, this document does not reprise Oftel's previous response.

1.12 The Director has also taken due account of the Recommendation and the SMP Guidelines in making his final decisions regarding identification of markets and market power determinations in those markets. The Director's Notification of his decision, as required under sections 79(4) and 48(1) of the Act, is provided at Annex D.

Chapter 2

Market definition: Final decision

Identification of markets

2.1 Section 79(1) of the Act provides that before a market power determination may be made, the Director must (i) identify the markets which are, in his opinion, the ones which, in the circumstances of the UK, are the markets in relation to which it is appropriate to consider such a determination; and (ii) analyse those markets. The Director is, as noted above, required to take due account of all applicable guidelines and recommendations issued by the European Commission. Under section 79(4) of the Act, the Director may identify markets and make market power determinations by way of publication of a notification. The notification may, by virtue of section 79(5)(c) of the Act, also set out the SMP conditions applicable to communications providers with SMP in the identified markets. The notification at Annex D is such a single notification.

Market definition

2.2 Taking account of the analysis in Chapter 2 and Annex A of the August consultation document, the responses to the August consultation document and the Director's response below, the Director has decided to define the relevant economic markets as:

In the UK excluding the Hull area -

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls;
- Residential calls to mobiles;
- Residential operator assisted calls;
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Business local calls;
- Business national calls;
- Business calls to mobiles;
- Business operator assisted calls;
- Business IDD category A calls;
- Business IDD category B calls (on a route-by-route basis).

In the Hull area -

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls originating in the Hull area ;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business calls to mobiles originating in the Hull area;
- Business operator assisted calls originating in the Hull area;
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area.

2.3 The chief features of the market definition remain as proposed in the August consultation document (at Chapter 2 and Annex A of that document). An updated list of category A and category B IDD routes is set out in Annex B of this document.

Responses to the August consultation document

2.4 In its response to the August consultation document the European Commission notes that Oftel has, on the basis of the existence of different competitive conditions, defined markets more narrowly than in the Recommendation. The Commission recognises that a broader definition along the lines of the Recommendation is unlikely to lead to a different conclusion of the SMP assessment and that a conclusion on the scope of the markets is not relevant.

2.5 In its response BT states its view that Oftel should define a single market for unmetered Internet access and that Oftel should take into account varying conditions of competition in different parts of the UK when defining markets. BT also argues that Oftel should investigate further the possibility of defining a separate market for supply of services to the large business market for instance by defining a market for tenders over £5M. UKCTA supported Oftel's proposal for UK-wide markets (excluding Hull).

The Director's response

2.6 Oftel's view is that there is not a single market including both narrowband and broadband. While Oftel recognises that customers have moved from narrowband to broadband and that this is likely to continue to some extent in the future, it is not clear that this is substitution in response to a relative price change as such, as opposed to customers upgrading to a higher quality product that was not previously available. Oftel's consumer survey evidence indicates that customers value the added functionality of broadband, in particular, the always on element, the ability to make simultaneous voice calls while accessing the Internet, as well as the additional speed. Therefore, Oftel believes that it is appropriate to define the broadband market using these characteristics.

2.7 The Director does not accept BT's repeated case that a separate market can be defined for supply of all telecommunications ("telecoms") services to large business customers. The detailed reasoning can be found in the August consultation document. In summary:

- Competitive conditions will vary significantly between the services supplied to large business customers. Therefore, if there is a risk of leverage of market power between the services supplied, a market definition based on a wider market (ie across a range of services) will be erroneous.
- If a market is to be narrowed by customer type, then this should be done having first defined the product and geographic market, not afterwards.
- The SMP Guidelines are not definitive on the matter of market definition for supply to large business customers.
- Community case law on global telecommunications services refers to competition issues and competitive situations which are markedly different from those obtaining in the UK for fixed telephony (see paragraph 2.125 of the August consultation document).

2.8 Nevertheless, if it can be verified that competitive conditions vary between large and small business customers for particular services, but a break-point cannot be readily identified, then the appropriate and proportionate response may be to consider the scope for flexible interpretation of ex-ante obligations in situations where the nature of supply/contracting goes some way to addressing potential competition problems. Such an approach may be appropriate and proportionate where there is at least scope for a potential competition problem – such as leverage of market power.

2.9 It is possible that tender situations provide the kind of environment where the scope for pre-emption of competition and the leverage of market power is diminished. Whether tender situations indeed provide such an environment will

be considered following responses to the Director's consultation *BT'S Pricing Of Services For Business Customers* published on 15 October 2003 <http://www.oftel.gov.uk/publications/licensing/2003/price1003.pdf> , the detailed information request regarding tendering (issued to suppliers), and the Director's survey of large business customers.

2.10 For these reasons and the reasons set out in Chapter 2 and Annex A of the August consultation document, the Director has decided to maintain the list of markets proposed in the August consultation. His identification of those markets is contained in the Notification under sections 79(4) and 48(1) of the Act, at Annex D.

Chapter 3

Market power: Final decision

Market Power determinations

3.1 As referred to above, under section 79(1) of the Act the Director must carry out an analysis of identified markets before making a market power determination. Further, section 45 of the Act details the various conditions that may be set under the new regulatory regime. Section 46 details upon whom those conditions may be imposed. In relation to SMP services conditions, section 46(7) provides that they may be imposed on a particular person who is a communications provider or a person who makes associated facilities available and who has been determined to have SMP in a “services market” (ie: a specific market for electronic communications networks, electronic communications services or associated facilities). Accordingly, having identified the relevant markets as discussed in Chapter 2, the Director is required to analyse those market in order to assess whether any person or persons have SMP as defined in section 78 of the Act (which implements Article 14 of the Framework Directive).

Approach used to assess Significant Market Power

3.2 Under the new Directives and section 78 of the Act, SMP has been newly defined so that it is equivalent to the competition law concept of dominance. Article 14(2) of the Framework Directive states that: "An undertaking shall be deemed to have significant market power if, either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers."

3.3 Further, Article 14(3) of the Framework Directive states that: “Where an undertaking has significant market power on a specific market, it may also be deemed to have significant market power on a closely related market, where the links between the two markets are such as to allow the market power held in one market to be leveraged into the other market, thereby strengthening the market power of the undertaking”.

3.4 Therefore, in the relevant market, one or more undertakings may be designated as having SMP where that undertaking, or undertakings, enjoys a position of dominance. Also, an undertaking may be designated as having SMP where it could lever its market power from a closely related market into the relevant market, thereby strengthening its market power.

Criteria used in assessing SMP in the markets for fixed retail narrowband services

3.5 The criteria that the Director has used to assess the extent of market power for these services are drawn from the Recommendation, the SMP Guidelines, *Oftel's market review guidelines: criteria for the assessment of significant market power* (http://www.oftel.gov.uk/publications/about_oftel/2002/smpg0802.htm) published in August 2002. The Director is of the view that the most important criteria relevant to the assessment of SMP in the markets set out in Chapter 2 defined above are:

- market shares;
- entry barriers (such as economies of scale and scope and sunk costs);
- excess pricing and profitability;
- barriers to switching;
- countervailing buyer power; and, where relevant,
- evidence from international benchmarking.

The Director's decision

3.6 Taking account of the analysis in Chapter 3 and Annex B of the August consultation document, the Recommendation and the SMP Guidelines, the responses to the August consultation document and the Director's response below, the Director has decided that BT has SMP in the following retail call markets in the UK excluding the Hull area:

- Residential analogue exchange line;
- Residential ISDN2 exchange line services;
- Business analogue exchange line;
- Business ISDN2 exchange line services, and;
- Business ISDN30 exchange line services.
- Residential local calls;
- Residential national calls;
- Residential calls to mobiles;
- Residential Operator assisted calls;
- Residential IDD category A calls;
- Residential IDD Category B calls (on a route-by-route basis);
- Business local calls;
- Business national calls;
- Business calls to mobiles;
- Business operator assisted calls.

3.7 Taking account of the analysis in Chapter 3 and Annex B of the August consultation document, the Recommendation and the SMP Guidelines, the responses to the August consultation document and the Director's response below, the Director has decided that that Kingston has SMP in the following retail call markets in the Hull area:

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services.
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business calls to mobiles originating in the Hull area ;
- Business operator assisted calls originating in the Hull area;
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area.

3.8 Taking account of the analysis in Chapter 3 and Annex B of the August consultation document, the Recommendation and the SMP Guidelines, the responses to the August consultation document and the Director's response below, the Director has decided that no person has SMP in the following retail call markets in the UK excluding the Hull area:

- Business IDD category A calls;
- Business IDD category B calls (on a route-by-route basis).

Responses to the August consultation document

3.9 In its response, the European Commission notes that Oftel does not have sufficiently detailed market share information to calculate both residential and business market shares in each of the relevant IDD calls markets. The Commission understands that Oftel was faced with disproportionate difficulty in obtaining the appropriate information in order to conduct a full SMP analysis of each of the 117 defined IDD calls markets, but considers the other, non-market-share-related assumptions made regarding the finding of SMP to be convincing. The Commission does not consider that any measure concerning these 117 markets would affect trade between Member States in a manner which might create a barrier to the single market within the meaning of Article 7(4) and Recital 38 of the Framework Directive.

3.10 BT expresses disappointment that Oftel is not able to conduct a full SMP analysis of each of the 117 defined IDD calls markets and concern at the SMP finding on residential IDD routes that are competitive at the wholesale level.

3.11 UKCTA agreed with Oftel that Article 14(3) of the Framework Directive was not intended to be used to make a blanket SMP designation in respect of all markets which are dependent in some way on an adjacent market, and that any application of Article 14(3) would have to be selective and carried out on a market by market basis. UKCTA did however argue in its response to the August consultation document that Oftel had a duty to consider the potential for leverage in each of the markets which are adjacent to a market in which a supplier has SMP. UKCTA questioned why this had been done only in respect of narrowband Internet termination. UKCTA also stated once again that it did not consider it acceptable for regulatory obligations in force in respect of BT simply to lapse because the market in which they apply has not been reviewed.

3.12 Kingston argues that Oftel should consider the extent to which there are competitive constraints in the Hull Area. Kingston argues that given the availability of appropriate wholesale inputs national players can easily enter retail markets given their size and established operation enabling them to benefit from economies of scale and scope and access to low costs of finance. As a result Kingston argues that it is unable to behave independently of potential competitors.

