

Annex 1: Vodafone's comments on the legal instruments

Annex 23 of Ofcom's wholesale local access (WLA) consultation document of 31 March 2017,¹ and Annex 8 of Ofcom's consultation on quality of service (QoS) for WLR, MPF and GEA.²³ set out draft legal instruments. Having reviewed these, we make a number of suggestions to improve clarity, address typographical errors and address implementation and interpretation.

This Annex is divided into two parts:

- I. In the first part, we give our comments on matters of procedure to improve implementation and understanding of compliance.
- II. In the second part, we suggest detailed drafting changes to certain SMP conditions and directions to improve reading and clarity.

Part 1: General comments

Drafting changes to the legal instruments

1. Certain aspects of the SMP conditions are defined in very broad and vague terms, or leave key matters within BT's discretion to determine contractually. This is inappropriate in the regulated context. More details are given in the table contained in part 2 of this Annex, but some examples include:
 - a. There is no list of MBORC triggers in the definitions section of the QoS SMP conditions. This gives BT the latitude to define force majeure events widely in its contracts for regulated products, and thereby reduce its liability for SLGs.
 - b. The draft conditions allow BT to define service management levels (SMLs) in its reference offers rather than prescribing these in the legal instruments. As a general principle, regulated service management levels should be defined by Ofcom in legal instruments, rather than by BT in its contracts for regulated products.
 - c. Ofcom uses BT's product names interchangeably with its own descriptions for regulated products. This could lead to abuse, particularly if BT later attempts to define new products and variants so as to avoid regulation.
2. Where regulated products are concerned, as a matter of law and policy, BT's ability to exploit regulatory loopholes should be limited as much as possible. The very fact that BT has SMP means that BT has the incentive and ability to abuse its dominant position. This has been illustrated most recently in the two Ofcom investigations relating to Openreach's of

¹ Available at https://www.ofcom.org.uk/data/assets/pdf_file/0030/99642/Annex-23.pdf.

² Available at https://www.ofcom.org.uk/data/assets/pdf_file/0033/99645/QoS-WLR-MPF-GEA.pdf.

‘deemed consent’ for Ethernet provisioning. In its investigations Ofcom found evidence

that Openreach had ‘gamed’ the system to benefit commercially. This misconduct could have been prevented or minimised by tighter drafting of the SMP conditions.

SoR process for new forms of network access

3. Some aspects of the new SoR process create gaps which could be exploited. We highlight some of the more problematic issues below.

a. BT’s SoR guidelines are not legally binding

Condition 3.1 requires BT (rather than Ofcom) to draft SoR “guidelines”, which presumably are not intended to be legally binding. This is highly problematic, given that the guidelines will cover contentious issues such as (1) the criteria against which SoR requests are to be assessed and (2) the timelines within which BT must process and decide on SoR requests. Ideally, BT should be held to a legally binding standard.

b. BT has the final say over the content of the SoR guidelines

Condition 3.2 seems to suggest that BT can unilaterally amend the SoR guidelines. In both cases, BT must consult with Ofcom and CPs first, but BT has the ultimate say over the guidelines if BT and the CPs are unable to reach agreement. Vodafone understands that many of the issues in the SoR guidelines will be operational in nature, and that it therefore makes sense for BT and CPs to attempt to agree on the process and criteria in a commercial context first. However, it is highly problematic that BT should have the final say in a context where BT is so dominant. As a matter of law and policy, Ofcom should approve the “guidelines” (and all subsequent amendments) before they come into force.

c. The SMP conditions do not set out the minimum requirements for the SoR guidelines

The WLA SMP conditions do not set out the minimum requirements for the SoR guidelines. This is a major gap in BT’s regulatory obligation because the current draft offers no assurance that the SoR guidelines will (i) be fit for purpose, (ii) actually useful for the purposes for which CPs intend for it to be used, or (iii) remedy past abuses of the SoR process.

d. The SMP conditions still give BT too much discretion over whether to accept or reject SoR requests from other CPs

As currently drafted, the WLA SMP conditions still allow BT far too much discretion to reject SoR requests from other CPs. In particular:

1. Condition 3.1(c) does not list any base set of minimum criteria which BT must consider before rejecting a new SoR request.
2. Condition 3.6(b) allows BT to “reasonably” to conduct feasibility studies before accepting or declining SoR requests, but doesn’t elucidate on what would be considered to be reasonable in the circumstances.
3. Condition 3.6(c) allows BT to reject a new SoR request on the basis that isn’t sufficiently well formulated.

Given that BT has abused the SoR process so badly in the past, it is essential that BT’s ability to reject SoRs should be restricted to circumstances where it is

objectively reasonable for to do so. This is essential to limit BT’s ability to reject SoR disputes on spurious grounds, or to unnecessarily prolong SoR processes, for example by commissioning and dragging out feasibility studies for longer than is necessary.

- e. The circumstances where Ofcom might grant an extension of time are unclear
A number of sub-conditions in Condition 3 require BT to obtain Ofcom’s pre-approval before obtaining an extension of time. However, the basis on which Ofcom may grant an extension of time is not specified. As a matter of law and policy, Ofcom should only be able to grant extensions where it is objectively reasonable to do so. BT should also bear the onus of justifying the extension to Ofcom.
- f. It is not clear what sanctions apply if Ofcom refuses to grant an extension of time
Condition 3 does not specify what sanctions apply if Ofcom refuses to grant an extension of time. Given its dominant position in the market, there are very limited incentives for BT to approve SoRs in a timely manner. Ofcom should consider imposing automatic penalties in such circumstances to ensure that Condition 3 is effective in facilitating the SoR process.

The new SoR process should extend to all regulated markets and services

And it is clear that, the SoR process is a cross-portfolio issue. Condition 3 of the WLA SMP conditions is not limited to the WLA market, and therefore could potentially extend to other regulated services in other markets. To avoid any doubt, Ofcom should use its direction-making powers under section 49 of the Communications Act to impose similar SoR obligations in relation to other regulated markets and services.

