

KCOM - Response to Ofcom's 2018 Business Connectivity Market Review

1. Introduction

- 1.1 KCOM Group PLC ('KCOM') welcomes the opportunity to provide a response to Ofcom's 2018 review of Business Connectivity (BCMR) in the UK. The consultation includes proposals on the definition of relevant markets, market power determinations in relation to BT and KCOM, and remedies packages for both BT in the UK (excluding the Hull Area¹) and KCOM in the Hull Area. This response is limited to Ofcom's proposed findings for KCOM in the Hull Area.
- 1.2 Considering the business grade solutions that KCOM provides in the Hull Area we have a clear interest in the outcome of the BCMR as the regulation that flows from it has direct commercial and operational implications for our business.
- 1.3 Ofcom is correct to recognise the positive developments that have taken place in business connectivity markets in the Hull Area. Ofcom presents evidence that competition has evolved since it conducted its previous review of leased lines markets. Because of these findings Ofcom is proposing to broadly maintain regulation in the relevant wholesale Contemporary Interface (CI) market but to deregulate in wholesale Traditional Interface (TI), and downstream retail CI and TI markets. Ofcom is proposing to find that:
- (i) KCOM has Significant Market Power (SMP) in the wholesale Contemporary Interface (CI) access market, but Ofcom plans to deregulate the Hull Area retail CI market following market entry by alternative providers. Ofcom is therefore proposing to maintain substantially the same remedies package for wholesale CI access services.
 - (ii) The ongoing regulation of certain legacy TI leased lines markets is no longer warranted given the volumes of TI leased lines are low and falling as users migrate to modern alternatives. Ofcom is therefore proposing to deregulate TI services throughout the UK.
- 1.4 KCOM welcomes the development of competition in the Hull Area. Investments in competing infrastructure by alternative providers adds additional choices of business connectivity supplier for both wholesale and retail customers in the area. These investments, together with solutions based on wholesale inputs made available by KCOM will help to play a critical role in the development of Hull and East Yorkshire region by ensuring that communications providers have the connectivity they need to build their networks (e.g. mobile), and that private and

¹ The area defined as the 'Licensed Area' in the license 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 (KCOM).



public sector retail companies have a range of capability to choose from.

- 1.5 KCOM considers that Ofcom is seeking to apply appropriate and proportionate regulation in response to the competition concerns that it has identified. KCOM also considers that based on the evidence available to Ofcom it is correct to deregulate as it proposes to do so.
- 1.6 Recognising the material change in Ofcom's proposed downstream SMP finding for CI access services we consider it helpful to offer to engage further with Ofcom to review this in advance of it reaching its final decision. KCOM notes the importance attached by Ofcom to entry and expansion of alternative network providers, and the use of wholesale inputs supplied by KCOM on the retail CI access market. We are not requesting, nor would Ofcom provide, commercially sensitive data on alternative access provision but do think this would be worthwhile discussing the proposed findings in further detail.
- 1.7 Set out below is a summary of the key points of KCOM's response to the consultation. We hope that Ofcom finds our contribution helpful.

2. Summary

- 2.1 KCOM agrees with the stated objective of the BCMR. KCOM agrees with Ofcom's provisional wholesale and retail product market definitions for the BCMR and that there is separate geographic market in the Hull Area for both wholesale and retail products². In particular:
 - KCOM agrees that there is a product market for wholesale CI access services (e.g. connections over fibre using an Ethernet interface) at all bandwidths, which includes all wholesale fibre-based point-to-point ('P2P') Ethernet services and WDM services. These wholesale CI access services are used to provide the P2P connections to business sites (e.g. office buildings or mobile base stations) with a single product market for CI access services at all bandwidths. KCOM supplies the wholesale CI access services market, as do other infrastructure providers in the Hull Area. (We note that Ofcom is not proposing to separately define wholesale inter-exchange connectivity market for the Hull Area but this is for reasons of market size rather than principle).
 - KCOM agrees that there is a parallel downstream product market for retail CI access services in the Hull Area, which is served using wholesale inputs supplied by the wholesale access services market.
 - KCOM agree that there are separate economic markets (wholesale and retail) for legacy TI circuits and concur that while Ofcom currently regulates

² The Hull Area being the area defined as the 'Licensed Area' in the license 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 (KCOM)



qualifying leased lines in the Hull Area that provide customers with low speed services (up to 8 Mbit/s), mainly over copper lines, in the Hull Area.