The Director's response

3.13 The Director is not persuaded by BT's view. The Director has taken account of the degree of competition at the wholesale level in his analysis. Those routes considered effectively competitive at the wholesale level ('category A routes') have been combined and treated as a single market at the retail level because of opportunities for supply-side substitution created by the availability of cost-based wholesale inputs. Those wholesale routes not effectively competitive at the wholesale level ('category B routes') have been defined as distinct retail markets because supply-side substitution at cost-based prices cannot be relied upon.

3.14 Based on the Director's retail market definition of category A routes being a single market and each category B route being a distinct market the Director considers that BT has SMP in each of these residential markets. For example, BT's volume market share for all residential international calls is currently 45% and has persistently been at this level or higher. With category A routes accounting for at least 90% of traffic BT's share on category A routes is likely to be in excess of 40%. It seems likely that this figure is at least as high on category B routes, for which the underlying wholesale markets are not competitive (in the majority of cases BT has SMP) and this makes it less likely that retail markets on category B routes are competitive. BT's revenue market share has recently increased and is currently at 59%. BT's return on sales in international calls (see Annex B) has increased in the last three financial years for which data is available and this return on sales is now close to BT's return on sales on other calls where its ROCE is significantly in excess of its cost of capital (ie local and national calls).

3.15 BT has expressed concern that the Director's observation regarding its share on the residential category A market – that it is likely to be in excess of 40% – is no more than an estimate. BT's concern is in the Director's view misplaced. Indeed, it is significantly more likely that BT's share is greater than 40%. In any case, notwithstanding existing wholesale regulation, BT's share on the category A market has persistently exceeded this value. Moreover, BT's share of retail revenues on IDD as a whole has remained high and recently increased. Its return on sales in IDD as a whole has also been high and increased in the last three financial years considered by the Director.

3.16 While Oftel understands the concerns expressed by UKCTA, Oftel does not accept that the European Commission intended that all markets downstream from, or otherwise adjacent to, a market in which BT has SMP should be individually defined and then reviewed with a view to determining scope for leverage and the adequacy or otherwise of remedies in the adjacent SMP market. Neither, more broadly, does Oftel accept that the European Commission intended that NRAs should review and notify to the European Commission all markets in which regulation had been imposed under the old regime.

3.17 As was explained in the August consultation document, the Recommendation listed a set of markets in which ex ante regulation may be warranted. NRAs are able to regulate markets which differ from those in the Recommendation where this is justified by national circumstances. NRAs are obliged to take the utmost account of this Recommendation when defining markets appropriate to national circumstances. In Oftel's view, it was not the European Commission's intention that NRAs should identify a further layer of markets adjacent to those included in the Recommendation or that markets should be reviewed simply because services within those markets had previously been subject to regulation. The reference point for identifying and reviewing markets under the new European Directives is the set of markets included in the Commission's Recommendation not the set of services which each NRA had been regulating under the old regime.

3.18 Oftel has acknowledged, in paragraph 3.90 of the August consultation document, that Article 14(3) of the Framework Directive allows NRAs to impose conditions to deal with anti competitive leverage from SMP markets into a closely related market, where conditions imposed in those SMP markets are not a sufficient remedy. Oftel will use Article 14(3) where it is appropriate to do so. Also, as mentioned at paragraph 3.94 of the August consultation document, Oftel will not hesitate to use the Competition Act 1998 to address instances of suspected leverage. Chapter 2 of Oftel's recent statement [Competition Act investigation into alleged anti-competitive practices by BT in relation to its BT Broadband Product - 11 July 2003](#) set out its approach to such investigations.

3.19 On Kingston's points, in a contestable market potential entrants face no barriers to entry. Competition takes the form of the threat of entry from potential entrants. This is sufficient to restrain the pricing behaviour of the incumbent(s) and

ensure the removal of supernormal profits (whatever the number of incumbents or the nature of competition between them). However it is worth emphasising that the tests for a market to be contestable are extremely tough. In particular there must be no sunk costs at all. In the Director's view this clearly is not true for wholesale services in the Hull area. In addition it seems clear that conditions in retail markets would not be consistent with contestable markets since potential entrants would have to incur some sunk costs associated with marketing and building up a customer base.

3.20 Oftel accepts that it is possible that potential entrants could impose some constraints to the pricing behaviour of Kingston. However Oftel considers that there are still substantial barriers to entry to markets in Hull. As a result Kingston is able to behave, to an appreciable extent, independently of competitors and customers.

3.21 Although in absolute terms the scale of investment required to enter retail call markets in Hull may be relatively small, since potential entrants would not need to incur the costs of building out a network, the size of the potential market is also relatively small. As a result potential entry may be deterred. Moreover as noted above other barriers exist as potential entrants would have to incur sunk costs in order to build up a customer base. However since Kingston's retail prices are comparable to (or lower than) those of BT, it is arguable that the threat of entry by other operators and the threat of regulation has constrained Kingston's pricing decisions.

3.22 As a result Oftel has proposed regulation designed to reduce entry barriers. The regulation is considered to be proportionate to reflect the potential for contestability, by ensuring that potential entrants have access to the necessary wholesale inputs in order to compete with Kingston, and to recognise the smaller size of markets in the Hull area.

3.23 For these reasons and the reasons set out in Chapter 3 and Annex B of the August consultation document, the Director has decided to make the market power determinations as proposed in the August consultation document. Those market power determinations are set out in the Notification at Annex D.

Chapter 4

Remedies: final decision

The framework for imposing regulatory remedies

4.1 As explained in Chapter 3, the Director has decided that BT and Kingston have SMP in some of the identified markets for retail fixed narrowband services. In this chapter, the Director sets out his decisions with regard to the SMP services conditions set by way of publication of the notification at Annex D as the regulatory remedies to address BT's and Kingston's SMP in the identified markets.

4.2 Section 91(1) of the Act provides that (i) where the Director has made a determination that a person has SMP in an identified services market, (ii) the relevant market is one for the end-users of public electronic communications services that are available in that market and (iii) it appears to the Director that the test in section 91(2) of the Act is satisfied in the case of the dominant provider, he must set such SMP conditions as he considers appropriate and as are authorised in that section. The test in section 91(2) is that the Director is unable, by the setting of access-related conditions or SMP conditions in wholesale markets, to perform, or fully perform his duties under section 4 of the Act in relation to the market situation in the relevant market. This implements Article 17 of the Universal Service Directive.

4.3 Paragraphs 21 and 114 of the Commission's SMP Guidelines state that NRAs must impose one or more SMP conditions on a dominant provider, and that it would be inconsistent with the objectives of the Framework Directive not to impose any SMP conditions on an undertaking which has SMP. Thus, the Director is under an obligation to impose at least one appropriate SMP condition where SMP is confirmed.

4.4 The Act (sections 45-50 and 87-92) sets out what obligations the Director can impose if he finds that any undertaking has SMP. Sections 87 to 92 implement Articles 9 to 13 of the Access Directive and Articles 17 to 19 of the Universal Service Directive. The obligations relevant to this review as permitted by Article 17 of the Universal Service Directive, implemented by section 91 of the Act, are:

- *price controls;*
- *no undue discrimination;*
- *price publication and notification;*
- *cost accounting and accounting separation.*

4.5 In addition, Recital 27 of the Framework Directive provides that ex-ante regulation should only be imposed where there is not effective competition and

where competition law remedies are not sufficient to address the problem. In order to provide a full analysis, Oftel has, therefore, also considered the option of no *ex ante* regulation, and whether it would be sufficient to rely on competition law alone, while noting the obligation referred to in paragraph 4.3.

4.6 Section 4 of the Act sets out the Community obligations on the Director which flow from Article 8 of the Framework Directive. The Director in considering whether to propose any conditions has considered all of these requirements. In particular, he has considered the requirement to promote competition in relation to the provision of electronic communications networks and electronic communications services and to promote the interests of citizens.

4.7 In particular, as well as being appropriate (see section 91(1) of the Act), each SMP condition must also satisfy the tests set out in section 47 of the Act, namely that each condition must be:

- a. objectively justifiable in relation to the networks, services or facilities to which it relates;
- b. not such as to discriminate unduly against particular persons or a particular description of persons;
- c. proportionate to what the condition is intended to achieve; and
- d. in relation to what it is intended to achieve, transparent.

4.8 It is the Director's view that the decisions contained in this chapter satisfy the relevant requirements specified in the Act and relevant European Directives. This view was explained in detail in chapter 4 of the August consultation document and key elements are set out in the following paragraphs.

The need for ex-ante regulation

4.9 As a competitive market will produce a more efficient outcome than a regulated market, the promotion of competition is central to Oftel's goal of securing the best deal for the consumer in terms of quality, choice and value for money.

4.10 Without the imposition of *ex-ante* regulations to promote actively the development of competition in a non-effectively competitive market, it is unlikely that *ex-post* general competition law powers will be sufficient to ensure that effective competition becomes established. For example, this is because *ex-post* powers prohibit abuse of dominance rather than the holding of a dominant position. *Ex-ante* powers can be utilised to reduce the level of market power in a market and thereby encourage effective competition to become established.

Characteristics of telecoms markets in general

4.11 Generally, the case for *ex-ante* regulation in telecoms markets is based on the existence of market failures which, by themselves or in combination, mean that competition might not be able to become established if the regulator relied solely

on its *ex-post* competition law powers. Therefore, it is appropriate for *ex-ante* regulation to be used to address these market failures and entry barriers that might otherwise prevent effective competition from becoming established. By imposing *ex-ante* regulation that will promote competition, it may be possible to reduce the need for such regulation later, with greater reliance on *ex-post* competition law.

4.12 The European Commission has also stated that *ex-ante* regulation is justified: "[...] where the compliance requirements of an intervention to redress a market failure are extensive (eg the need for detailed accounting for regulatory purposes, assessment of costs, monitoring of terms and conditions[...])." This is the case for many markets where lack of competition leads to a risk of a firm setting excessive prices, where a charge control would be justified, or where there is likely to be a need for intervention to set detailed terms and conditions for access to networks.

Legacy monopoly

4.13 Although competition has developed in some of the markets considered in this Review, this is from a position in which most were controlled by a legacy monopoly operator. The increase in competition that has occurred inevitably reflects the imposition of *ex-ante* regulation to counter the market power of the dominant operator. Despite this, BT and Kingston remain strongly dominant in these markets. Therefore, it may be appropriate to continue to impose *ex-ante* regulations in these markets in order to ensure that effective competition can become established.