Unilateral variations to contracts for regulated products

- 4. There is nothing in the WLA legal instruments (particularly in SMP conditions 8 and 9) to preclude BT from unilaterally amending the terms and conditions of contracts for regulated products. BT is merely required to give advance notice to other CPs within the prescribed time periods when it amends a charge.
- 5. This is highly problematic, as while some of the WLA contracts restrict BT’s rights to make unilateral amendments, others are not clear. Some contracts explicitly allow BT to increase its prices, including the prices of (1) products that are not subject to a price control or basis of charges obligation, and (2) unregulated services. These are as follows:

	GEA	WLR3	LLU (RANF - revised access network facilities agreement)	SLU
Unilateral price rises	✓	✓	? (not clear)	? (not clear)
Unilateral changes to SLAs / SLGs	✗	✗	? (not clear)	? (not clear)
Other powers to change contract unilaterally	✓ (qualified)	? (not clear)	✓ (qualified)	✓ (qualified)

6. Unilateral contract variations are a cross-portfolio issue that Vodafone and other CPs have repeatedly raised in the context of BT's other reference offers – most recently in the context of the dark fibre contract and Access Locate agreement. As Ofcom is aware, CPs have also asked BT to amend paragraph 12 of the Standard

Interconnection Agreement (SIA) so as to restrict BT's to restrict its rights to unilaterally amend interconnection charges.

7. BT's right to unilaterally increase prices in particular is highly problematic as:
 - a. A number of BT's contracts apply to deregulated services as well, such as products in deregulated geographic markets. Some services have never been regulated, even though BT has de facto SMP (such as UK-wide MEAS and a number of interconnection products). This effectively allows BT unilaterally increase the price of unregulated products, which is inconsistent with normal commercial behaviour in a fully competitive market.
 - b. Following the Supreme Court's ladders judgment,⁴ Ofcom has become less and less willing to accept disputes about unregulated products or to rule against BT – leaving CPs without protection where a service is unregulated, or where there is no charge control or a basis of charges obligation.
8. It is also important to place on record that a number of assumptions that underlay the Supreme Court's decision were patently wrong. In particular, the Court assumed that the terms of the SIA (which is BT's reference offer for voice services) were "freely negotiated" in a "competitive market"⁵ and that the terms of the agreement were "unchallenged"⁶ This is simply not true. CPs have opposed BT's insistence on including unilateral variation clauses several times:
 - a. In the context of interconnection (which formed the backdrop to the Ladders judgment), Three challenged the fairness and reasonableness of paragraph 12 of the SIA (which allows BT to unilaterally vary prices) by referring a dispute to Ofcom in 2013, which Ofcom determined in BT's favour.⁷ CPs have also asked BT to modify paragraph 12 on a number of occasions, but without any success.
 - b. In Vodafone's experience of negotiating other reference offers and in periodic reviews of reference offers, it is BT's practice to simply finalise reference offers / amendments. Of course this not give the hand to its customers, but ensures it retains favourable terms. Most recently BT published its final reference offer for dark fibre access (DFA), which contained a number of provisions that CPs vigorously opposed, including predictably, the DFA contract included a right (insisted upon by BT) to increase the prices of unregulated products unilaterally.
9. The negotiating position of BT relative to other CPs remains hugely unequal, often even where services are unregulated. In the circumstances:
 - a. The SMP conditions should prohibit BT from being able to unilaterally increase prices for services that are not subject to (1) a charge control or (2) basis of charges obligation.

⁴ British Telecommunications Plc v Telefónica O2 UK Ltd & Others [2014] UKSC 42.

⁵ See §33 of the Ladders judgment.

⁶ See §46 of the Ladders judgment.

⁷ See Ofcom's final statement and determination at:

https://www.ofcom.org.uk/__data/assets/pdf_file/0018/84123/2013august_sia_determination.pdf.

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- b. The SMP conditions should also explicitly reserve Ofcom's rights to determine contractual terms in BT's reference offers where BT and is unable to come to a consensus with other CPs in the industry.
 - c. Because there is no accepted F&R cost standard, BT should not be able to increase the prices of products that are subject only to a F&R charging obligation without CP consent.
10. The SMP conditions should similarly restrict BT's ability to unilaterally vary other material terms of its reference offers without the consent of CPs, except in very limited circumstances (such as where there has been a change in law or regulation).

Directions

A. Withdrawal of 2008 SLG direction

11. Vodafone strongly disagrees with Ofcom's proposal to withdraw the 2008 SLG direction⁸, as this direction deals with a number of matters that are common to all market reviews.
12. Ofcom's proposal to withdraw is based on the premise that:
- a. many of the amendments required by the 2008 SLG directions are now well established in BT's contracts, which restrict BT's ability to vary their terms,⁹ and
 - b. Ofcom would rather include SLAs and SLGs in SMP conditions than in directions.¹⁰
13. There are a number of problems with this approach:
- a. The 2008 SLG directions deal with a number of principles that are applicable to SLAs and SLGs across all portfolios of regulated services. It is unclear whether Ofcom has conducted a due diligence to ensure that the principles underlying the SLG directions have been captured in all of BT's existing reference offers. The withdrawal of the 2008 SLG directions would also leave a lacuna in relation to reference offers that don't yet exist, but that may be mandated in the future.
 - b. Vodafone is also extremely worried about Ofcom's casual assumption that BT's rights to vary its contracts are limited. Neither of WLA SMP conditions 8 or 9 prohibits BT from unilaterally varying SLGs. Although the GEA and WLR3 contracts explicitly prohibit BT from unilaterally decreasing SLGs, the RANF and SLU contracts are less clear on this. Either way, Vodafone would be loathed to rely on the contracts alone to constrain BT's ability to change SLGs. Ideally, the SMP conditions should constrain BT's ability to amend SLAs and SLGs (we deal with this in more detail in part 2 of this annex, in our drafting comments on condition 9).
 - c. Lastly, the 2008 SLG direction sets out a number of important principles for SLGs generally, several of which have not been replicated in any of the legal instruments contained in Annex 8 of the QoS consultation. Vodafone considers this to be a grave omission. Examples of important issues in the 2008 direction which should be carried through to the next market review period, but which are absent from the proposed legal instruments in Annex 8 of the QoS direction include the following:
 - a. Methodology for calculating the amount of compensation: The 2008 direction gives helpful guidance on the methodology that BT and other CPs should use in calculating SLG payments. A list of relevant factors is given in §5.28, which

⁸ See: Ofcom, Service level guarantees: incentivising performance, 20 March 2008, Available at: https://www.ofcom.org.uk/data/assets/pdf_file/0020/33617/statement.pdf.

