

Non-Confidential

KCOM's supplementary response to Ofcom's consultation for the Wholesale Fixed Telecoms Market Review 2021-26 (Hull Area)

1. Introduction

1.1 KCOM Group Limited ('KCOM') welcomes the opportunity to provide further comments on Ofcom's further consultation on the Wholesale Fixed Telecoms Market Review ('WFTMR') for the UK (excluding the Hull Area) 2021-26 (the 'November Consultation')¹ and has submitted a short response to it given its relevance to KCOM's deployment of fibre-infrastructure outside the Hull Area. Importantly, given the regulatory approach Ofcom is proposing to take in the Hull Area, Ofcom's approach to the regulation of BT also has direct relevance to KCOM's Hull operations. For this reason, KCOM considers it helpful to provide Ofcom with additional representations, supplementing the points that we made in our response to the WFTMR (Hull Area) consultation. These additional representations in this response are limited to two of the points that Ofcom raises in the November Consultation: Dark Fibre Access (DFA) pricing and its implementation.

1.2 The remainder of this submission sets out KCOM's comments on Ofcom's proposals in relation to the November Consultation and its implications in relation to Ofcom's proposals in the WFTMR (Hull Area) consultation. The structure of the submission is as follows:

- Section 2 provides a summary of our response
- Section 3 provides the relevant context in which KCOM makes this submission
- Section 4 sets out our comments on Ofcom's proposals in relation to Dark Fibre Access pricing and our comments on Ofcom's proposals in relation to Dark Fibre Access implementation.

2. Summary

2.1 In July 2020, Ofcom issued a consultation on its WFTMR for the Hull Area ('the Hull consultation').² Within the Hull consultation, Ofcom proposed to find that KCOM had Significant Market Power (SMP) in identified wholesale markets and sought to remedy that SMP by introducing both general and specific remedies. This proposed remedies package reflected Ofcom's proposed approach to

¹ Ofcom (2020), *Wholesale Fixed Telecoms Market Review 2021-26, Further consultation on certain proposed remedies*, 6 November 2020, available at: https://www.ofcom.org.uk/data/assets/pdf_file/0023/206960/wftmr-further-consultation-proposed-remedies.pdf

² Ofcom (2020), *Promoting competition in fibre networks – Hull Area Wholesale Fixed Telecoms Market Review 2021-26*, 16 July 2020, available at: <https://www.ofcom.org.uk/consultations-and-statements/category-1/2021-26-hull-area-wholesale-fixed-telecoms-market-review> The Hull Area accords with the geographic boundary that is defined by KCOM's original 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.

regulating KCOM in the Hull Area over the period 2021-26, which is affected by the nature and form of the remedies Ofcom proposes to impose on BT in parallel wholesale fixed telecoms markets in the UK (excluding the Hull Area).

- 2.2 In the Hull consultation Ofcom proposed that KCOM would be required to provide DFA within the Hull Area and set an implementation timescale for its introduction. Ofcom also proposed that KCOM should offer DFA on 'fair and reasonable' terms and that Ofcom would consider this wholesale pricing constraint with reference to Openreach's DFA pricing.
- 2.3 KCOM responded to the Hull consultation, which continues to stand in its entirety.³ In our response, we made clear that we did not consider that the introduction of a DFA remedy in the wholesale leased lines access market in the Hull Area was either necessary or proportionate.⁴
- 2.4 However, as we have previously argued, if Ofcom considered that the balance of evidence and analysis supported the introduction of DFA in the Hull Area we considered that:
- **Benchmarking Openreach DFA pricing is not appropriate for determining the 'fair and reasonable' pricing for DFA in the Hull Area.** In particular, we stated that a benchmarking approach "fails to recognise the significant differences between KCOM's network and Openreach's network"⁵ Rather, if the first line test for fair and reasonable pricing is benchmarking to Openreach's DFA pricing and this does not effectively reflect network differences then Ofcom should simply remove the reference to benchmarking for the purpose of its assessment.
 - **The introduction of DFA introduces demand risk for KCOM.** As such, we should only be required to provide DFA⁶ if there was a committed order from a CP.⁷ Given the potential lack of demand for DFA in the Hull Area we remain of this view.
 - **KCOM faces implementation challenges in introducing DFA:** KCOM would have significant operational and systems challenges in developing DFA that meant Ofcom's proposed timescale for DFA's introduction in the Hull Area was unrealistic.⁸
- 2.5 In the November Consultation Ofcom is proposing changes to the remedies package imposed on BT in wholesale fixed telecoms markets. Amongst other things, Ofcom is proposing to amend:

³ KCOM, KCOM's response to Ofcom's consultation for the Hull Area Wholesale Fixed Telecoms Market Review 2021-26 ('September 2020 KCOM response')

⁴ September 2020 KCOM response, paragraph 2.3

⁵ September 2020 KCOM response, paragraph 2.3

⁶ KCOM also considered the same approach should apply to the proposed amendments to KCOM's current Wholesale Local Access reference offer, which would introduce an interconnection variant.