Network externality effects

4.14 Externality effects are present in many telecoms markets. In particular, the network externality effect, which means that the value of a network increases more than proportionately with the number of subscribers, gives the large incumbent network a great advantage over potential competitors. As a consequence, this would enable it to exclude rivals from the market.

4.15 General *ex-post* competition law powers may not be sufficient to address the effects of the network externality effect. This is because the network externality effect generally reinforces a dominant position and under general competition law there is no prohibition on holding a position of dominance. Therefore, it may be more appropriate to address the impact of network externality through *ex-ante* regulations, for example by requiring interconnection with the incumbent's network, which would have pro-competitive effects in the retail market.

Entry barriers

4.16 Telecoms networks require significant investment and most of this will be sunk costs, in the sense that the costs will not be recoverable if the entrant

decides to exit the market. Significant sunk costs create an asymmetry in the market between incumbents and potential entrants that the former could exploit to deter entry, if allowed to. Incumbents could exploit this asymmetry by signalling to a potential entrant that if it were to enter the market prices would be too low to cover sunk costs. Entry might therefore be deterred.

4.17 Also, although entry at the retail level by operators without their own networks is likely to require relatively smaller sunk investments, it is also likely to require regulated supply of wholesale inputs if retail competition is to become established where there is market power at the network level. Therefore, in telecoms markets, especially where there is a requirement for larger sunk investments, *ex-ante* regulation should remain in place to address this effect.

Pricing

4.18 A problem arising from a finding of SMP in retail markets is the ability of the SMP provider to maintain prices at a level higher than they would be if competition were effective. In the absence of competitive pressure, a firm with market power will profitably be able to sustain prices above costs in such a way as to earn economic (ie super-normal) profits.

BT Pricing

4.19 In the August consultation document, the Director proposed a condition placing a safeguard control, RPI-RPI on BT.

Responses

4.20 In its response, BT continues to argue that the safeguard control is unnecessary given current and future competition. BT repeated its public commitments to pass on the benefits of the reduction in mobile termination rates as a result of the Competition Commission's inquiry. Mobile operators restate concerns regarding BT's fixed-to mobile retention: namely how to ensure that reductions in mobile termination charges are passed through to fixed retail charges; the size of BT's retention on calls to mobiles and its monitoring; and non-discriminatory treatment of MNOs by BT with regard to its retention.

The Director's response

4.21 The Director continues to believe that a safeguard control is appropriate to promote the interests of citizens before competition becomes effective. Ofcom is committed to proposing a relaxation of the control when BT has implemented a fit-for-purpose WLR product that is being actively taken up by other providers.

4.22 On mobile services, the Director remains of the view that it is appropriate for calls to mobiles to be regulated as part of the price control basket for reasons set out in paragraph 4.27 and in Annex G of the August consultation document. The

Director's policy with regard to BT's pricing behaviour also remains as set out in Annex G of the August consultation document. On non-discriminatory treatment of MNOs, Oftel's assessment of BT's compliance is carried out annually; this year's assessment is expected to be completed by the end of December.

The Director's decision

4.23 Having taken account of the assessment of market power and the responses to the consultation, the Director has decided to set a condition placing a safeguard control of RPI-RPI on BT. The control will last until July 2006. Compliance will be assessed annually with the first assessment taking place post 31 July 2004. Condition D1 sets out the control. D1.1 has been modified slightly from the condition proposed in the August consultation document to include text omitted in error.

4.24 This control is to be applied to the spending patterns of the lowest 80% of residential customers and be based on a basket of residential services in the following markets in the UK excluding the Hull area where Oftel is concluding that BT has SMP:

- Residential analogue exchange line services;
- Residential local calls;
- Residential national calls;
- Residential calls to mobiles;
- Residential operator assisted calls
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis).

4.25 For the reasons set out in paragraphs 4.30 to 4.32 of the August consultation document, the control is based on the spending patterns of the lowest 80 per cent of residential customers and does not apply to business markets or to the residential ISDN2 market.

4.26 A control set at RPI-RPI has the potential to become unduly onerous for BT if inflation turns out to be unexpectedly high. In order to avoid this, the control is to be limited to RPI-4% if inflation is greater than 4% per year.

4.27 Oftel continues to believe that the speed of the development of competition has implications for the proportionality even of a safeguard control. As competition develops there is a risk that a control of RPI-RPI could prevent BT from recovering its costs. The returns from the lowest spending 80 per cent of residential customers, measured on a fully-allocated cost basis, are below the cost of capital. (See Table 2.6: Profitability of BT residential customers by spending deciles in *Protecting consumers by promoting competition* - 31 January 2002. <http://www.oftel.gov.uk/publications/pricing/2002/pcr0102.htm#Chaptertwo>) Profits from other higher spending customers allow BT to recover its costs overall.

If competition develops as expected the profits that BT makes outside the basket on calls will be competed away and the control may eventually not be sustainable for BT.

4.28 The likelihood of this control being too tight is increased with the introduction of Wholesale Line Rental, as BT could lose higher spending customers that currently allow BT to at least cover its cost of capital overall. In view of this concern, and in order to provide BT with an incentive to introduce WLR as quickly and efficiently as possible, the Director proposes to modify the charge control from RPI-RPI to RPI+0 per cent when he is satisfied that a fit-for-purpose WLR product is available and being actively used by competitors. Further details on the operation of the control are set out in Annex B. The SMP charge control condition is set out in Schedule 1 of the Notification in Annex D.

Compliance with Tests in the Act

4.29 The Director considers that the condition meets the tests set out in Section 47 of the Act. It is justifiable, in that it is required to ensure that BT does not exploit its market power by raising prices in markets concerned. It does not unduly discriminate against BT in that although the condition only applies to BT, the condition is imposed in order to address BT's ability to raise prices above the competitive level in light of its SMP in the markets to which the control applies. It is proportionate in that it is the least burdensome means of achieving its aim. The Director considers it has met the requirement of transparency set out in the Act by setting out the requirements on BT and the justification for the condition.

4.30 In setting this condition the Director has considered his duty set out in Section 4 of the Act to act in accordance with the six Community requirements. He considers that by protecting customers against excessive pricing the condition meets the third Community requirement to protect the interest of EU citizens.

4.31 The Director also considers that the proposed condition meets the test set out in Section 91(2) of the Act. The Director does not consider that he can perform his duties in Section 4 of the Act at the present time by setting SMP conditions in the related wholesale call origination market such as conditions on BT to provide CPS and WLR. That is because it will take time for the intended effect of those conditions to come about i.e. to improve competition in the retail market. Therefore it is necessary in the meantime, in order for the Director to be able to perform his section 4 duty to promote the interests of citizens, to impose a charge control on BT's prices in certain retail markets. As explained above, however, the Director proposes to relax the control once the Director is satisfied that a fit-for-purpose WLR product is available and being actively used by competitors.

Kingston Pricing

4.32 In the August consultation document, the Director considered whether the pricing remedies identified above in respect of BT would be appropriate for

Kingston in those markets in which the Director had provisionally concluded that Kingston has SMP. In doing so, the Director considered in particular remedies at the wholesale level and the proportionality of measures at the retail level.

4.33 The Director took account of Kingston's retail prices being comparable to BT's and of consumer survey evidence (published by Of tel in March 2003) suggesting that fixed narrowband residential customer expenditure is around £68 (including VAT) in the Hull area, whereas for the UK as a whole, this figure is higher at £75 (incl. VAT). [Of tel survey www.of tel.gov.uk/publications/research/2003/hullr0303 and Of tel's August 2002 residential survey (published in October 2002).]

4.34 The Director accepted the argument that the perceived threat of entry by other operators, the implicit threat of charge control regulation and other ex ante retail regulation has effectively constrained Kingston's retail pricing behaviour. Moreover the imposition of a control on Kingston's prices would require Kingston and Of tel to put in place extensive monitoring and compliance systems.

Responses

4.35 All respondents on this issue agree with the proposal not to impose a charge control for Kingston.

The Director's decision

4.36 For the reasons set out above and taking account of the responses to the consultation, the Director has decided not to propose a charge control on Kingston. The Director considers that that a retail charge control is not a proportionate response to the characteristics of the retail telecommunications markets in the Hull area and therefore would not satisfy all the tests in Section 47 of the Act.

Undue discrimination

4.37 There is a risk that a provider with SMP may exercise undue discrimination against a particular person or persons. In general, a provider can be said to be discriminating when it applies dissimilar conditions to equivalent transactions. Such discrimination may be in various forms including price offers, terms and conditions or information. Such behaviour would represent undue discrimination if it has no objective justification eg if it has a material adverse effect on competition.

4.38 In the August consultation document, the Director proposed that, as competition was not yet effective in those markets where BT and Kingston have SMP and as measures taken at the wholesale level do not prevent undue discrimination at the retail level, ex-ante conditions should be placed on BT and Kingston to prohibit undue discrimination.

Responses

4.39 In its response BT restates its view that the level of competition means that reliance on ex-post regulation on undue discrimination is adequate. BT also argues that competitive conditions in the supply of services to large businesses justify a relaxation of regulation. Other providers argue that ex ante controls are needed to prevent discrimination and anti-competitive practices and that Oftel should enforce this requirement rigorously.

The Director's response

4.40 The Director continues to believe that a specific condition is appropriate given the level of competition in the markets where BT and Kingston have SMP. The condition will enable the Director to carry out his duties to promote competition and the interests of citizens by prohibiting undue discrimination.

The Director's decision

4.41 In the Director's view, obligation facilitates the development of competition by providing greater certainty regarding dominant supplier behaviour in the provision of retail tariffs. Where techniques such as anti-competitive discounting or bundling can be used to foreclose markets and restrict the development of competition (and indeed increase market power), it is important that the Director is able to intervene to prevent such as abuses. In particular, by publishing guidelines on how this obligation is to be applied in the realm of business tariffs, the Director hopes to provide greater certainty to (a) SMP operators, (b) competitors and (c) customers, than would be the case if competition law alone were relied upon. Therefore, given

- (i) the Director's duty to promote competition;
- (ii) the large number of retail markets not effectively competitive; and
- (iii) the practical advantages of ex-ante regulation (ie greater clarity, certainty and speed of intervention) over competition law when the latter is relatively undeveloped in a particular area (specifically bundling and horizontal leverage of market power),

the Director considers that for the period considered by this review, an ex-ante prohibition on undue discrimination is appropriate.