⁹ §5.110 of the WLA consultation document.

¹⁰ §5.114 of the WLA consultation document.

includes lost revenues, lost customers and damage to reputation as relevant considerations.

- b. **Prohibition on linking SLGs to inaccurate forecasts:** The 2008 direction also precludes BT from linking SLGs to inaccurate forecasts (see §3.49). It is well-documented, most recently in the dark fibre contract negotiations, that Openreach is unable to respond to unexpected spikes in demand, even where CPs provide accurate forecasts. Openreach's lead times for hiring and training new engineers are simply too long.
- c. **Proactive compensation payments:** The 2008 direction imposes positive obligations on BT to proactively compensate CPs if it misses its service level targets.

14. There is no doubt that some elements of the 2008 direction are out of date and should be deleted (such as the 60-day compensation cap referred to in §§5.21-5.25). However, others need to be preserved. Instead of throwing the baby out with the bathwater, Ofcom should revise the 2008 direction – so as to remove sections that are no longer applicable, and to retain elements that will continue to have ongoing relevance.

B Directions relating to regulatory financial reporting

- 15. The WLA legal instruments contain a number of directions relating to financial reporting requirements that are common to most, if not all SMP conditions that Ofcom publishes following a market review.¹¹
- 16. For the sake of consistency and for ease of administration, Ofcom should consider (1) publishing one set of financial reporting requirements to deal with cross-portfolio matters common to all market reviews, and (2) incorporating these by reference into each fresh set SMP conditions following a market review, together with any pertinent amendments applicable to particular regulated services.

B. Directions that Ofcom may issue in the future

- 17. Presumably in order to maintain flexibility, Ofcom explicitly reserves its rights in a number of SMP conditions to issue directions to BT under section 49 of the Communications Act – specifically:

Condition number	Condition heading	Specific sub-condition
SMP condition 1	Network access on reasonable request	1.2(b)(ii), 1.3(b)(ii), 1.5
SMP condition 3	Requests for new forms of network access	3.16
SMP condition 6	Basis of charges	6.4
SMP condition 7A	LLU charge control	7A.11
SMP condition 7B	VULA charge control	7B.9
SMP condition 7C	Charge controls and related provisions relevant to both LLU and VULA	7C.10
SMP condition 8	Publication of a reference offer	8.12

¹¹ See directions 2.1-2.9.

SMP condition 11	Quality of service	11.1, 11.2
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18. Legally, this reservation of rights is not strictly necessary, but is undoubtedly meant to underscore Ofcom’s powers to impose ex ante regulatory measures in between market reviews. However, as far as we are aware, Ofcom has rarely made use of its direction making powers during a market review period. We suspect this is partly due to the market Review team being disbanded after the final decision has been published. We would fully support, Ofcom’s continued involvement in the market in order to ensure it could, where necessary, use its direction-making powers more proactively in between market reviews.
19. One obvious candidate is that new services and processes introduced under this WLA may require ongoing review, notably:
- a. **Passive infrastructure access (PIA):** In this WLA market review, Ofcom is proposing to modify the terms and conditions on which BT provides duct and pole access (DPA) in order to facilitate take-up of the service. As a result, BT’s existing reference offer for PIA will need to be substantially renegotiated. To prevent BT from unilaterally imposing material contractual terms on CPs if negotiations fail, the SMP conditions should explicitly reserve Ofcom’s rights to review and finally approve or determine contested clauses before BT publishes its final revised reference offer for PIA. Ofcom should also consider reviewing (and possibly revising) the DPA SLGs by way of directions during the review period – as uptake increases and more data becomes available – if it becomes apparent that the existing SLGs are no longer fit for purpose.

SoR process: As indicated in paragraph 0 of this Annex, it is highly inappropriate for BT to have the final say over the SoR “guidelines”. Ofcom (rather than BT) should have an explicit power in the SMP Conditions to review and finally approve the “guidelines”, and to finally determine contested clauses in the “guidelines” before they are finalised (including for any subsequent amendments).



Part 2: Vodafone's detailed drafting comments on the draft WLR legal instruments

The following tables set out the issues and errors that Vodafone has identified in the WLA and QoS draft legal instruments. We separately identify

- (i) substantive errors – e.g. where we consider that Ofcom's underlying policy assumptions are incorrect, or where Ofcom has for example failed to consider an issue in sufficient detail,
- (ii) policy recommendations to reflect best practice – e.g. where we take the view that Ofcom could regulate in a more efficient manner, (iii) drafting errors – where the current drafting is unclear or where there are typographical errors.

Document	Para	Issue	Potential rectification	Category
WLA SMP conditions (Annex 23, main condoc)	Schedule 1, part 1, para 1	Application (scope of the SMP conditions)	Schedule 1 of the WLA SMP conditions seeks to restrict the scope of the SMP conditions to "copper loop-based, cable-based and fibre-based wholesale local access at a fixed location. In the existing PIA contract, BT has interpreted this as precluding CPs from using DPA in connection with fixed wireless access (see para (B) of the PIA main conditions, for example). Given the	
WLA SMP conditions (Annex 23, main condoc)	WLA SMP condition 3	Requests for new forms of network access (SoRs)	For the reasons given in paragraph 0 of this Annex: <ul style="list-style-type: none">• BT's SoR "guidelines" should be legally binding standards.• Ofcom (and not BT) should finally determine all disputed aspects of the "guidelines" by way of directions.• The SMP conditions should make it clear that BT may reject new SoR requests and conduct feasibility studies only where it is reasonable to do so (which is an objective standard), and preferably in pre-specified circumstances. BT should bear the onus of proving reasonableness.• The SMP conditions should similarly explicitly allow Ofcom to extend the time periods for processing SoR requests only if it is reasonable to do so, and	Substantive error / policy recommendation.