- 2.2 KCOM agrees with Ofcom's provisional finding that KCOM holds SMP in the wholesale CI access market at all bandwidths in the Hull Area, and that based on the analysis that Ofcom presents that KCOM no longer holds SMP in the retail CI access market.
- 2.3 In light of Ofcom's provisional conclusions that KCOM holds SMP in the provision wholesale CI access, KCOM agrees with Ofcom proposals with respect to general access remedies and a number of complementary transparency and reporting (regulatory and cost accounting) obligations applying to the wholesale CI access market. We consider that these interventions are in broad measure appropriate and proportionate. By extension, we do not consider it necessary for Ofcom to introduce specific access products in the BCMR market, be these active or passive or to impose a charge control on these.
- 2.4 Furthermore, considering Ofcom's provisional findings in TI markets that there is a compelling case for deregulation. This is because there is low and falling demand for these services as users migrate to modern alternatives (largely CI access services) and this structural shift in demand away from TI is evident across the UK, including in the Hull Area. Considering these material changes in TI market and likely further downward trajectory of TI demand over the course of the review period as customers switch away we consider likely competition concerns likely to be limited and the ongoing case for regulatory intervention unwarranted.
- 2.5 Separately, KCOM notes Ofcom's proposals in its physical Infrastructure market review, which is currently limited in its assessment to passive access remedies in the UK (excluding the Hull Area) and understands that Ofcom will be separately be considering what measures might be further needed to support investment in the Hull Area. We consider that the market conditions in the Hull Area are different in the Hull Area with the relative size of the market requiring a tailored approach. We look forward to engaging in this review with the expectation that the proposals put forward in that review to be an appropriate and proportionate response to the identified competition issues and consistent with Ofcom's broader strategic objectives set out in its Strategic Review of Digital Communications.³
- 2.6 Without pre-judging any findings of Ofcom's further review of the Hull Area, we would note that KCOM is already required to meet requests for network access under the terms of the Communications (Access to Infrastructure) Regulation 2016 (the 'ATI Regulation')). Indeed, Ofcom themselves pointed to the ATI Regulations as relevant to its consideration of the current SMP remedies package applying to KCOM in the Hull Area. While Ofcom may not consider this form of symmetric regulation to be an appropriate measure for the wider UK it is our view

³ <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/policy/digital-comms-review>



a proportionate solution for the Hull Area, operating in conjunction with the SMP condition providing for reasonable requests for network access to be made.

3. KCOM's response to Ofcom's consultation questions

Question 9.1: Do you agree with our proposal to deregulate the retail market for CI services at all bandwidths in the Hull Area? Please provide evidence to support your view.

- 3.1 KCOM agrees with Ofcom's proposals to deregulate the retail market for CI access services at all bandwidths. Specifically, that there exists a separate economic market for these retail services in the Hull Area and that Ofcom presents evidence that KCOM no longer holds SMP in their provision. For these reasons, the imposition of SMP remedies is not justified.
- 3.2 In particular, KCOM notes Ofcom's provisional findings that the three criteria test set out in the 2014 EC Recommendation (the 'Three Criteria Test') is not met and hence the imposition of *ex ante* (SMP) regulation is not warranted. Specifically:
- (i) *There evidence does not suggest the presence of high and no-transitory barriers to entry*
- The presence of wholesale SMP regulation provides for wholesale network access, with competing communications providers using KCOM's access products to contest leased lines customers and in doing so now supply 30-40% of the retail CI access services market in the Hull Area.
 - CityFibre's deployment of an alternative network infrastructure used to supply wholesale CI access services and this competing infrastructure is now used to supply significant numbers of leased lines to customers in retail CI access services market in the Hull Area. Entry and expansion in a market of this type is consistent with a market exhibiting low barriers to entry.
- (ii) *The structure of the market is now tending towards effective competition within the relevant time horizon*
- The investments made by competing providers in the Hull Area and the use of wholesale reference inputs supplied by KCOM have materially impacted KCOM's retail market share. Ofcom reports this as being less than 40% in the retail CI access market in the Hull Area. A structural indicator at this level suggests the presence of effective competition. KCOM's retail market share is now below 40% in the retail CI access services.