4.42 Taking account of the findings of SMP and of responses to the consultation, the Director has decided that BT should be required not to discriminate unduly between retail customers in the following markets in the UK, excluding the Hull area:

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;

- Residential local calls;
- Residential national calls
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential calls to mobiles;
- Residential operator assisted calls;
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Business local calls;
- Business national calls;
- Business calls to mobiles;
- Business operator assisted calls.

4.43 For the same reasons, the Director has decided that Kingston should be required not to discriminate unduly between retail customers in the following markets in the Hull area:

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business calls to mobiles originating in the Hull area;
- Business operator assisted calls originating in the Hull area.
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area.

4.44 The conditions on undue discrimination are set out in Schedules 1 and 2 to the Notification in Annex D.

Compliance with Tests in the Act

4.45 Oftel considers that the condition meets the tests set out in Section 47 of the Act. It is justifiable, in that it is required to ensure that BT and Kingston do not exploit their market power by discriminating unduly in the retail markets in which they have SMP. It does not discriminate unduly against BT and Kingston because, although it only applies to them, they have SMP and it is therefore justified to

impose the condition only on them. Where providers have SMP, discrimination can be effectively applied by the provider in question. Without market power, discrimination can be undermined by competitors or customers and attempted discrimination would not be considered undue. It is proportionate in that it does not prevent the application of dissimilar conditions to different transactions where there are objective reasons for doing so. It is therefore the least burdensome means of achieving its aim. Oftel considers it has met the requirement of transparency set out in the Act by setting out the proposed requirements on BT and Kingston and the justification for the condition.

4.46 In setting this condition the Director has considered his duty set out in Section 4 of the Act to act in accordance with the six Community requirements. By preventing undue discrimination, it meets the first requirement to promote competition and the third requirement to protect the interests of EU citizens.

4.47 The Director also considers that the condition meets the test set out in Section 91(2) of the Act. The Director does not consider that he can perform his duties in Section 4 of the Act at the present time by setting SMP conditions in the related wholesale call origination market i.e. conditions on BT and Kingston to provide IA, CPS and WLR. That is because it will take time for the intended effect of those conditions to come about i.e. to improve competition in the retail market. Therefore it is necessary in the meantime, in order for the Director to be able to perform his section 4 duties to promote competition and promote the interests of citizens, to impose regulation which prevents BT and Kingston from discriminating unduly in markets where they have SMP. The Director intends to review the relevant markets regularly to assess whether retail competition has developed as a result of regulation in wholesale markets and whether wholesale level regulation alone might be sufficient at some future date.

Requirement to notify charges terms and conditions

4.48 The Director has wide statutory powers to seek specific information needed to assess allegations of anti-competitive behaviour. Some general and reliable visibility of a dominant operator's prices is needed, however, to enable Oftel and competitors to monitor those prices for possible anti competitive behaviour. Regulation intended to provide this visibility has variously included obligations to publish prices, to notify prices to the Director, to publish or notify amendments, and to publish or notify amendments in advance of their implementation.

4.49 In the August consultation the Director proposed that BT and Kingston should be required, inter alia, to publish on their web-sites full details of all charges, terms and conditions, including bundled tariffs, terms and conditions, and to notify amendments to those charges, terms and conditions, including those for new services, to the Director, within 24 hours of the time that those amendments or new charges, terms and conditions come into force.

Responses

4.50 Although BT welcomes the increased flexibility given by the proposed same-day notification, BT argues there is no need for a specific condition given the general condition on all providers to publish prices, terms and conditions. UKCTA restates its view that 28-day advance notice of such changes is needed to allow them to identify anti-competitive behaviour before it can have a detrimental effect on consumers and competition.

The Director's response

4.51 The Director set out the reasons why a price publication condition is required in paragraphs 4.63 to 4.65 of the August consultation document, including why he considers that 28 days' advance notice is no longer required. Furthermore, the Director does not believe that the general condition provides adequate provision to monitor for anti-competitive behaviour because it does not include a requirement to notify the Director of amendments and charges, terms and conditions for new services within 24 hours.

The Director's decision

4.52 The Director has decided to require BT and Kingston to publish charges, terms and conditions, including bundled services and to publish amendments and new charges, terms and conditions within 24 hours of the time that those amendments or new charges, terms and conditions come into force, including notification to the Director. This option provides certainty that charges, terms and conditions will be published and offers the benefits of notification for monitoring purposes without facilitating price following in accordance with the Director's duties to promote competition and the interests of citizens.

4.53 The requirement would apply to BT in respect of the following markets in the UK excluding the Hull area:

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls;
- Residential calls to mobiles;
- Residential operator assisted calls;
- Residential IDD category A calls;
- Residential IDD category B calls (on a route-by-route basis);
- Business local calls;
- Business national calls;
- Business calls to mobiles;

- Business operator assisted calls.

4.54 The requirement would apply to Kingston in respect of the following markets in the Hull area:

- Residential analogue exchange line services;
- Residential ISDN2 exchange line services;
- Business analogue exchange line services;
- Business ISDN2 exchange line services;
- Business ISDN30 exchange line services;
- Residential local calls;
- Residential national calls originating in the Hull area;
- Residential calls to mobiles originating in the Hull area;
- Residential operator assisted calls;
- Residential IDD category A calls originating in the Hull area;
- Residential IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business local calls;
- Business national calls originating in the Hull area;
- Business IDD category A calls originating in the Hull area;
- Business IDD category B calls (on a route-by-route basis) originating in the Hull area;
- Business calls to mobiles originating in the Hull area ;
- Business operator assisted calls originating in the Hull area.

4.55 As the Director believes BT and Kingston have SMP in these markets, a price publication and notification obligation is needed to provide Oftel and competitors with visibility of possible anti-competitive behaviour.

4.56 The Director has decided to include a power to disapply the condition by consent. This would allow such disapplication where, for example, the Director's view is that publication should not be required in the case of supply to business customers under certain conditions. The Director's proposed policy in relation to publication of prices for large businesses is currently subject to consultation (see *BTPricing of Services for Business Customers* published on 15 October 2003 <http://www.oftel.gov.uk/publications/licensing/2003/price1003.pdf>).

4.57 The condition requires that charges for bundles should be published eg where expenditure on SMP services contribute to qualifying levels of spend for discounts on other services. The rationale for this is in order to monitor/police the situation where discounts in non-SMP markets also reflect expenditure in SMP markets.

Compliance with the Tests in the Act

4.58 The Director considers that the condition meets the tests set out in Section 47 of the Act. The justification for imposing the condition is that general and reliable visibility of a dominant provider's prices enables Oftel and competitors to

monitor the dominant provider's prices for possible anti-competitive behaviour. Imposition of this condition does not discriminate unduly against BT and Kingston as these are the only providers in the market with SMP; the behaviour of other operators is not capable of having a materially adverse effect on competition as these providers do not have market power. The remedy is proportionate, as it is the least burdensome means of achieving the objective by requiring publication but not in advance, and the requirement is made fully transparent in the condition which is published at Annex D to this document.

4.59 In setting this condition the Director has considered his duty in Section 4 of the Act to act in accordance with the six Community requirements. In particular, he has considered the requirement to promote competition: the monitoring of anti-competitive behaviour allows the identification of anti-competitive behaviour.

4.60 The Director also considers that the condition meets the tests set out in Section 91(2) of the Act. The Director does not consider that he can perform his duties in Section 4 of the Act at the present time by setting SMP conditions in the related wholesale call origination market i.e. conditions on BT and Kingston to provide IA, CPS and WLR. That is because it will take time for the intended effect of those conditions to come about i.e. to improve competition in the retail market. Therefore it is necessary in the meantime, in order for the Director to be able to perform his section 4 duties to promote competition and promote the interests of citizens, to impose regulation which requires BT and Kingston to publish charges, terms and condition in markets where they have SMP. The Director intends to review the relevant markets regularly to assess whether retail competition has developed as a result of regulation in wholesale markets and whether wholesale level regulation alone might be sufficient at some future date.

4.61 The Director's notification of the conditions is set out in Annex D.

Cost accounting

4.62 Under section 91(5) of the Communications Act, the Director may impose on dominant providers such regulatory controls as he may direct in relation to the provision by those providers of any public electronic telecommunications service to the end-users of that service. Under section 91(6) of the Act, where a regulatory control on tariffs or other matters to which costs are relevant is imposed, the Director shall also impose cost accounting obligations to the extent that he considers appropriate.

4.63 In the August consultation document (paragraphs 4.75 to 4.92), the Director referred to proposals to set regulatory financial reporting obligations to be placed on the Dominant Providers to ensure that proposed obligations are met. In particular, price control obligations can require the imposition of financial reporting regimes to monitor Dominant Providers' compliance.

4.63 These proposals were set out in the consultation document published on 22 May 2003 *Financial reporting obligations in SMP markets* ("the May consultation document"). This document can be found at http://www.oftel.gov.uk/publications/eu_directives/2003/cost/index.htm. This consultation closed on 31 July 2003 and responses to the consultation are at <http://www.oftel.gov.uk/publications/responses/2003/cost0503/index.htm>.

4.64 The scope of the May consultation document was to address the issues of how the requirements for cost accounting and accounting separation will be implemented. It contained the draft cost accounting and accounting separation conditions. It also proposed the level of granularity required for such obligations to be imposed in a proportionate and appropriate manner. The details of the cost accounting information required for these purposes from BT can be found at Annex M of that document.

Responses to consultation

4.65 Respondents to the August consultation made their substantive comments on the proposals in responses to the May consultation document. In its response to the August consultation, BT did restate its view that it is disproportionate for the Director to require BT to meet cost accounting obligations at a lower level of detail than the market to which a charge control is applied. BT believes that the Director has not demonstrated how the proposed cost accounting obligations will demonstrate compliance with the requirement to amend prices consistent with RPI-X.

The Director's response

4.66 The May consultation document addresses the issue of the level of detail required by the financial reporting obligations and that this subject has been dealt with in that consultation, and will be dealt with in the explanatory statements and formal notification to be published following that consultation. In respect of the charge control requirements, a cost accounting system provides the information necessary to enable the Director to set, monitor and review the control.