Document	Para	Issue	Potential rectification	Category
			<p>preferably in pre-specified circumstances. Again, BT should bear the onus of proving reasonableness.</p> <ul style="list-style-type: none"> • The SMP conditions should make it clear that BT will be in breach of condition 3 if Ofcom refuses to grant BT an extension of time. Ofcom could also consider imposing automatic, pre-determined, escalating fines on BT arising out of a breach of the time periods, depending on the length of the delay. • As the SoR process is a cross-portfolio issue Ofcom should use its directionmaking powers under section 49 of the Communications Act to impose similar SMP conditions relating to new forms of network access in other regulated markets. <p>In addition, and as a general principle:</p> <ul style="list-style-type: none"> • Whenever an exchange of information is required, the SMP conditions should specify the minimum level of information required as far as possible. Because much of the information may be competitively sensitive, BT should be prohibited from sharing that information with its downstream divisions. • Where the consent of a CP is required to allow BT to extend a time period, this should be given in writing, to avoid any doubt. • Where BT is permitted to extend a period of time because a feasibility study has not been completed, BT should only be entitled to the extension if the feasibility study has not been completed due to an objectively reasonable circumstance that is genuinely beyond BT's reasonable control. • All processes and consents referred to in condition 3 that are required to be reasonable so be prefaced by "objective" to minimise the risk of abuse. 	

			<p>Below, we give some non-exhaustive examples of the kinds of amendments that we envisage to SMP condition 3:</p>	
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Document	Para	Issue	Potential rectification	Category
			<p>3.1 The Dominant Provider shall, for the purposes of transparency, publish legally binding standards in relation to requests for new forms of network access made to it. Such standards shall detail... [remainder of clause omitted]</p> <p>NEW The criteria by which requests will be assessed under condition 3.1(c) must specify the following at the very least:</p> <ul style="list-style-type: none">(a) ...(b) ... <p>3.2 The Dominant Provider shall publish such standards within two months of the date that this condition enters into force following a consultation with Ofcom and Third Parties. The Dominant Provider shall keep the standards under review and consult with relevant Third Parties and Ofcom before making any amendments to the standards. The Dominant Provider shall make such amendments to the guidelines as Ofcom may direct from time to time.</p>	

			<p>NEW If the Dominant Provider and Third Parties are unable to agree on any terms and conditions contained in the standards (including any subsequent amendments), then Ofcom shall give a direction to the Dominant Provider fixing the terms and conditions that are in dispute.</p> <p>NEW The Dominant Provider may not reject a request for a new form of network access under condition 3.1(c) unless the Dominant Provider can establish that it is objectively reasonable to do so, taking into account the following considerations:</p> <p>(a) ...</p> <p>(b) ...</p> <p>3.3 The Dominant Provider shall, upon a reasonable request from a Third Party considering making a request for a new form of network access, provide that Third Party with information so as to enable that Third Party to make a request</p>	
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Document	Para	Issue	Potential rectification	Category
			<p>for a new form of network access. Such information must include the following at the very least:</p> <ul style="list-style-type: none">(a) ...(b) ... <p>The Dominant Provider shall provide such information within [rather specify time period as this is too open-ended].</p>	



			<p>NEW The Dominant Provider must not share the information provided to a Third Party under condition 3.3 with the Dominant Provider's employees, contractors or officers before approving a request for a new form of network access except to the extent that:</p> <ul style="list-style-type: none">(a) it is strictly necessary to do so for the purpose of assessing and processing the request;(b) commercially and competitively sensitive information is made available only to those employees, contractors or officers of the Dominant Provider who strictly require the information, and the information is distributed to as limited a number of people as reasonably practicable; and(c) commercially and competitively information is not accessed by the Dominant Provider's wholesale, retail or strategy business units under any circumstances. <p>3.5 Within five Working Days of receipt of a request under condition 3.4 the Dominant Provider shall acknowledge that request in writing. Failing this, the Dominant Provider shall be deemed to have acknowledged the request within [seven] Working Days of the access seeker sending the request to the Dominant Provider.</p> <p>NEW For the purposes of this Condition 3:</p>	
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Document	Para	Issue	Potential rectification	Category
			<p>(a) The Dominant Provider may conduct a feasibility study only if it is objectively reasonable to do so and for the reasons stated in the standards;</p> <p>(b) The Dominant Provider shall not reject a request under condition 3.6(c) on the basis that it is insufficiently formulated, if the request substantially requires with the Dominant Provider’s standards referred to in condition 3.1.</p> <p>(c) The Dominant Provider may reject a request for a new form of network access only if it is objectively reasonable to do so and for the reasons stated in the standards.</p> <p>3.10 The time limit set out in condition 3.9 shall be extended up to seventy Working Days from the date that the Dominant Provider informs the requesting Third Party that a feasibility study is reasonably required pursuant to condition 3.8, if—</p> <p>(a) circumstances have arisen which constitute a MBORC and which, despite the Dominant Provider using its best endeavours, prevent it from completing the feasibility study within forty-five Working Days of the date that the requesting Third Party was informed of the need for a feasibility study pursuant to condition 3.8; or</p> <p>(b) the Third Party and the Dominant Provider agree in writing to extend the time limit up to seventy Working Days.</p> <p>3.13 The time limit set out in condition 3.12 shall be extended up to eighty-five Working Days of receipt of a request under condition 3.4, if—</p> <p>(a) circumstances have arisen which constitute a MBORC and which, despite the Dominant Provider using its best endeavours, prevent it from completing the feasibility study within sixty Working Days of receipt of a request under condition 3.4; or</p> <p>(b) the Third Party and the Dominant Provider agree in writing to extend the time limit up to eighty five Working Days.</p>	