- 3.3 KCOM notes the supporting evidence of Ofcom findings, which includes evidence of market entry and expansion the details of which were provided to Ofcom by KCOM and others in responses to information requests. We further note that Ofcom's provisional findings are further supported by KCOM's s 2018 retail Price Transparency Report (PTR).
- 3.4 KCOM notes that it is possible that having competed on the merits that we increase our future market share in the retail CI market and it is important that Ofcom does not place undue weight on this metric in any 'criteria' assessment in future market reviews. Moreover, given Ofcom's findings in relation to structural barriers to entry we consider it important that Ofcom considers its analysis of market failure at the retail level carefully.

Question 9.2: Do you agree with Ofcom's analysis and proposed findings in relation to the wholesale market for CI access services at all bandwidths in the Hull Area? Please provide evidence to support your views.

Market definition

- 3.5 KCOM agrees with Ofcom's provisional product market definition in the Wholesale Contemporary Interface (CI) market in the Hull Area, which is analytically consistent with the product market definition applying in the rest of the UK.
- 3.6 KCOM agrees with Ofcom's analysis that there is a product market for wholesale CI access services (e.g. connections over fibre using an Ethernet interface) at all bandwidths, which includes all wholesale fibre-based point-to-point ('P2P') Ethernet services and WDM services. These CI access services providing the P2P connections to business sites (e.g. office buildings or mobile base stations) with a single product market for CI access services at all bandwidths.
- 3.7 KCOM notes that Ofcom's market definition for wholesale CI access services at all bandwidths is driven by the evidence, amongst other things, that:
- Neither asymmetric broadband (including FTTX), nor EFM, impose a sufficient constraint on leased lines prices to be included in the same economic market and are so excluded from the relevant market. However, Ofcom provisionally finds that dark fibre access is in the same economic market.
 - Supply side and demand side substitution possibilities:
 - underline that P2P leased lines utilise a common physical bearer and that physical infrastructure presents the basis for effective switching between bandwidths transmitted across this connectivity;



- that business connectivity services that utilise P2P leased lines but provide additive capability (e.g. internet access) are downstream of CI access services and therefore do not form part of the same economic market; and
- extensive coverage of fibre access infrastructure used to deliver CI access services is important.

3.8 While Ofcom is proposing to find a separate CI product market for wholesale inter-exchange connectivity, defined as the connection between BT exchanges in different geographic areas (e.g. between towns and cities) within the UK (excluding the Hull Area), we agree that it is unnecessary to propose to define a separate inter-exchange market within the Hull Area given the size of the market size and likely demand for P2P backhaul and core connections. Indeed, as Ofcom recognises a competing CP to serve its customers through a single point of presence in the Hull Area and then to backhaul its traffic to another point of presence outside the Hull Area.

3.9 We note the proposed finding that separate economic markets (wholesale and retail) exist for certain legacy TI circuits and concur that while Ofcom currently regulates qualifying leased lines in the Hull Area that provide customers with low speed services (up to 8 Mbit/s), mainly over copper lines, in the Hull Area.

SMP assessment – Wholesale CI access services

3.10 KCOM agrees with Ofcom's provisional finding that KCOM has SMP in the CI wholesale access services market in the Hull Area.

3.11 KCOM also notes the following in Ofcom's analysis:

- The main determinant of competition for the supply of wholesale leased lines as communications providers require network in the proximity of a site to compete for the supply of CI services; and
- There is clear evidence of market entry and expansion in the provision of wholesales CI services based on the deployment of competing end-to-end fibre-based network infrastructure.

3.12 The infrastructure investments that have been made, particularly by CityFibre, represents strategic investments, providing CityFibre (and potentially BT and MS3) with an 'anchor' at specific customer ends. While these investments remain localised at the current point in time, as manifest in Ofcom's network reach analysis, the generalised picture of competition may well change in the future. Indeed, it is entirely conceivable that these investments increase the near-term competitive constraints placed on KCOM in the provision of wholesale CI access services through competing network expansion. Changes in this coverage being a



material factor that would warrant the re-assessment of the KCOM's wholesale CI SMP.

Question 9.3: Do you agree with our proposal to deregulate wholesale and retail low bandwidth TI services in the Hull Area? Please provide evidence to support your views.

Market definition

- 3.13 KCOM agrees with Ofcom's provisional product market definitions concerning wholesale Traditional Interface (TI) and retail TI low bandwidth (up to and including 8Mbit/s) markets in the Hull Area, which is analytically consistent with the product market definition applying in the rest of the UK.
- 3.14 KCOM agrees with Ofcom's analysis that there is a product market for wholesale and retail TI services.