The Director's view

4.67 Taking account of the placing of the retail charge control on BT (as set out in paragraphs 4.10 to 4.31 above), the responses to the May and August consultation documents and the Director's response and the analysis set out in paragraphs 4.75 to 4.92 of the August consultation document, the Director's view is that BT shall maintain a cost accounting system that provides the information necessary to enable the Director to set, monitor and review the charge control.

4.68 The cost accounting obligations for BT would apply to the markets identified at paragraphs 4.29 as being subject to the retail charge control. These markets, in the UK excluding the Hull area, are:

- residential analogue exchange line services;
- residential local calls;
- residential national calls
- residential operator assistance calls;
- residential calls to mobiles; and
- residential international calls – market for category A routes and the route-by-route markets for category B routes.

4.69 The Director intends to publish the explanatory statement and formal notifications on regulatory financial reporting at the end of the market review process so that the requirements of the accounting separation condition and the cost accounting condition can reflect the findings of the individual reviews.

Communications Act Tests

4.70 Section 4 of the Act sets out the Community requirements for regulation. The Director has considered all of the criteria in Section 4 of the Act. In particular, the imposition of a cost accounting obligation would specifically be justifiable and proportionate to promote competition in relation to the provision of electronic communications networks and services. This is because the imposition of a cost accounting obligation will ensure that obligations designed to curb potentially damaging market power can be effectively monitored and enforced.

4.71 Section 47 of the Communications Act requires conditions to be objectively justifiable, non-discriminatory, proportionate and transparent. The Director believes that given the importance of charge controls in these markets (as described in paragraphs 4.10 to 4.31) the imposition of a cost accounting obligation is objectively justifiable. That is, in order to ensure that the charge control obligations are met and the benefits are realised, it is essential that the Director is able to monitor the obligations via a cost accounting obligation. Furthermore, the cost accounting obligation does not discriminate between providers of the same class. That is, BT is the only Dominant Provider identified by this market review and the only provider on whom charge control obligations are proposed.

4.72 The proportionality and transparency of the financial reporting obligations is dealt with in more detail in the May consultation document. In this document, the Director has proposed the amount of information required and the processes needed to ensure that the information is fit for purpose, relevant and reliable. The Director will ensure that in imposing a cost accounting obligation it is both proportionate and transparent.

Discontinuing existing regulation

4.73 The new Directives allow Member States to carry forward some existing regulation until the market reviews have been completed and any new conditions

put in place. The power for the Director to do this is contained in paragraphs 9 and 22 of Schedule 18 to the Act. As NRAs were not able to notify draft proposals to the European Commission before 25 July 2003, the Director issued continuation notices to relevant communications providers to maintain some of the regulatory regime that existed before that date. Specified licence conditions were made to continue in force by continuation notices given to BT and Kingston on 23 July 2003 (the 'Continuation Notices'). The Continuation Notices came into effect on 25 July 2003. Further details are contained in the Director's statement "Continuing Licence Conditions after 25th July" of 10th September 2003, available at http://www.oftel.gov.uk/publications/eu_directives/cont_notices/cont0903.pdf.

4.74 Paragraph 9(11) and 22(9) of Schedule 18 to the Act imposes a duty on the Director, as soon as reasonably practicable after giving a continuation notice, to take the necessary steps to enable him to decide whether or not to set an SMP condition for the purpose of replacing the continued obligation. He must also decide whether or not to impose a new SMP condition for that purpose. As the Director has now concluded that the above SMP conditions should apply in the markets covered in this review, present regulatory requirements on BT and Kingston set out in the Continuation Notices in respect of the fixed narrowband retail markets defined in this document will be discontinued. Discontinuation notices for both BT and Kingston are included at Annex E to this document. The effect of the discontinuation notices will be to discontinue the continued conditions, in so far as they apply to the markets identified in this document.

4.75 The Director recently issued a consultation document "Discontinuing licence conditions after 25th July 2003" of 2nd October 2003 (available at http://www.oftel.gov.uk/publications/eu_directives/2003/discont1003.pdf) (the "October consultation document"), which consulted on a model discontinuation notice, the process for discontinuation and the appropriateness of discontinuing a particular obligation in respect of a particular market review. In that consultation document the Director set out at Annex 3 the continued conditions which he considers apply in the markets covered by this document, namely-

1. For BT, Conditions 54, 65, 70 and 71
2. For Kingston, Condition 54

4.76 The Director received no responses relevant to this review to that consultation.

4.77 In so far as Conditions 57 and 58 are concerned, the Director set out at paragraph 11 of the October consultation document his view that those obligations only apply where certain obligations are in place e.g. the obligation to interconnect or to provide specific services. He therefore did not consider it necessary to discontinue Conditions 57 and 58 on a market by market basis since they will cease to apply when other obligations, such as an obligation to provide specific services, are discontinued, which will be on a market by market basis. He proposed that Conditions 57 and 58 are discontinued formally once the whole

market review process has been completed. The Director received no responses to the October consultation document which led him to change that view.

4.78 In relation to Condition 43, the Director set out his proposal in paragraph 13 of the October consultation document that that condition should be discontinued on a market by market basis, and that he will provide an indicative opinion on the services included in Condition 43 which are to be discontinued for the purposes of a particular market review. The Director has therefore discontinued Condition 43 in so far as it applies in the markets covered by this review (see Discontinuation notices at Annex E).

4.79 As set out in the discontinuation notices at Annex E, therefore, the following conditions will cease to apply in so far as they relate to the markets covered in this review-

1. For BT, Conditions 43, 54, 65, 70 and 71
2. For Kingston, Conditions 43 and 54.

4.80 Accounting separation conditions i.e. Conditions 50 and 78 for BT, and Condition 50 for Kingston, will be discontinued separately at a later date.

Annex A

Representations received

Table A.1 Representations on 26 August 2003 Notification & Explanatory Statement

Consultation respondent
European Commission
PTS (Swedish regulator)
BT
Kingston
Orange
UKCTA
A confidential response

Publication of representations

A.1 On this occasion, the Director did not invite interested parties to comment on the representations made by others. However, in the interests of transparency, all representations have been published, except where respondents indicated that a response, or part of it, is confidential. You can view representations at http://www.oftel.gov.uk/publications/responses/2003/fix_narrow_retail0803/index.htm.

A.2 Most responses to the March consultation document supported Of tel's analysis. For full details of those responses, see http://www.oftel.gov.uk/publications/responses/2003/eu_mob_access/index.htm

Annex B

IDD: List of category A and category B routes

Competitive routes (Category A)	Non-competitive routes (Category B)
Andorra	Afghanistan
Antigua and Barbuda	Albania
Argentina	Algeria
Australia	American Samoa
Austria	Angola
Azerbaijan	Anguilla
Bahamas	Antarctica Australian Territory
Bahrain	Armenia
Bangladesh	Aruba
Barbados	Ascension Island
Belarus	Benin
Belgium	Bhutan
Belize	Bosnia and Herzegovina
Bermuda	Burkina Faso
Bolivia	Burundi
Botswana	Cambodia
Brazil	Cameroon
Brunei Darussalam	Cape Verde
Bulgaria	Central African Republic
Canada	Chad
Cayman Islands	Comoros
Chile	Congo
China	Congo, DR
Colombia	Cook Islands
Costa Rica	Côte d'Ivoire
Croatia	Cuba
Cyprus	Diego Garcia
Czech Republic	Djibouti
Denmark	East Timor
Dominica	Emsat
Dominican Republic	Equatorial Guinea
Ecuador	Eritrea
Egypt	Ethiopia
El Salvador	Faroe Islands
Estonia	Fiji
Falkland Islands	French Polynesia
Finland	Gabon

France	Georgia
Gambia	Greenland
Germany	Guam
Ghana	Guinea
Greece	Guinea Bissau
Grenada	Haiti
Guatemala	Honduras
Guyana	Inmarsat
Hong Kong	Iraq
Hungary	Iridium
Iceland	Kiribati
India	Korea, PDR
Indonesia	Kirgizstan
Iran	Lebanon
Ireland	Lesotho
Israel	Liberia
Italy	Libya
Jamaica	Liechtenstein
Japan	Lithuania
Jordan	Macedonia
Kazakhstan	Madagascar
Kenya	Malawi
Korea (South)	Mali
Kuwait	Marshall Islands
Laos	Mauritania
Latvia	Mauritius
Luxembourg	Mayotte
Macau	Micronesia
Malaysia	Midway Islands
Maldives	Moldova
Malta	Montserrat
Mexico	Mozambique
Monaco	Myanmar
Mongolia	Namibia
Morocco	Nauru
Nepal	New Caledonia
Netherlands	Niger
Netherlands Antilles	Niue
New Zealand	Norfolk Island
Nicaragua	Northern Marianas
Nigeria	Palau
Norway	Papua New Guinea
Oman	Puerto Rico
Pakistan	Rodriguez Islands
Panama	Romania
Paraguay	Rwanda

Peru	Saint Kitts & Nevis
Philippines	Saint Pierre & Miquelon
Poland	Samoa
Portugal	San Marino
Qatar	Sao Tome and Principe
Russian Federation	Senegal
Saint Helena	Seychelles
Saint Lucia	Sierra Leone
Saint Vincent & the Grenadines	Solomon Islands
Saudi Arabia	Somalia
Singapore	Sudan
Slovak Republic	Suriname
Slovenia	Swaziland
South Africa	Tajikistan
Spain	Thuraya
Sri Lanka	Togo
Sweden	Tokelau
Switzerland	Tonga
Syria	Trinidad & Tobago
Taiwan	Tristan Da Cunha
Tanzania	Turkmenistan
Thailand	Turks & Caicos
Tunisia	Tuvalu
Turkey	Uganda
Ukraine	Uzbekistan
United Arab Emirates	Vanuatu
Uruguay	Virgin Islands (US)
USA	Wake Island
Venezuela	Wallis & Futuna
Vietnam	
Virgin Islands (UK)	
Yemen	
Yugoslavia	
Zambia	
Zimbabwe	

Annex C

Charge Control Monitoring and Other Issues

C1 This annex covers a number of general issues relating to the operation of the retail charge control.

Scope

C2 The charges for the following residential services will be included in the control:

- analogue exchange line services;
- local calls;
- national calls;
- IDD category A calls;
- IDD category B calls (on a route-by-route basis);
- retention for calls to mobiles; and
- operator assisted calls.

C3 With respect to charges for an analogue residential exchange line, only residential rental, connection and takeover will be covered by the control. Services additional to these will not be included in the control. Such services include: low loss lines; alternatively routed lines; out-of-area-lines, internal shifts, external shifts, split line service and restoration of service.