⁷ September 2020 KCOM response, paragraph 2.5

⁸ Hull consultation, Volume 3, figure 2.1

- the charge control for Openreach's DFA pricing based on new evidence it has obtained relating to the allocation of costs in BT's Regulatory Financial Statements (RFS); and
- the implementation timescales for the introduction of DFA. Specifically, by extending the DFA implementation period for all essential elements of the product (provision and repair), and for all non-essential elements of the product (including billing, novation and service level agreements) and compliance with Ofcom's quality of service standards.

- 2.6 KCOM considers it important to make additional representations in relation to the DFA remedy proposed by Ofcom in the Hull consultation.
- 2.7 As we set out in the September 2020 KCOM response we consider that the obligation for KCOM to provide DFA is unnecessary and disproportionate.⁹ Furthermore, we also noted that Ofcom's proposals to benchmark KCOM's DFA prices to BT "fails to recognise the significant differences between KCOM's network and Openreach's network."¹⁰ Therefore, if Ofcom was to go ahead with its proposals in relation to the Hull Area, the approach it takes to regulating BT would have a direct impact on KCOM.
- 2.8 Ofcom has changed the method in which it proposes to set BT's DFA prices. Given the confidential nature of BT's cost information, KCOM (and others in the industry) cannot meaningfully comment on these proposals. The aggregate effect of Ofcom's proposals is to restructure Openreach's DFA charges and to maintain an overall level that is similar to that proposed in the January 2020 consultation. As we set out in our September 2020 KCOM response, KCOM considers that benchmarking KCOM's DFA charges to BT is inappropriate and may prevent KCOM from recovering its efficiently incurred charges.¹¹ As Ofcom has not materially increased its proposals for BT's DFA charges we remain of the view as set out in the September 2020 KCOM response.
- 2.9 In the November Consultation, Ofcom has also proposed giving BT a longer timeframe in which to launch its DFA product. Given KCOM's concerns around the timetable in which it would be required to launch its DFA product we consider it is also appropriate to respond to the November Consultation in relation to this issue, supplementing the September 2020 KCOM response.
- 2.10 Ofcom has proposed a revised and extended implementation timetable for the launch of an Openreach DFA product with soft launch 4.5 months after publication of a statement and full launch 14 months following publication of a statement.¹² For the reasons set out in this response, KCOM believes this supports our view set out in the September 2020 KCOM response that the nine month implementation period proposed for the launch of a DFA product in the Hull

⁹ September 2020 KCOM response, paragraph 2.3

¹⁰ September 2020 KCOM response, paragraph 2.3

¹¹ September 2020 KCOM response, paragraph 3.31-3.35

¹² November Consultation, paragraph 5.19

consultation is unrealistic and that a minimum timescale of 18 months will be necessary.

- 2.11 In conclusion, we remain of the view that Ofcom's proposals to require KCOM to provide DFA to be inappropriate. Furthermore, KCOM continues to be of the view that in this instance the utilisation of benchmarking against Openreach's DFA wholesale pricing as a reference for assessing fair and reasonable pricing remains problematic. Given the November Consultation does not propose to make material adjustments to Openreach's DFA pricing KCOM remains of the view that Ofcom's approach to DFA pricing in the Hull Area is not appropriate. KCOM is also of the view that given Ofcom has accepted BT's arguments that it will take longer than Ofcom initially anticipated to launch a DFA product Ofcom should also recognise that KCOM will also need longer than Ofcom had initially proposed to launch KCOM's DFA product.

3. Ofcom's Hull consultation

- 3.1 In the Hull consultation, Ofcom made a number of proposals in relation to KCOM's obligation to provide DFA. It proposed, amongst other things:

- KCOM would be required to provide DFA on fair and reasonable terms¹³
- In considering whether KCOM's DFA prices were fair and reasonable it would assess the degree to which they aligned with BT¹⁴
- KCOM should be required to launch the DFA product within six months of Ofcom's final statement¹⁵

- 3.2 KCOM's position remains that it "*disagrees with the DFA remedy and considers that it is unnecessary and disproportionate*".¹⁶ KCOM considers that the DFA remedy should therefore not be introduced. However, KCOM considered that Ofcom should review its approach to DFA pricing and the implementation timescales if it took the contrary view.