Proposed deregulation

- 3.15 Based on the evidence presented by Ofcom, we agree with Ofcom's proposal to deregulate both wholesale and retail TI low bandwidth services in the Hull Area.
- 3.16 On Ofcom's analysis, we consider Ofcom is correct to provisionally conclude that while wholesale TI markets represent one of the markets on identified by the European Commission as susceptible to ex ante regulation we agree that in the circumstances identified by Ofcom it is not appropriate to impose SMP regulation in the wholesale TI market. Based on the evidence and analysis presented by Ofcom, the Three Criteria Test is not met for the ongoing application of wholesale TI regulation. Furthermore, we are of the view that based on the evidence and analysis presented by Ofcom the Three Criteria Test is not met for retail TI market in the Hull Area.
- 3.17 KCOM considers there to be a compelling case for deregulation both in terms of wholesale and retail TI services. This is because there is low and falling demand for these services as users migrate to modern alternatives (largely CI access services) and this structural shift in demand away from TI is evident across the UK, including in the Hull Area. Considering these material changes in TI market and likely further downward trajectory of TI demand over the course of the review period as customers switch away we consider likely competition concerns likely to be limited and the ongoing case for regulatory intervention unwarranted. Consequently, KCOM agrees that Ofcom should withdraw both existing wholesale retail regulation in the Hull Area.
- 3.18 Furthermore, KCOM expects as the demand structure to continue to favour alternatives to TI low bandwidth services that prices for our TI services in the near



future will increase. Indeed, we are currently in the process of reviewing the pricing structure of these services.

Question 10.1: Do you agree with our proposed approach to remedies in the Hull Area? Please provide reasons and evidence in support of your views.

Proposed SMP remedies

- 3.19 KCOM agrees with Ofcom's proposals with respect to general wholesale access remedies and a number of complementary transparency and reporting (regulatory accounting) obligations. We consider that these are in broad measure designed to remedy our proposed SMP in the wholesale CI market to be appropriate and proportionate.
- 3.20 KCOM agrees that there disproportionate for Ofcom to seek to introduce specific access products in the Hull Area to remedy our SMP in the wholesale CI market. This includes, but is not limited to, the decision to not impose a passive access remedies in the form of duct and pole access. We do not consider that there is enough demand for passive remedies or wholesale services more generally in the Hull Area to warrant such an intervention.
- 3.21 As Ofcom is aware we, like other network providers, are subject to the requirements of the ATI Regulations, whose explicit purpose is to reduce the cost of next generation broadband deployments.⁴
- 3.22 ATI Regulation 6(1) establishes a right for network providers to request access to infrastructure operators' physical infrastructure (including KCOM's) with a view to deploying elements of high-speed electronic communications networks within that infrastructure. "High-speed" in relation to an electronic communications network means a network capable of delivering access to broadband services at speeds of at least 30 megabits per second (30Mbit/s). The ATI Regulations are silent as to specific customers (e.g. residential versus business customers), technical interfaces, network architecture (e.g. point-to-point versus point-to-multipoint) or network segments and to the extent that a duct and pole access this form of symmetric regulation provides a clear route to meeting such requests.

⁴ *The Communications (Access to Infrastructure) Regulations 2016*, Statutory Instrument 2016, No.700, available at: http://www.legislation.gov.uk/ukxi/2016/700/pdfs/ukxi_20160700_en.pdf. The ATI regulation is a sectoral intervention (i.e. it is not a Significant Market Power (SMP) remedy) that applies symmetrically to all qualifying undertakings (i.e. it is a passive access measure that applies in equally to all network provider across various sectors (communications, energy, transport, water etc.)). It provides a tool by which relevant network providers can obtain network access to passive infrastructure (excluding dark fibre) owned by a communications provider, and other qualifying utilities. The introduction of the measures contained with the ATI Regulation means that qualifying undertakings cannot simply chose to reject infrastructure access requests without an objective justification.



Requirement to provide network access on reasonable request and to provide such access on fair and reasonable terms conditions and charges

3.23 KCOM agrees with Ofcom's proposals to impose obligations on it in the wholesale CI access market in the Hull Area that requires KCOM to meet reasonable requests for network access as soon as reasonably practicable. Furthermore, to provide that access on fair and reasonable terms, conditions and charges, or on such other terms, conditions and charges that Ofcom might direct.