Reference prices and discounts

C4 BT should ensure that its net revenues in any relevant year (i.e. including discounts) from all residential customers in the bottom eight deciles by spend are equal to or less than the net revenues received from those customers in the previous year, calculated for constant volumes and services in the basket. This is a transparent process that measures actual prices paid by residential consumers and hence meets the tests in section 47 of the Act, as set out in chapter 4. A price change late in the year will apply only for a relatively small proportion of the year. BT's scope to influence compliance with the cap by introducing large price reductions late in the year is thus limited.

C5 Any increases in the value of BT's current standard Inclusive Call Allowance (ICA) will not count towards meeting the requirements of the new charge control. This is because the charge control is intended to allow the line rental to increase in response to competition forcing the generality of call prices down. If the standard ICA counted to meeting the cap BT would have an incentive to anticipate competitive pressure by raising the line rental, offsetting it by an increase in the ICA. This could then be a 'cheap' way of satisfying the control

compared to reductions in per minute call prices, which benefit higher spenders proportionately more. The Director will consider any decrease in the value of the standard ICA as a price rise and this will count towards the cap calculation. The Director will continue to allow 'opt-in' schemes, which allow consumers to purchase a certain volume of 'free' minutes for a fee additional to their standard line rental, to count towards the cap calculation.

Prior year weighting

C6 To ensure that the compliance calculation is not affected by volume or compositional changes the Director will continue to use a prior year weighting process. This adjusts the revenues in any given year to the level they would be had the volume of each service (e.g. individual call type) remained unchanged from the previous year. This is important as expenditure levels can increase from year to year because of factors other than price increases, such as growth in new services.

In-year monitoring

C7 While compliance cannot be formally checked until the end of a Relevant Year, Oftel will undertake a programme of ongoing monitoring of BT's prices to minimise the chance of BT failing to meet the control.

Duration

C8 The new control is intend to last until 31 July 2006, and will initially be set so that BT is not permitted to raise its prices in absolute terms i.e. by more than RPI-RPI. However, Oftel proposes to relax the cap when it is satisfied that BT has introduced a wholesale line rental product which successfully stimulates competition. From such time that Oftel is satisfied that such a product is available then the cap shall be RPI itself i.e. BT will not be permitted to make any 'real' increases in prices of the basket of services.

Provision for carry-over

C9 If BT fails to reduce its prices by a sufficient amount then it must make additional equivalent reductions in the following year. Similarly if BT reduces its prices by more than is required in a particular charge control year then it is allowed to count the excess price reductions towards its obligations in the following year.

The appropriate index for charge control

C10 The control will continue to be based on the all-items RPI. This has the advantages of public familiarity and certainty.

Annex D

NOTIFICATION PURSUANT TO SECTION 48(1) AND SECTION 79 OF THE COMMUNICATIONS ACT 2003

The identification of markets, the making of market power determinations in relation to those markets and the setting of SMP services conditions under section 45 of the Communications Act 2003

WHEREAS

- (A) The Director General of Telecommunications (“the Director”) issued a notification pursuant to section 48(2) and section 80 of the Communications Act 2003 (“the Act”) setting out his proposals for the identification of markets, the making of market power determinations and the setting of SMP services conditions on 26 August 2003 (“the First Notification”);
- (B) A copy of the First Notification was sent to the Secretary of State in accordance with section 50(1)(a) of the Act, and to the European Commission and to the regulatory authorities of every other member State in accordance with sections 50(3) and 81 of the Act;
- (C) By virtue of the Communications Act 2003 (Commencement Order No. 1) Order 2003 (‘the Commencement Order’) made under sections 411 and 408 of the Act:
 - (i) certain provisions of the Act were commenced on 25 July 2003 for the purpose only of enabling the networks and services functions under those provisions to be carried out by the Director; and
 - (ii) those provisions of the Act are to have effect as if references to OFCOM were references to the Director;
- (D) In the First Notification and the accompanying explanatory statement, the Director invited representations about any of the proposals set out therein by 26 September 2003;
- (E) By virtue of section 80(6) of the Act, the Director may give effect to any proposals to identify a market for the purposes of making a market power determination or any proposals for making a market power determination set out in the First Notification, with or without modification, where:

- (i) he has considered every representation about the proposals made to him within the period specified in the First Notification; and
 - (ii) he has had regard to every international obligation of the United Kingdom (if any) which has been notified to him for this purpose by the Secretary of State; but
 - (iii) the Director's power to give effect to such proposals is subject to sections 82 and 83 of the Act;
- (F) By virtue of section 48(5) of the Act, the Director may give effect to any proposals to set SMP services conditions set out in the First Notification, with or without modification, where:
- (i) he has considered every representation about the proposals made to him within the period specified in the First Notification; and
 - (ii) he has had regard to every international obligation of the United Kingdom (if any) which has been notified to him for this purpose by the Secretary of State;
- (G) The Director received responses to the First Notification and has considered every such representation made to him in respect of the proposals set out in the First Notification and the accompanying consultation document; and the Secretary of State has not notified the Director of any international obligation of the United Kingdom for this purpose;
- (H) The European Commission has not made a notification for the purposes of Article 7(4) of the Framework Directive as referred to in section 82 of the Act and the proposals do not relate to a transnational market as referred to in section 83 of the Act;

THEREFORE

1. The Director in accordance with section 79 of the Act identifies the following markets for the purposes of making a market power determination:
 - (a) in the United Kingdom excluding the Hull area-
 - (i) Residential analogue exchange line services;
 - (ii) Residential ISDN2 exchange line services;
 - (iii) Business analogue exchange line services;
 - (iv) Business ISDN2 exchange line services;
 - (v) Business ISDN30 exchange line services;
 - (vi) Residential local calls;
 - (vii) Residential national calls;
 - (viii) Residential calls to mobiles;
 - (ix) Residential operator assisted calls;
 - (x) Residential IDD category A calls;

- (xi) Residential IDD Category B calls (on a route by route basis);
- (xii) Business local calls;
- (xiii) Business national calls;
- (xiv) Business calls to mobiles;
- (xv) Business operator assisted calls;
- (xvi) Business IDD category A calls ;
- (xvii) Business IDD category B calls (on a route by route basis);

(b) in the Hull area-

- (i) Residential analogue exchange line services;
- (ii) Residential ISDN2 exchange line services;
- (iii) Business analogue exchange line services;
- (iv) Business ISDN2 exchange line services;
- (v) Business ISDN30 exchange line services;
- (vi) Residential local calls;
- (vii) Residential national calls originating in the Hull area;
- (viii) Residential calls to mobiles originating in the Hull area;
- (ix) Residential operator assisted calls originating in the Hull area;
- (x) Residential IDD category A calls originating in the Hull area;
- (xi) Residential IDD Category B calls (on a route by route basis) originating in the Hull area;
- (xii) Business local calls;
- (xiii) Business national calls originating in the Hull area;
- (xiv) Business calls to mobiles originating in the Hull area;
- (xv) Business operator assisted calls originating in the Hull area;
- (xvi) Business IDD category A calls originating in the Hull area;
- (xvii) Business IDD category B calls (on a route by route basis) originating in the Hull area.

(c) In this paragraph 'the Hull area' means the area defined as 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc.

2. The Director in accordance with section 79 of the Act makes the following market power determinations:

- (a) in relation to the markets set out in paragraph 1(a) sub-paragraphs (i) to (xv) above, BT;
- (b) in relation to the markets set out in paragraph 1(b) above, Kingston.
- (c) in relation to the markets set out in paragraph 1(a) sub-paragraphs (xvi) – (xvii) above, no undertaking, either individually or jointly with others, has significant market power.

3. The Director in accordance with section 48(1) and section 79 of the Act hereby sets pursuant to section 45 the SMP services conditions on the persons referred to in paragraphs 2 (a) and (b) above as set out in Schedules 1 and 2 respectively to this Notification to take effect, unless otherwise is stated in those Schedules, on the date of publication of this Notification.
4. The effect of, and the Director's reasons for the decisions referred to in paragraphs 1 to 3 are contained in the Explanatory Statement accompanying this Notification.
5. In making the decisions referred to in paragraphs 1 and 2, the Director has taken due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of a Community instrument, and relate to market identification and analysis, as required by section 79 of the Act.
6. In making the decisions referred to in paragraphs 1 to 3, the Director has considered and acted in accordance with the six Community requirements set out in section 4 of the Act.
7. The Director considers that the SMP services conditions referred to in paragraph 3 comply with the requirements of sections 45 to 50 and section 91 of the Act.
8. The Director has sent a copy of this Notification to the Secretary of State in accordance with sections 50 (1) (a) and 81 (1) of the Act and to the European Commission in accordance with sections 50 (2) and 81(2) of the Act
9. Save for the purposes of paragraph 1 of this Notification and except as otherwise defined in this Notification, words or expressions used shall have the same meaning as in the Act.
10. In this Notification-
 - a) "**BT**" means British Telecommunications plc (registered company number 1800000) including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;
 - b) "**Kingston**" means Kingston Communications (Hull) plc (registered company number 2150618) including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989; and
 - c) "**United Kingdom**" has the meaning given to it in the Interpretation Act 1978.

DAVID ALBERT EDMONDS
DIRECTOR GENERAL OF TELECOMMUNICATIONS

28 November 2003

Schedule 1

The conditions imposed on BT under Sections 45 and 91 of the Communications Act 2003 as a result of the analysis of the markets set out in paragraph 1(a) of this Notification in which BT has been found to have significant market power

Part 1: Definitions and Interpretation

1. Condition D1 shall apply to the markets set out in paragraph 1(a) sub-paragraphs (i) and (vi) to (xi) of this Notification. Conditions D2 and D3 shall apply to the markets set out in paragraph 1(a) sub-paragraphs (i) to (xv) of this Notification.

2. For the purpose of interpreting the conditions imposed on the Dominant Provider following a review of the markets referred to in paragraph 1 (a) of this Notification the following definitions shall apply-

"Act" means the Communications Act 2003;

"Director" means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;

"Dominant Provider" means British Telecommunications plc (registered company number 1800000) including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act.

4. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.