Document	Para	Issue	Potential rectification	Category
			<p>NEW In the absence of agreement between the Dominant Provider and a Third Party, Ofcom may grant the Dominant Provider an extension of time under conditions 3.11 and 3.14(a) only if the Dominant Provider can demonstrate to Ofcom that it is objectively reasonable to extend the time period in the circumstances, with reference to the following considerations:</p> <p>(a) ...</p> <p>(b) ...</p> <p>NEW For the avoidance of doubt, the Dominant provider shall be deemed to be in breach of its obligations to the extent that the Dominant Provider is not eligible for or Ofcom does not grant the Dominant Provider an extension of time under any of the circumstances permitted under this condition 3.</p> <p>Consistent with these drafting suggestions, this condition will need to be led so as to include a definition for an MBORC.</p>	



WLA SMP conditions (Annex 23, main condoc)	Condition 8	Reference offers	<p>By operation of the law, terms and conditions that BT imposes on CPs in its reference offers are already subject to the SMP conditions. However, BT's reference offers do not always make this clear. We suggest making this explicit in condition 8.11, as follows:</p> <p>The Dominant Provider must provide network access at the charges, terms and conditions in the relevant Reference Offer and these SMP conditions and must not depart therefrom either directly or indirectly. These SMP conditions shall prevail to the extent that they conflict with the relevant Reference Offer.</p>	Drafting error.
WLA SMP conditions (Annex 23, main condoc)	Condition 9	Unilateral changes to reference offers	<p>There is nothing in condition 9 which restricts BT's rights to unilaterally vary the terms of its reference offers. This is problematic, as many of BT's reference contracts apply to unregulated products (e.g. products that fall outside the scope regulated geographic markets). A number of BT's reference offers also contain unilateral variation clauses.</p>	Substantive error.

Document	Para	Issue	Potential rectification	Category
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			<p>The ideal scenario would be for BT to excise all unregulated products from the scope of its reference offers, and to supply these to CPs on separate, commercial terms that are consistent with a truly competitive market. Possibly to facilitate contract management, BT generally extends the scope of its reference offers to unregulated services as well.</p> <p>Given this practice, BT's rights to vary material provisions in its reference offers relating to unregulated products should be severely restricted. In particular, BT should be prohibited from increasing the prices of unregulated products unilaterally. Because Ofcom has never prescribed a F&R cost standard, BT should be prevented from unilaterally increasing charges which are subject to a F&R obligation until such time as Ofcom prescribes a F&R standard.</p> <p>BT should also be prohibited from unilaterally varying other material terms without the consent of other CPs – such as by unilaterally decreasing service levels.</p> <p>Because variations to charges are more complex, the SMP conditions should specify two distinct processes for (1) charge changes and (2) other (non-pricing) variations. In this regard, we find Ofcom's proposed terminology confusing - particularly the reference to WLA access changes.</p> <p>As unilateral variations are a cross-portfolio issue, Ofcom should use its directionmaking powers under section 49 of the Communications Act to impose similar SMP conditions restricting BT's rights to unilaterally vary its reference offers.</p> <p>On this basis, Vodafone proposes that Ofcom makes the following changes to condition 9:</p> <p>Condition 9 – Notification of charges and terms and conditions</p> <p>9.1 Except in so far as Ofcom may from time to time otherwise consent in writing, the Dominant Provider must publish charges, terms and conditions and act in the manner set out in this condition.</p> <p>9.2 Where it proposes an Access Change or an Access Charge Change, the Dominant Provider must:</p>	
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Document	Para	Issue	Potential rectification	Category
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			<p>(a) send an Access Change Notice or an Access Charge Change Notice (as applicable) to every person (“Third Party”) with whom it has entered into an Access Agreement pursuant to conditions 1 and/or 2; and</p> <p>(b) publish the Access Change Notice or Access Charge Change Notice on its website (as applicable).</p> <p>9.3 The obligation in condition 9.2(a) shall not apply where the Access Change or Access Charge Change is directed or determined by Ofcom or is a consequence of such direction or determination (including pursuant to the setting of an SMP services condition under the power in section 45 of the Act) or required by a notification or enforcement notification issued by Ofcom under sections 96A or 96C of the Act.</p> <p>9.4 An Access Charge Change Notice must—</p> <p>(a) take effect no earlier than the time periods specified in condition 9.4A;</p> <p>(b) in the case of an Access Charge Change relating solely to a reduction in the price of existing network access (including, for the avoidance of doubt, a Special Offer), be sent not less than 28 days before any such amendment comes into effect;</p> <p>(c) in the case of an Access Charge Change relating to the end of a temporary price reduction in accordance with the terms of a Special Offer, be sent not less than 28 days before any such amendment comes into effect.</p> <p>9.4A Where the Dominant Provider wishes to increase or introduce any new charges under a Reference Offer, then the following applies:</p> <p>9.4A.1 For charges which:</p> <p>(a) are subject to condition 7; or</p> <p>(b) are otherwise subject to a condition or determination that sets a direct, specific charge for the service to which it relates,</p> <p>the Dominant Provider must publish an Access Charge Change Notice on its website within not less than 28 calendar days of the date on which the Access Charge Change is due to take effect or within such other notice period that Ofcom may direct.</p>	
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Document	Para	Issue	Potential rectification	Category
			<p>9.4A.2 For charges that are subject to a condition obliging the Dominant Provider to ensure that a charge is derived from the cost of provision of a service:</p> <ul style="list-style-type: none">(a) The Dominant Provider must publish an Access Charge Change Notice on its website and send a copy to each Third Party within not less than 90 calendar days of the date on which the Access Charge Change is due to take effect (the “effective date”).(b) The Access Charge Change shall take effect on the effective date unless a Third Party objects in writing to the change within 28 calendar days after the date of publication of the Access Charge Change Notice.(c) If a Third Party does object, the Access Charge Change shall be deemed to be disputed from the date on which the Third Party sends its written objection to the Dominant Provider (the “objection date”), in which case:<ul style="list-style-type: none">(i) the Dominant Provider and the Third Party must use their best endeavours to resolve the dispute within 60 calendar days of the objection date (the “negotiation period”).(ii) If they do not agree, either the Dominant Provider or the Third Party may refer a dispute about the Access Charge Change to	