3.24 KCOM notes:

- Ofcom's approach in assessing fair and reasonable pricing. In particular, where it was assessing whether KCOM was charging excessively high prices then it would review these prices against those charges by Openreach, taking into account legitimate differences arising from our more limited scale.
- Ofcom's intention to support KCOM's fair and reasonable charges obligation with information required under a separate wholesale PTR requirement and cost accounting conditions to observe our actual wholesale charges and how these relate to wholesale costs.
- Ofcom's confirmation that they consider interconnection and accommodation to fall within the scope of the network access obligations proposed by Ofcom and therefore KCOM is required to meet reasonable requests for these products in relation to services in the wholesale CI market.

3.25 KCOM agrees that the opportunities for further competition in the Hull Area are best met by the provision of a general access obligation that secures our response to reasonable requests for network access. This allows communications providers to request wholesale products (and associated interconnect and accommodation facilities) when they are needed. We further concur with Ofcom that specific forms of network access are unwarranted, including specified active or passive products (including but not limited to dark fibre access).

Requirement not to discriminate unduly

3.26 We consider Ofcom's proposals concerning non-discrimination to be appropriate. Furthermore, the imposition of a strict form of non-discrimination (EoI) would be disproportionate to impose such an obligation given the competition concerns that Ofcom has identified and the costs that would need to be incurred to serve demand from competing providers in the wholesale CI market in the Hull Area.



Transparency and notification obligations

Requirement to publish a Reference Offer ('RO')

- 3.27 KCOM considers it proportionate to require the publications of a wholesale RO for CI access services in the Hull Area, and to do so with the content, and in the form, specified in the consultation.
- 3.28 KCOM's wholesale RO is made public on our website with both current and prospective wholesale providers able to access it. Similarly, competitors can observe KCOM's wholesale pricing information from our website (as well as the retail RO at present).

Requirement to notify changes to charges, terms and conditions

- 3.29 KCOM considers it proportionate to require the notification of charges, terms and conditions of the form and to the timescales detailed in the consultation relating to wholesale ROs.
- 3.30 KCOM agrees that it is helpful to align the periods for the wholesale RO notification period with those specified in the WLA and WBA market reviews.

Requirement to notify changes to technical information

- 3.31 KCOM considers it proportionate to require the notification of changes to technical information of the form and to the timescales detailed in the consultation.

Approach to price controls in the Hull Area

- 3.32 KCOM considers it proportionate to require that our wholesale charges are fair and reasonable and to monitor these against suitable benchmarks (i.e. Openreach's wholesale charges.)
- 3.33 In previous market review KCOM has presented its approach to leased line pricing for the relevant period. While we recognise that Ofcom doesn't 'clear' wholesale pricing we continue to be committed to working the regulator and to ensure that our approach is understood.
- 3.34 We are happy to work with Ofcom to help understanding of the pricing detailed in our wholesale PTR.

Proposal to produce a wholesale Price Transparency Report (PTR)

- 3.35 Ofcom's stated purpose of the wholesale PTR is to monitor KCOM's compliance with the charges that are being paid by wholesale customers signed up to the wholesale RO. It also provides a basis for determining whether KCOM is



complying with the obligation to charge fair and reasonable prices.

- 3.36 KCOM considers it proportionate to require that we produce a wholesale PTR on an annualised basis. The current wholesale PTR lists all the qualifying wholesale (internal and external) P2P services in the relevant market (i.e. CI and TI) services. This includes those services that were contracted after the new SMP obligations came into force and legacy wholesale services that pre-date the new regulations.
- 3.37 Ofcom has listed four additional pieces of detail that it is proposing KCOM to be required to supply as part of its annual wholesale PTR (first of which will be in 2020). Certain of these details proposed by KCOM warrant further discussion. For example, we cannot determine with the level of accuracy seemingly required the type of ends being connected. We hold address details and would need to review each of the records in turn to try and discern the nature of the connection.
- 3.38 [X]

Proposals regarding regulatory financial reporting requirements

- 3.39 KCOM notes Ofcom's required revisions to our regulatory reporting obligations including those applying to the introduction of cost accounting to supplement our pre-existing accounting separation obligations.
- 3.40 We note that Ofcom considers accounting separation obligations as necessary to monitor KCOM's activities regarding our non-discrimination obligations and to require cost accounting in the wholesale CI access market in the Hull Area.