- 3.3 KCOM has considered the revised proposals on DFA pricing and implementation timescales for Openreach detailed in the November Consultation given the September 2020 KCOM response.^{17,18}

4. KCOM's comments on Ofcom's proposals in relation to DFA pricing and approach to the timing of the launch of a DFA product in the Hull Area

¹³ Hull consultation, figure 2.1 and paragraph 2.6

¹⁴ Hull consultation, paragraph 2.21

¹⁵ Hull consultation, paragraph 2.48

¹⁶ September 2020 KCOM response, paragraph 2.3

¹⁷ September 2020 KCOM response, paragraph 3.31-3.35

¹⁸ September 2020 KCOM response, paragraph 3.37-3.42

DFA pricing and implementation

Pricing issues with DFA

- 4.1 In the January 2020 consultation Ofcom proposed that it would set a cost-based charge control on Openreach's DFA product.¹⁹ Ofcom planned to base its assessment of Openreach's costs of a dark fibre access circuit using Openreach's costs of providing an Ethernet Access Direct (EAD) circuit.²⁰ In the January 2020 consultation Ofcom proposed that Openreach's access tail should be priced at £701 per tail²¹ with inter-exchange connectivity priced at £0.15 per m.²²
- 4.2 In the November Consultation Ofcom has changed its proposals. It has raised the charges for access tail circuits to a range of £830 to £1,120 per circuit.²³ Additionally it has lowered the inter-exchange connectivity price to between £0.08 and £0.11 per m.²⁴ The exact impact of the change in proposals between the January 2020 and November Consultations is dependent on the ratio of access tails to inter-exchange connectivity that CP's require. [3<]
- 4.3 Ofcom has proposed these changes as a result of changes to BT's methodology in the 2019/20 RFS.²⁵ Given the confidential nature of these changes, KCOM cannot meaningfully comment on these proposals.
- 4.4 Given that the November Consultation proposals are likely to lead to overall DFA charges that are broadly similar to that set out in the January 2020 consultation, KCOM remains of the view that using Openreach's DFA charges (as set by Ofcom) is not an appropriate mechanism.
- 4.5 We also wish to re-iterate our view that due to differences in network architecture between KCOM and Openreach, it is not appropriate to base KCOM's prices on Openreach's.

Timing issues with the introduction of DFA

- 4.6 Ofcom has proposed a revised implementation timetable for the launch of an Openreach DFA product with soft launch 4.5 months after publication of a statement and full launch 14 months following publication of a statement. Ofcom does not believe that a manual launch would offer CPs a DFA product that is on par with active leased lines which could be used at scale. We note Ofcom's view that a manual launch of the DFA product would result in an inferior product with

¹⁹ See November Consultation paragraph 4.2 for a summary of Ofcom's proposals in the January 2020 consultation

²⁰ Ofcom (September 2020 KCOM), letter to BT, Ofcom's proposed approach to setting prices for dark fibre services as published on the Ofcom website

²¹ July 2020 consultation, table 3.1

²² July 2020 consultation, Volume 5, legal instruments, Condition 121.3, page 193

²³ November Consultation, table 4

²⁴ November Consultation, table 4.1

²⁵ November Consultation, paragraph 4.7

poor customer experience during the first phase of implementation and would result in delays to subsequent phases of implementation.²⁶

- 4.7 In the Hull consultation, Ofcom proposed a nine month implementation period for KCOM to launch a DFA product. In the September 2020 KCOM response we argued that this was unrealistic considering the significant work that needs to be undertaken to ascertain network availability, define product characteristics, update systems, put in place appropriate processes and develop a Reference Offer. We also noted that when Ofcom first imposed an obligation on BT to provide DFA services in the Business Connectivity Review Statement published 28 April 2016 the timetable for implementation was a staged approach which would have resulted in the launch of DFA 18 months after publication of the statement (by 1 October 2017).²⁷
- 4.8 KCOM has initiated a programme of investment in improved capabilities in IT systems to ensure OSS and BSS support our wholesale objectives, and with the first release of a new customer portal in March 2021.²⁸ It is our intention that these systems will be used across the KCOM wholesale portfolio including, if required, to support a DFA product. Delivery of improved IT systems capabilities is a complex undertaking and will invariably require ongoing enhancement and improvement as CPs engage with the new portal.
- 4.9 Ofcom's revised implementation timetable for an Openreach DFA product supports our view that a nine month implementation period for the launch of a KCOM DFA product is insufficient and unrealistic and risks the launch of a product which does not meet CPs' needs. In particular, we are keen to avoid the use of manual processes which, as Ofcom notes, would result in an inferior product and poor customer experience. However, the nine month period proposed for the launch of a KCOM DFA product may give us no choice but to launch a product with manual processes. KCOM faces similar issues to those that have been highlighted by Openreach and the current proposed implementation period would introduce an additional burden when we are still refining our improved IT systems capabilities.
- 4.10 We therefore reiterate our view that Ofcom's proposed timetable for KCOM to launch a DFA product is inappropriately short and that a minimum timescale of 18 months from the final statement to product launch would be necessary.

²⁶ November Consultation, paragraph 5.16

²⁷ September 2020 KCOM response, paragraphs 3.37-3.42

²⁸ See <https://www.kcom.com/regulatory/kcom-wholesale/service-information/new-services-and-strategic-it-developments/>