			<p>Ofcom, a court or any other judicial or quasi-judicial body within [XXX] after the negotiation period ends, failing which the Dominant Provider may implement the Access Charge Change thereafter.</p> <p>9.4A.3 For charges to which neither condition 9.4A.1 nor 9.4A.2 applies:</p> <ul style="list-style-type: none"> (a) The Dominant Provider must publish an Access Charge Change Notice on its website and send a copy to each Third Party within at least 90 days of the effective date specified in the notice. (b) The Access Charge Change shall come into effect on the date specified in the Access Charge Change Notice unless a Third Party sends a written objection to the Dominant Provider within 60 days of the publication of the Access Charge Change Notice on the Dominant Provider's website, in which case, the Access Charge Change shall not come into effect. 	
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			<p>9.4A.4 Condition 9.4A.1 shall apply if an Access Change Charge falls within the scope of both conditions 9.4A.1 and 9.4A.2.</p> <p>9.4A.5 Condition 9.4A.3 shall apply to all of the Dominant Provider’s charges that Ofcom requires to be fair and reasonable. [Retain only if Ofcom rejects our suggestion to prescribe a F&R cost standard]</p> <p>9.4B The Dominant Provider may implement an Access Change at any time by publishing an Access Change Notice on its website not less than 28 calendar days before the change is due to take effect or within such other period that Ofcom may direct, in order to comply with any legal or regulatory obligation.</p> <p>9.4C Excluding the circumstances referred to in condition 9.4B, the Dominant Provider may implement any other Access Change at any time by publishing an Access Change Notice on its website and by sending a copy to every person with whom it has entered into an Access Agreement pursuant to conditions 1 and/or 2 (as applicable) not less than 90 calendar days before the change is due to take effect, in order to:</p> <ul style="list-style-type: none"> (a) maintain the integrity or security of any network access services supplied by the Dominant Provider and/or the Dominant Provider’s electronic communications network; or (b) introduce or withdraw Service features (but only to the extent permitted by law or regulation, and subject to such notice that may be required by law or regulation); or (c) introduce improved service levels, service level guarantees and compensation payments payable on a breach; or (d) introduce process changes to improve the quality of any network access services supplied by the Dominant Provider; or (e) make corrections to typographical errors; <p>9.4D An Access Change referred to in condition 9.4C shall come into effect on the date specified in the Access Change Notice unless:</p> <ul style="list-style-type: none"> (a) the Access Change materially adversely affects the supply of any network access services that the Dominant Provider provides to any Third Party under a Reference Offer; and 	
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			<p>(b) a Third Party sends a written notice of objection to the Dominant Provider before the effective date, in which case, the Access Change shall not come into effect.</p> <p>9.4E The Dominant Provider or any Third Party may propose any other change to a Reference Offer at any time by giving written notice to the other. Where the proposer is the Dominant Party, it must also publish a proposed Access Change Notice on its website and send a copy to each Third Party.</p>	



		<p>9.4F The Dominant Provider may implement Access Changes proposed by it or a Third Party or Access Charge Changes proposed by Third Parties in accordance with the following procedure:</p> <ul style="list-style-type: none">(a) The Dominant Provider must negotiate to vary its Reference Offer in good faith with a group of customers which it reasonably believes is representative of Third Parties and/or potential customers for its products (the “Third Party Contracts Group”).(b) The Dominant Provider must record all agreed changes in an Access Change Notice and/or Access Charge Change Notice and publish the notice on its website and by send a copy to each Third Party at least 90 calendar days before the effective date specified in the notice.(c) For the avoidance of doubt, the Dominant Provider may only vary its Reference Offer in accordance with this condition 9.4F to the extent it and the Third Party Contracts Group agree to the variation. <p>9.5 The Dominant Provider must include the following in each Access Charge Change Notice and Access Charge Notice (as applicable) — (a) a description of the network access in question;</p> <ul style="list-style-type: none">(b) a reference to the location in the Dominant Provider’s current Reference Offer of the terms and conditions associated with the provision of that network access;(c) the current and proposed new charge and/or current and proposed new terms and conditions (as applicable); and	
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			<p>(d) the date on which, or the period for which, the Access Change or Access Charge Change will take effect (the “effective date”).</p> <p>9.6 The Dominant Provider must not apply any Access Change or Access Charge Change before the effective date specified in the applicable Access Change Notice or Access Charge Change Notice.</p> <p>9.7 Subject to condition 5, to the extent that the Dominant Provider provides network access to itself that—</p> <p>(a) is the same, similar or equivalent to any network access services that the Dominant Provider provides to any Third Party; or</p> <p>(b) may be used by the Dominant Provider for a purpose that is the same, similar or equivalent to that used by any Third Party,</p> <p>in a manner that differs from that detailed in an Access Change Notice or Access Charge Change Notice, the Dominant Provider must send written notice to Ofcom specifying :</p> <p>(i) at least those matters detailed in conditions 9.5(a) to (d), and</p> <p>(ii) where the Dominant Provider amends the charges, terms and conditions on which it provides such network access to itself, it must send Ofcom a notice equivalent to an Access Change Notice or an Access Charge Change Notice (as applicable).</p> <p>[The meaning in this clause was unclear, so we have suggested improvements to the drafting.]</p> <p>9.8 In this condition 9:</p> <p>(a) “Access Change” means any amendment to the terms and conditions on which the Dominant Provider provides network access, other than an Access Charge Change; and</p> <p>(b) “Access Change Notice” means a notice given by the Dominant Provider or a Third Party of a proposed Access Change.</p>	