5. Headings and titles shall be disregarded.

Part 2: The conditions

Condition D1 – Control of Charges

In this Condition-

"Analogue Exchange Line Services" means services to provide an analogue Exchange Line;

"Approved Apparatus" means, in relation to any network, Apparatus which meets the appropriate essential requirements of regulation 4 of the Radio Equipment and Telecommunications Terminal Equipment Regulations 2000;

"Calls to Mobiles" mean circuit switched conveyances of Signals originating in the Dominant Provider's Electronic Communications Network, and intended to terminate on a handset connected to the mobile Public Electronic Communications Network of any Specified Mobile Operator;

"Condition 70" means the condition numbered 70 continued by way of continued provisions as set out in the Continuation Notice given by the Director to the Dominant Provider on 23 July 2003 and ending on such a day with respect to which a notice has been given under paragraph 9(9) of Schedule 18 to the Act;

"Condition AA10" means the SMP condition with that number set under section 45 of the Act by way of publication of a Notification under sections 48(1) and section 79 of the Act on 28 November 2003.

"Controlling Percentage" has the meaning given to it in Condition D1.6;

"Customer" means the persons to whom the services in the markets to which this Condition applies are provided by the Dominant Provider;

"Exchange Line" means Apparatus comprised in the Dominant Provider's Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;

"Fault Repair Service" means a service consisting in the repair, maintenance adjustment or replacement of any of the Dominant Provider's Electronic Communications Network, or such repair or replacement of any Apparatus for which the Dominant Provider has undertaken the responsibility for repair and maintenance, as is necessary to restore and maintain a sufficient service;

"General Charges" means charges for services supplied in the markets to which this Condition applies (save in relation to the market for Calls to Mobiles to which this Condition applies where it means only Retentions), other than charges for special, emergency or priority Fault Repair Services;

"Hull Area" means the area defined as 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of

the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

"Network Termination and Testing Apparatus" means an item of Apparatus comprised in an Electronic Communications Network installed in a fixed position on Served Premises which enables-

- (a) Approved Apparatus to be readily connected to, and disconnected from, the network;
- (b) the conveyance of Signals between such Approved Apparatus and the network; and
- (c) the due functioning of the network to be tested,

but the only other functions of which, if any, are:

- (i) to supply energy between such Approved Apparatus and the network;
- (ii) to protect the safety or security of the operation of the network; or
- (iii) to enable other operations exclusively related to the running of the network to be performed or the due functioning of any system to which the network is or is to be connected to be tested (separately or together with the network;"

"Network Termination Point" means the physical point at which a Subscriber is provided with access to a Public Electronic Communications Network and, where it concerns Electronic Communications Networks involving switching or routing, that physical point is identified by means of a specific

network address, which may be linked to the Telephone Number or name of Subscriber. A Network Termination Point provided at a fixed position on Served Premises shall be within an item of Network Termination and Testing Apparatus;

"Percentage Change" has the meaning given to it in Condition D1.2;

"Relevant Financial Year" means in relation to a Relevant Year the financial year of the Dominant Provider ending last before the beginning of the Relevant Year, being a financial year in respect of which annual accounts have been prepared and audited in accordance with the requirements of the Companies Act 1985;

"Relevant Year" means: any of the three periods of 12 months beginning on 1st August starting with 1st August 2003 and ending on 31st July 2006;

"Retail Prices Index" means the index of retail prices compiled by an agency or a public body on behalf of Her Majesty's Government or a governmental department from time to time in respect of all items (which is the Office for National Statistics at the time of publication of this Notification);

"Retention" means the retail charge made by the Dominant Provider at its standard charges net of discounts for Calls to Mobiles less the payment made by the Dominant Provider to each Specified Mobile Operator for Interconnection of the Calls to Mobiles;

"Served Premises" means a single set of premises in single occupation where Apparatus has been installed for the purpose of the provision of Electronic Communications Services by means of an Electronic Communications Network at those premises;

"Specified Mobile Operator" means-

- (a) O2 Limited, whose registered company number is 2604354;
- (b) Vodafone Limited, whose registered company number is 1471587;
- (c) Orange plc, whose registered company number is 3110666;
- (d) T-Mobile Limited, whose registered company number is 4347402;
- (e) Hutchison 3G UK Limited, whose registered company number is 3885486;

and any subsidiary or holding company of the companies listed in (a) – (e) above, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989, or any successor company operating the same or substantially the same mobile public electronic communications network as the companies listed in (a) to (e) above;

"Subscriber" means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such Services; and

"Value of Inclusive Calls" means the monetary value of the charges for calls made from a place within the United Kingdom excluding the Hull Area to any other place (whether or not within the United Kingdom excluding the Hull Area) which are included in the charges for Analogue Exchange Line Services provided to Customers in the United Kingdom excluding the Hull Area.

D1.1 The Dominant Provider shall take all reasonable steps to secure that, during any Relevant Year, the amount of General Charges remains such that the Percentage Change in the aggregate of all General Charges (determined by employing the formula set out in paragraph D1.2 and, as the case may be,

calculated as set out in paragraphs D1.4 and D1.10) is not more than the Controlling Percentage.

D1.2 The formula referred to in paragraph D1.1 is-

$$C = \left[\frac{\sum_{i=1}^m \sum_{j=1}^n \frac{N_{tij} V_{(t-1)ij}}{V_{tij}} - \sum_{i=1}^m \sum_{j=1}^n N_{(t-1)ij}}{\sum_{i=1}^m \sum_{j=1}^n N_{(t-1)ij}} \right] \times 100$$

where:

C is the Percentage Change in the aggregate of all General Charges;

$N_{(t-1)ij}$ is the actual net revenue from service j within package i in the year immediately preceding the Relevant Year where service j is a specific service for which a General Charge is charged and package i is a group of services which, if offered separately, would each be a specific service for which a General Charge is charged;

$V_{(t-1)ij}$ is the actual volume of service j within package i in the year immediately preceding the Relevant Year where service j is a specific service for which a General Charge is charged and package i is a group of services which, if offered separately, would each be a specific service for which a General Charge is charged;

N_{tij} is the actual net revenue from service j within package i in the Relevant Year where service j is a specific service for which a General Charge is charged and package i is a group of services which, if offered separately, would each be a specific service for which a General Charge is charged;

V_{tij} is the actual volume of service j within package i in the Relevant Year where service j is a specific service for which a General Charge is charged and package i is a group of services which, if offered separately, would each be a specific service for which a General Charge is charged;

m is the number of packages available during the Relevant Year or a sufficient number of packages to reflect no less than ninety-five per cent of revenues accrued by the Dominant Provider in the Relevant Year; and
 n is the number of General Charges or a sufficient number of services to reflect no less than ninety-five per cent of revenues accrued by the Dominant Provider in the Relevant Year.

D1.3 In applying the formula set out in paragraph D1.2, references in that formula to revenues from, and volumes of, package i and service j shall mean those revenues and volumes accrued from all Customers whose bills issued by the Dominant Provider to them are equal to or less than the highest bill of Customers in the eighth decile (ranked on the basis of the amount billed by the Dominant Provider to all Customers for the services for which General Charges are charged, the highest bill being at the top of the tenth decile) in the Relevant Financial Year.

D1.4 Where the Value of Inclusive Calls-

(a) is increased during any Relevant Year beyond £5.49 per quarter (excluding VAT), such increase shall not be taken into account in the calculation of the Percentage Change in the aggregate of General Charges (calculated in accordance with paragraph D1.2) for the Relevant Year in question or any following Relevant Year; and

(b) is decreased during any Relevant Year, such decrease shall be deemed as a corresponding increase in the charges for the services in the market for Analogue Exchange Line Services provided to Residential Customers in the United Kingdom excluding the Hull Area and shall be taken into account as such in the calculation of the Percentage Change in the aggregate of

General Charges (calculated in accordance with paragraph D1.2) for the Relevant Year in question.

D1.5 Where, notwithstanding the obligation imposed on the Dominant Provider by paragraph D1.1 (or paragraph 1 of Condition 70), and without prejudice to the generality of that obligation, there has taken place a change in General Charges (or General Charges as defined in Condition 70 for the purposes of that Condition) of a kind not permitted under paragraph D1.1 (or paragraph 1 of Condition 70), the Dominant Provider shall make such adjustments in General Charges (or leave them unchanged) in the following year (whether or not that year is a Relevant Year as defined in Part 1 of this Schedule 1) as may be reasonably required to satisfy the Director that the matter has been remedied. Such adjustments shall not be relevant for the purposes of establishing compliance with paragraph D1.1 in a following Relevant Year.

D1.6 Subject to paragraph D1.7, the Controlling Percentage in relation to any Relevant Year is the amount of the change in the Retail Prices Index ('RPI') in the period of 12 months ending on 30 June immediately before the beginning of that Year, expressed as a percentage (rounded by two decimal places) of that Index as at the beginning of that period, reduced by RPI subject to the following provisions-

- (a) where the Director notifies the Dominant Provider in writing that he is satisfied in relation to the introduction and provision of services specified in paragraph AA10.1 of Condition AA10 during any Relevant Year, he may direct that the Controlling Percentage in the Relevant Year in question shall be calculated according to the following formula-

$$\frac{b(RPI)}{a + b}$$

where *a* is the number of days in the Relevant Year prior to the satisfactory introduction and provision of such services and *b* is

the number of days in the Relevant Year after the satisfactory introduction and provision inclusive and that the Controlling Percentage in any following Relevant Year shall be RPI; and

(b) where on 30 June, in any Relevant Year, RPI is 4 per cent or more, the Director may direct that the Controlling Percentage for the following Relevant Year shall be RPI reduced by 4.

D1.7 If-

- (a) the Percentage Change in any Relevant Year (as defined in Part 1 of this Schedule 1) is less than the Controlling Percentage; or
- (b) the Percentage Change (as defined in Condition 70 for the purpose of that Condition) in the Relevant Year beginning on 1 August 2002 and ending on 31st July 2003 (as defined in Condition 70 for the purposes of that Condition) is less than the Controlling Percentage (as defined in that Condition 70 for the purpose of that Condition),

then the Controlling Percentage for the following Relevant Year shall be determined in accordance with paragraph D1.6 but increased by the amount of such deficiency, and in the case mentioned in sub-paragraph (b) the following Relevant Year shall be the year commencing on 1st August 2003 and ending on 31st July 2004.

