



# Review of the wholesale fixed analogue exchange lines markets

Statement on market definition, market power  
determinations and remedies

Statement

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# Contents

Section		Page
1	Summary	1
2	Introduction	4
3	Market definition	9
4	Market power assessment	13
5	General SMP remedies for BT and KCOM	17
6	Specific remedy for BT (WLR)	45
7	Specific remedy for BT (WLR charge control)	52
<b>Annex</b>		<b>Page</b>
1	Legal instruments	56
2	Legal Instrument: Direction	84
3	Additional representations	91

## Section 1

# Summary

## Overview

- 1.1 This document sets out our concluding analysis of the competitive conditions operating in the wholesale fixed analogue exchange line services market in the period up to April 2014, and the measures that we are taking to address the competition issues we have identified. These measures are intended to ensure that consumers do not have to pay excessive prices for these services, and that they have more choice. We published our proposals on these issues in October 2010 (“the Consultation”).<sup>1</sup>

## The market review

- 1.2 This market review has considered the wholesale input that is needed to provide fixed telephone services to residential and business consumers. For this reason, the outcome of this market review is important to consumers as the cost and reliability of wholesale fixed analogue exchange lines will be reflected in the retail products provided to consumers.

## Background

- 1.3 In September 2009, we concluded our Review of the fixed narrowband services wholesale markets (“the September 2009 Wholesale Review”), which assessed the wholesale analogue exchange line services market.<sup>2</sup> In that review we imposed a range of general network access and non-discrimination obligations on BT and KCOM, based on findings of significant market power (“SMP”) in that market. In addition to these general obligations, we also set a specific obligation on BT to supply analogue wholesale line rental (“WLR”) and subsequently set a charge control for this product. The current WLR charge control applying in this market expires at the end of March 2011 and we consider it necessary to review this market now in order to determine whether SMP regulation remains appropriate, and where we consider it is required what form it should take. This includes an assessment of whether a new WLR charge control is needed beyond March 2011.
- 1.4 In the September 2009 Wholesale Review, we also reviewed the wholesale narrowband call origination, call termination, conveyance, transit and ISDN2 exchange lines markets. However, this review does not consider any of these markets and is only concerned with the wholesale fixed analogue exchange line services market.
- 1.5 Since the September 2009 Wholesale Review there have been two key developments. First, there has been significant growth in the use of local loop unbundling (“LLU”) for the provision of telephone services. Second, the scale of planned next generation access (“NGA”) deployment by BT has increased.

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<sup>1</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/summary/main.pdf>

<sup>2</sup> *Review of the fixed narrowband services wholesale markets: Statement on the markets, market power determinations and remedies including further consultation*, Statement and consultation, 15 September 2009, at [http://stakeholders.ofcom.org.uk/binaries/consultations/wnmr\\_statement\\_consultation/summary/main.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wnmr_statement_consultation/summary/main.pdf)

## Summary of our decisions

- 1.6 This document should be read in conjunction with the Consultation, which sets out our original analysis. Our conclusions in this statement draw from that original analysis and build on it by setting out our further consideration of issues that have been raised by respondents to the Consultation. A summary of our final conclusions for this market review is set out below.

### Market definition

- 1.7 We conclude that the relevant product market is that of wholesale fixed analogue exchange line services.
- 1.8 We conclude that there are two separate geographic markets for wholesale fixed analogue exchange line services:
- The UK, excluding the Hull Area; and
  - The Hull Area.

### Market power assessment

- 1.9 Our SMP findings in the wholesale fixed analogue exchange line services market are as follows:
- BT has SMP in the wholesale fixed analogue exchange line services market in the UK, excluding the Hull Area; and
  - KCOM has SMP in the wholesale fixed analogue exchange line services market in the Hull Area.
- 1.10 We have found that SMP in both of these markets has persisted over time, and is likely to remain for the period of this review i.e. until April 2014. We have therefore decided to impose regulatory requirements on BT and KCOM to address the identified competition problems.

### Remedies

- 1.11 In the market where BT retains SMP, we are imposing both general and product specific remedies (i.e. analogue WLR and an associated charge control) so that other communications providers (“CPs”) are able to gain access to services that allow them to provide retail products in competition with BT. These wholesale remedies are unchanged from those that are currently in place.
- 1.12 In the market where KCOM retains SMP, we are imposing a number of general remedies so that other CPs are able to request access to services that will enable them to provide retail products in competition with KCOM. These general remedies remain unchanged from those that are currently in place, except for the imposition of an additional network access remedy that requires KCOM to create a Statement of Requirements (“SOR”) process, in order to provide additional transparency for potential entrants into the Hull market.

## **Next steps**

- 1.13 We will be consulting on our detailed charge control proposals in early 2011. This consultation will consider the proposed form, level and duration of the new analogue WLR charge control on BT and all other aspects of its implementation.