			<p>(c) "Access Charge Change" means any amendment to the Dominant Provider's charges for the provision of network access or for new network access;</p>	
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			<p>(e) "Access Charge Change Notice" means a notice given by the Dominant Provider or a Third Party of a proposed Access Charge Change;</p> <p>[Definition not in correct alphabetical order][Definition not in correct alphabetical order](c) "Special Offer" means a temporary price reduction for a particular product or service, applicable to all customers on a non-discriminatory basis, which is stated to apply for a limited and predefined period and where the price immediately on expiry of that period is no higher than the price immediately before the start of that period;</p> <p>[This terminology is confusing] [This terminology is confusing]</p>	
WLA SMP conditions (Annex 23, main condoc)	Condition 12	Regulatory financial reporting	<p>This condition is common to most, if not all SMP conditions that Ofcom publishes following a market review.</p> <p>For the sake of consistency and for ease of administration, Ofcom should consider (1) publishing one SMP condition on regulatory financial reporting that is common to all market reviews, and (2) incorporating these by reference into each fresh set SMP conditions following a market review, together with any pertinent amendments applicable to specific regulated services.</p>	Policy suggestion.



<p>WLA SMP conditions, directions (Annex 23, main condoc)</p> <p>QoS SMP conditions (Annex 8, QoS condoc)</p>	<p>Various parts of the legal instruments</p> <p>See e.g. page 12, para 2 of the WLA SMP conditions</p>	<p>Definitions of BT's regulated products</p>	<p>A number of regulatory rules in the legal instruments are defined with reference BT's own descriptions for regulated products. This can lead to abuse, particularly if BT later chooses attempts to define new products and variants so as to avoid regulation.</p> <p>As a matter of policy and principle, Ofcom should:</p> <ul style="list-style-type: none"> replace all BT product names contained in all legal instruments with more neutral terms, define the parameters of regulated services on their own terms rather than with reference to BT's product descriptions. 	<p>Substantive error.</p>
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			<p>By way of illustration in the context of VULA all references to GEA, GEA-FTTC and GEA-FFTP should be substituted with references to VULA, VULA-FTTC or FFTP, where applicable.</p>	

<p>QoS SMP conditions (Annex 8, QoS condoc)</p>	<p>Various – see eg page 254, para 24.h</p>	<p>Definition – fault</p>	<p>The definition applies only where the degradation or problem is identified by BT or a third party customer. We do not agree that this is the intention, since it could be interpreted in a way that excludes faults identified by end users. The definition also suggests that the appropriate test is whether BT has been made aware of the fault; and</p> <p>Also, the definition applies only where the degradation or problem is “registered on the Dominant Provider’s operational support system”. There is no reason why the existence of a fault should rely on a matter within BT’s control, which would incentivise it to have poor operational support systems. It also creates a situation where BT can resolve a fault by declaring it “right when tested” (“RWT”) and then removing the fault from its systems. Clarification of the types of fault clears that should be included in the fault repair metric is required.</p>	<p>Substantive error</p>
<p>WLA SMP conditions (Annex 23, main condoc)</p> <p>QoS SMP conditions (Annex 8, QoS condoc)</p>	<p>WLA: page 10, paras 1(t), (u), (v), (w), (x) & (y)</p> <p>QoS: page 225, paras 14(xxiii), (xxiv)</p>	<p>Definitions of service management levels (SMLs)</p>	<p>Ofcom has defined SMLs (including regulated SMLs) with reference to the definitions in BT’s reference offers rather than in the SMP conditions themselves. As a matter of law and policy, Ofcom (not BT) should define regulated SMLs in the legal instruments. Moreover, this leaves gaps in the SMP conditions, because not all of BT’s reference offers define all SMLs (in particular, SML 1 is not defined, and neither is SML 2.5).</p> <p>One option available to Ofcom would be to lift and harmonise the various SML definitions from BT’s reference offers for its WLA products, and to replicate these in the SMP conditions, but only where appropriate. In particular, we caution against defining SMLs with reference to the agreed appointment day (as BT’s reference offers currently do), as this could potentially allow BT to game the system by delaying appointments, and thus fixing faults. In standard commercial contracts, it is common for fault restoration times to be defined in absolute terms – usually with reference to when the fault is notified to the service provider. Extrapolating the SML</p>	<p>Substantive error.</p>



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			<p>definitions in BT’s GEA reference offer as an example, this approach would necessitate the following amendments.</p> <p>“Service Maintenance Level” means the time period within which the Dominant Provider must resolve a Fault affecting the provision of MPF, Shared Access or VULA services to Third Parties, as applicable ;</p> <p>“Service Maintenance Level 1” means [definition to be inserted];</p> <p>“Service Maintenance Level 2” means the clearance of a fault no later than 23:59 hours on the day following the day the fault report is received by the Dominant Provider, excluding Sunday, Bank and Public Holidays;</p> <p>“Service Maintenance Level 2.5” means [definition to be inserted];</p> <p>“Service Maintenance Level 3” means:</p> <p>(a) the clearance of a fault no later than 23:59 hours on the same day if the Fault is received by the Dominant Provider before 13:00 hours, or</p> <p>(b) the clearance of a fault no later than 12:59 hours on the next day following the Fault report is received by the Dominant Provider if the Fault is reported between 13:00 hours and 23:59 hours,</p> <p>,</p> <p>whichever is the latest;</p> <p>“Service Maintenance Level 4” means the clearance of a Fault no later than 6 hours from the fault being received by the Dominant Provider;</p>	
QoS SMP conditions (Annex 8, QoS condoc)	Various – see eg page 223, para 14.xv	Definition – “MBORC”	<p>Ofcom has defined MBORCs with reference to the definitions in BT’s reference offers rather than in the SMP conditions themselves. The implication is that BT can alter the definition of an MBORC.</p> <p>As a matter of law and policy, Ofcom (not BT) should define the parameters of MBORCs in the legal instruments. The definition should restrict MBORCs to events that are genuinely beyond BT’s reasonable control.</p>	Substantive error.