D1.8 Where the Dominant Provider makes a material change (other than to the amount of a General Charge) to any service for which a General Charge is charged or to the date on which its financial year ends, this Condition shall have effect subject to such reasonable adjustment to take account of the change as the Director, after consultation with the Dominant Provider, shall direct to be appropriate in the circumstances; and for the purposes of this paragraph a material change to any service includes the introduction of a new service wholly or substantially in substitution for that existing service.

D1.9 If the Dominant Provider imposes a specific charge or an increased charge in relation to any service which up to the time when the charge or increased charge is first imposed had been provided without charge or at a lower charge and the Director directs that some or all the costs properly attributable to that service had previously been attributed to services to which General Charges apply and that it would be proper in the circumstances for the newly introduced or increased charge to be controlled, that charge shall, unless the Director directs otherwise, be a General Charge and this Condition shall have effect subject to the following provisions:

(a) the Dominant Provider shall produce a forecast of the revenue expected to accrue as a result of the charge or increased charge for the service over a period of twelve months from the date of introduction or increase of the charge; and

(b) the Percentage Change in the aggregate of General Charges shall be re-calculated to take account solely of the imposed charge or increase in the manner which the Director directs to be appropriate in the circumstances.

D1.10 The Dominant Provider shall ensure that in any Relevant Year its Retention for Calls to Mobiles to a Specified Mobile Operator averaged across all the charging periods in each twenty-four hour period is within five per cent of its Retention for Calls to Mobiles to any other Specified Mobile Operator averaged across all the charging periods.

D1.11 The Dominant Provider shall, within 3 months after the end of each Relevant Year, supply to the Director, in writing, the data necessary to perform the calculation of the Percentage Change in that Relevant Year.

D1.12 The Dominant Provider shall comply with any direction the Director may make from time to time under this Condition.

D1.13 This Condition shall not apply to such extent as the Director may direct.

Condition D2 – Requirement not to unduly discriminate

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

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

Condition D3 – Requirement to publish charges

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

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

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

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

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

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

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

Schedule 2

The conditions imposed on Kingston under Sections 45 and 91 of the Communications Act 2003 as a result of the analysis of the markets set out in paragraph 1(b) of this Notification in which Kingston has been found to have significant market power

Part 1: Definitions and Interpretation

1. Conditions DA1 and DA2 shall apply to the markets set out in paragraph 1(b) of this Notification.

2. For the purpose of interpreting the conditions imposed on the Dominant Provider following a review of the markets referred to in paragraph 1(b) of this Notification the following definitions shall apply -

‘Act’ means the Communications Act 2003;

‘Director’ means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984; and

‘Dominant Provider’ means Kingston Communications (Hull) plc (registered company number 2150618 including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 736 of the Companies Act 1985, as amended by the Companies Act 1989;

3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act.

4. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.

5. Headings and titles shall be disregarded.

Condition DA1 – Requirement not to unduly discriminate

DA1.1 The Dominant Provider shall not unduly discriminate against particular persons or a particular description of persons in relation to services offered.

DA1.2 Nothing done in any manner by the Dominant Provider shall be regarded as undue discrimination under this Condition if and to the extent that the Dominant Provider is required or expressly permitted to do such thing in that manner by or under any condition set under section 45 of the Act which applies to the Dominant Provider.

Condition DA2 – Requirement to publish charges

DA2.1 Except in so far as the Director may otherwise consent in writing, the Dominant Provider shall publish charges, terms and conditions and act in the manner set out below.

DA2.2 The Dominant Provider shall publish charges, terms and conditions, including bundled charges, terms and conditions (whether or not those bundles include charges, terms and conditions for services supplied in markets to which this Condition does not apply).

DA2.3 The Dominant Provider shall publish any amendments to the charges, terms and conditions published under paragraph DA2.2, including charges, terms and conditions for any new services, within 24 hours of the time that the amendment comes into effect.

DA2.4 Publication referred to in paragraphs DA2.2 and DA2.3 shall be effected by placing a copy of the information on any relevant website operated or controlled by the Dominant Provider.

DA2.5 The Dominant Provider shall send to the Director a written notice of any amendment to the charges, terms and conditions published under paragraph DA2.2 (including charges, terms and conditions for any new services) within 24 hours of the time that the amendment comes into effect and shall send a copy of the notice to any person who may reasonably request such a copy.

DA2.6 Where it would be impractical for the Dominant Provider to publish under paragraphs DA2.2, DA2.3 or DA2.5 any charge or amended charge, the Dominant Provider shall instead publish the method to be adopted for determining that charge or amended charge.

DA2.7 The Dominant Provider shall provide services at the charges, terms and conditions published under this Condition, and shall not depart therefrom either directly or indirectly.

Annex E

NOTICE TO BRITISH TELECOMMUNICATIONS PLC UNDER PARAGRAPH 9 OF SCHEDULE 18 TO THE COMMUNICATIONS ACT 2003

Notice that certain continued provisions set out in the continuation notices given to British Telecommunications plc on 23 July 2003 will cease to have effect from the date this notice is deemed to be effected in accordance with section 7 of the Interpretation Act 1978 and section 394(7) of the Communications Act 2003

1. The Director General of Telecommunications ('the Director'), in accordance with Paragraph 9(9) of Schedule 18 to the Communications Act 2003 ('the Act') hereby gives notice to British Telecommunications plc ('BT') that certain continued provisions contained in Schedule 1 to the continuation notice given to BT on 23 July 2003, which had effect from 25 July 2003, ('the Continuation Notice'), will cease to have effect from the date this notice is deemed to be effected in accordance with section 7 of the Interpretation Act 1978 and section 394(7) of the Communications Act 2003,, to the extent set out in Schedule 1 to this notice ('the Discontinued Provisions').
2. In giving this notice, the Director has, in accordance with Paragraph 9 (11) of Schedule 18 to the Act, taken all steps necessary for enabling him to decide whether or not to set a condition under Chapter 1 of Part 2 of the Act for the purpose of replacing the continued provisions and whether or not to exercise his power to set a condition under that Chapter for that purpose.
3. All directions, determinations, consents and other provisions which were continued under the Continuation Notice by virtue of Paragraph 9(8) of Schedule 18 to the Act will also cease to have effect from the date this notice is deemed to be effected in accordance with section 7 of the Interpretation Act 1978 and 394(7) of the Communications Act 2003, to the extent that they were given or made for the purposes of the Discontinued Provisions.
4. To the extent that the Continuation Notice does not cease to have effect under Paragraph 1 of this notice, the Continuation Notice shall continue to have effect until the Director has given a further notice to BT in accordance with Paragraph 9(9) of Schedule 18 to the Act that it shall cease to have effect.
5. The Director issued a consultation as to his proposals to discontinue the Discontinued Provisions on 2 October 2003 and requested comments by 9.00 a.m. on 16 October 2003. The Director has taken into account the comments he received during that consultation.

6. In this notice, except as otherwise provided or unless the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act. For the purposes of interpreting this notice, headings and titles shall be disregarded.

DAVID ALBERT EDMONDS
DIRECTOR GENERAL OF TELECOMMUNICATIONS

28 November 2003

Schedule 1

The following continued provisions which were contained in Schedule 1 to the Continuation Notice will cease to have effect from the date this notice is deemed to be effected in accordance with section 7 of the Interpretation Act 1978 and section 394(7) of the Communications Act 2003, to the extent set out below.

Conditions 43, 54, 65, 70 and 71 in so far as those conditions relate to the markets which have been reviewed in the review of Fixed Narrowband Retail Services Markets ('the Market Review') and will be replaced by SMP Conditions imposed on BT by way of the Notification set out in Annex D of the Market Review published by the Director on 28 November 2003.

NOTICE TO KINGSTON COMMUNICATIONS (HULL) PLC UNDER PARAGRAPH 9 OF SCHEDULE 18 TO THE COMMUNICATIONS ACT 2003

Notice that certain continued provisions set out in the continuation notices given to Kingston Communications (Hull) plc on 23 July 2003 will cease to have effect from the date this notice is received, in accordance with section 7 of the Interpretation Act 1978

1. The Director General of Telecommunications ('the Director'), in accordance with Paragraph 9(9) of Schedule 18 to the Communications Act 2003 ('the Act') hereby gives notice to Kingston Communications (Hull) plc ('Kingston') that certain continued provisions contained in Schedule 1 to the continuation notice given to Kingston on 23 July 2003, which had effect from 25 July 2003, ('the Continuation Notice'), will cease to have effect from the date this notice is received, in accordance with section 7 of the Interpretation Act 1978, to the extent set out in Schedule 1 to this notice ('the Discontinued Provisions').

2. In giving this notice, the Director has, in accordance with Paragraph 9 (11) of Schedule 18 to the Act, taken all steps necessary for enabling him to decide whether or not to set a condition under Chapter 1 of Part 2 of the Act for the purpose of replacing the continued provisions and whether or not to exercise his power to set a condition under that Chapter for that purpose.

3. All directions, determinations, consents and other provisions which were continued under the Continuation Notice by virtue of Paragraph 9(8) of Schedule 18 to the Act will also cease to have effect from the date this notice is received, in accordance with section 7 of the Interpretation Act 1978, to the extent that they were given or made for the purposes of the Discontinued Provisions.

4. To the extent that the Continuation Notice does not cease to have effect under Paragraph 1 of this notice, the Continuation Notice shall continue to have effect until the Director has given a further notice to Kingston in accordance with Paragraph 9(9) of Schedule 18 to the Act that it shall cease to have effect.

5. The Director issued a consultation as to his proposals to discontinue the Discontinued Provisions on 2 October 2003 and requested comments by 9.00 a.m. on 16 October 2003. The Director has taken into account the comments he received during that consultation.

6. In this notice, except as otherwise provided or unless the context otherwise requires, words or expressions shall have the meaning assigned to them and

otherwise any word or expression shall have the same meaning as it has in the Act. For the purposes of interpreting this notice, headings and titles shall be disregarded.

DAVID ALBERT EDMONDS
DIRECTOR GENERAL OF TELECOMMUNICATIONS

28 November 2003

Schedule 1

The following continued provisions which were contained in Schedule 1 to the Continuation Notice will cease to have effect from the date this notice is received, in accordance with section 7 of the Interpretation Act 1978, to the extent set out below.

Conditions 43 and 54, in so far as those conditions relate to the markets which have been reviewed in the review of Fixed Narrowband Retail Services Markets ('the Market Review') and will be replaced by SMP Conditions imposed on Kingston by way of the Notification set out in Annex D of the Market Review published by the Director on 28 November 2003.