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			<p>One option would be to import a standard definition of a force majeure event from one of BT's reference offers, but to exclude MBORCs that were contractually introduced by BT, which do not actually fall within BT's reasonable control – such as industrial action for example. By way of illustration, Ofcom could easily use the following definition from the dark fibre contract, in place of the existing definition in the SMP conditions subject to the amendments below.</p> <p>“MBORC” means a matter beyond our reasonable control, that is, a force majeure event that is beyond the reasonable control of the Dominant Provider. MBORCs include the following events, but only to the extent that the event is genuinely beyond the Dominant Provider's reasonable control:</p> <ul style="list-style-type: none"> (a) an act of God or force of nature (including fire, earthquake, flood, lightning, landslide and weather of exceptional severity); (b) a serious incident, the cause of which is unconnected to the Dominant Provider (including an explosion, radioactive contamination, sabotage, riot, insurrection, terrorism or civil disorder); (c) a change of law applicable to the Dominant Provider, but only to the extent that the change was not reasonably foreseeable by the Dominant Provider; <p>[Not necessary as covered by (a)]; [Not necessary as covered by reworked (b)]</p> <ul style="list-style-type: none"> (f) military operations or war (whether declared or not); or (g) acts, omissions or delays of governmental authorities but only to the extent not caused by the acts or omissions of the Dominant Provider; <p>[Not necessary as third party acts not connected to BT area already covered by (b). The latter part of the definition is also legally wrong, as employees and servants are not contractors.]</p> <ul style="list-style-type: none"> (i) acts of animals. 	
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			<p>For the avoidance of doubt, the Dominant Provider is responsible for the acts and omissions all of its employees and contractors (including suppliers and agents),</p>	
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QoS SMP conditions (Annex 8, QoS condoc)	Various – see eg page 223, para 14.xiii	Definition – “High Level MBORC Declaration”	<p>This definition is circular and gives no clue as to the types of MBORCs that qualify as “High Level”. Simply stating that an MBORC should be “major” in order to be “High Level” is not good enough. Because the definition is so vague, it is also likely to be legally enforceable.</p> <p>Ofcom also defines MBORCs as “high level” with reference to whether they are declared by as such by BT. This is not an objective standard. The definition should specify objective criteria that must be satisfied for the definition to be met. Options include referencing the definition to the number of customers affected by the MBORC in the region, or the geographic coverage area affected within the region.</p> <p>With this in mind, we suggest amending the definition of a “high level MBORC declaration” along the following lines:</p> <p style="padding-left: 40px;">“High Level MBORC” means any MBORC affecting network access to MPF, WLR or VULA, as applicable which meets one or more of the following thresholds:</p>	Substantive error.



			<table border="1"> <tr> <td>Minimum number of end customers affected</td> <td></td> </tr> <tr> <td>Minimum duration of service loss or major disruption</td> <td></td> </tr> <tr> <td>Minimum number of Relevant Regions affected</td> <td></td> </tr> </table>	Minimum number of end customers affected		Minimum duration of service loss or major disruption		Minimum number of Relevant Regions affected		
Minimum number of end customers affected										
Minimum duration of service loss or major disruption										
Minimum number of Relevant Regions affected										
QoS SMP conditions (Annex 8, QoS condoc)	Various – see eg page 255, para 24.s	Definition – “local MBORC declaration”	<p>This definition is circular and unworkable for the same reasons as those given in relation to “high level” MBORCs. It would also be simpler to define local MBORCs to refer to all MBORCs which are not “high level” MBORCs.</p> <p>We suggest the following amendments to the existing definition:</p> <p>“Local MBORC” means any MBORC affecting network access to MPF, WLR or GEA services, as applicable, which is not a High Level MBORC</p>							

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QoS SMP conditions (Annex 8, QoS condoc)	Various – see eg page 224, para 14.xix	Definition – “Relevant Region”	<p>This definition allows BT to specify the geographic parameters of each relevant reason. The implication is that BT can “gerrymander” regions so as to avoid liability for exceeding the MBORC threshold.</p> <p>As a matter of law and policy, Ofcom (not BT) should define the geographic parameters of each relevant region with reference to objective criteria – such as a map published by Ordnance Survey. This would entail the following adjustments to the definition.</p> <p>“Relevant Region” means the following ten regions, as defined by Ordnance Survey Limited or its successor in title:</p> <p>... [text omitted]</p> <p>or other such regions as OFCOM may direct from time to time, but which cumulatively at all times cover the wholesale local access market in the UK, as applicable, excluding the Hull Area</p>	Substantive error.
QoS SMP conditions (Annex 8, QoS condoc)	Part I, pages 227-229	QoS obligations – WLR, MPF and VULA-FTTC	<p>The QoS standards only extend to GEA-FTTC. FTTP services should also be included. The QoS standards extend to installations and fault repairs only. There are no specific obligations for engineers to keep their appointments for a certain percentage of the time. It is not clear why Ofcom has chosen not to address missed or delayed engineer appointments, as this directly impacts on the ability of BT’s competitors to provide a good quality of service to their end customers. Engineer availability is a factor that falls squarely within BT’s control and should be subject to QoS targets.</p>	Substantive error.
QoS SMP conditions (Annex 8, QoS condoc)	Part II, Pages 242-267	KPIs – WLR, MPF, GEA-FTTC	<p>BT should be required to report on both (1) missed and delayed engineer appointments and on (2) GEA-FTTP installations and fault repairs.</p>	Substantive error.
QoS SMP conditions		No proactive compensation	<p>There are no proactive obligations on BT to compensate CPs or to pay a regulatory penalty if it breaches its contractual or QoS obligations. The automatic linkage of</p>	Substantive error.
Document	Para	Issue	Potential rectification	Category



(Annex 8, QoS conduc)			compensation / fines to performance is necessary to ensure that the legal instruments are effective.	
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