## Section 2

# Introduction

## Scope of this statement

- 2.1 This document considers the markets for wholesale fixed analogue exchange line services. In this statement we define these markets, conclude whether any undertakings have SMP in any of these markets and, where SMP exists, impose appropriate remedies.
- 2.2 The structure of this Section is as follows:
- The analytical approach and regulatory framework for market reviews
  - Markets considered in this review
  - A forward look at market developments
  - Impact assessments
  - Consultation responses
  - Outline of the rest of the document

## The analytical approach and regulatory framework for market reviews

- 2.3 In the Consultation we set out in detail both the analytical approach (Annex 5) and the regulatory framework (Annex 6) applying to this market review. We have not set those Annexes out again in this statement. Our further considerations on market definition, SMP and remedies in light of stakeholder responses follow the same approach as those that we set out in the Consultation. In particular in reaching our decisions on:
- **Market definition:** we have taken the utmost account of the European Commission's Recommendation on relevant product and services markets<sup>3</sup> and accompanying Explanatory memorandum<sup>4</sup>;
  - **SMP:** we have taken utmost account of both the Commission guidelines (Guidelines for market analysis and the assessment of SMP)<sup>5</sup> and guidance produced by Oftel in relation to the criteria to assess effective competition;<sup>6</sup> and

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<sup>3</sup> Commission Recommendation of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services, 2007/879/EC, OJ L344, 28.12.2007, p. 65-69, at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:EN:PDF>

<sup>4</sup> Explanatory Memorandum to the Commission Recommendation of 17 December 2007 on relevant Product and Service Markets, Commission Staff Working Document, SEC(2007) 1483 final, Brussels, at [http://ec.europa.eu/information\\_society/policy/ecomms/doc/library/proposals/sec2007\\_1483\\_final.pdf](http://ec.europa.eu/information_society/policy/ecomms/doc/library/proposals/sec2007_1483_final.pdf)

<sup>5</sup> Commission guidelines on market analysis and the assessment of significant market power under

- **Remedies:** we consider that they comply with the requirements of section 47(2) of the Communications Act (“the Act”) ((and section 49(2) of the Act where applicable), in that we consider each to be objectively justifiable, not unduly discriminatory, proportionate and transparent. Furthermore, where remedies relate to network access and network access pricing we also consider that these comply with sections 87 and 88 of the Act. Also, overall, we consider that our decisions in this market review are consistent with our general duties and community duties set out in sections 3 and 4 of the Act.

2.4 The wholesale fixed analogue exchange line services market is not listed as one of the markets the European Commission identifies in its recommendation on markets for review by national regulatory authorities (“NRAs”). However, for the reasons set out in paragraph 2.9 of the Consultation we maintain our provisional view that the three criteria test, that the European Commission applies to markets that are susceptible to SMP regulation set out in the Recommendation on Markets, have been met in the wholesale fixed analogue exchange line services market.

## Markets considered in this review

2.5 This market review is limited to the consideration of the market for wholesale fixed analogue exchange line services. Wholesale fixed analogue exchange lines are intermediate products that are sold to CPs to enable them to provide a telephone connection (typically a single 64 kbit/s channel) from a customer’s premises to a local aggregation point (e.g. local exchange) in the access network. This connection provides consumers with the capability to consume other telephony services in the form of telephone calls, facsimile and dial-up internet access. The demand for wholesale analogue exchange lines is therefore derived from the demand for retail fixed analogue telephone lines.

## A forward look at market developments

2.6 In addition to considering the competitive conditions operating in the market at present, market reviews also look ahead to how those conditions might change in the future. Our evaluation of the current market therefore takes into account historic and likely future developments effecting competition. In this market review, we have looked at potential developments up to April 2014.

2.7 The forward look period that we have used allows for the possibility of the next review taking place within that timeframe. However, it does not preclude us reviewing the market before that point should the market develop in way we have not foreseen. In determining when to undertake the next review, we will consider the new procedures and timeframes for conducting market reviews introduced by the amendments to the EU regulatory framework. Those requirements will apply in the UK from May 2011.

## Impact assessments

2.8 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best

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*the Community regulatory framework for electronic communications networks and services*, Official Journal of the European Communities, C165, 11/7/2002, p. 6-31, at: [http://ec.europa.eu/information\\_society/topics/telecoms/regulatory/new\\_rf/documents/smp\\_guidelines/c\\_16520020711en00060031.pdf](http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/documents/smp_guidelines/c_16520020711en00060031.pdf)

<sup>6</sup> *Oftel’s market review guidelines: Criteria for the assessment of significant market power*, 5 August 2002, at [http://www.ofcom.org.uk/static/archive/oftel/publications/about\\_oftel/2002/smpg0802.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/about_oftel/2002/smpg0802.pdf)



practice policy-making. This is reflected in section 7 of the Act,<sup>7</sup> which requires that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or where there is a major change in our activities. However, as a matter of policy, we are committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions.

- 2.9 The analysis presented in this review represents an impact assessment, as defined in section 7 of the Act. This statement adopts the analysis undertaken in the Consultation and sets out any additional information and responses to that consultation. In particular, in Section 3 we explain our conclusions on market definition. In Section 4 we conclude as to whether or not any CP holds SMP in a particular market and in Sections 5 to 7 we consider what the appropriate remedies are for each market where we have found SMP. Taking all of our analysis from the Consultation and this statement into account, we have discussed the relevant considerations and the options we have considered, including their impact, before reaching our conclusions.
- 2.10 We also have equality impact assessment (“EIA”) requirements, to assess the potential impacts of our decision on race, disability and gender equality. We do not believe that our conclusions in this statement, which build on our proposals in the Consultation, will be to the detriment of any group in society. In particular, we do not consider that they will have a differential impact on consumers in different parts of the UK or on consumers with low incomes.
- 2.11 We have not carried out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes. This is because we do not believe that the policies presented here would have a different impact on people of different gender or ethnicity, on consumers in Northern Ireland or on disabled consumers compared to consumers in general.
- 2.12 No stakeholders made representations about the approach that we have taken. We therefore adopt the position we set out in the Consultation.

## Consultation responses

2.13 We received eight non-confidential responses to the Consultation from:

- BT;
- Cable & Wireless (“C&W”);
- The European Commission (“the Commission”);
- Federation of Communications Services (“FCS”);
- KCOM;
- Network Services.com Ltd (“Network Services.com”);
- Scottish and Southern Energy (“SSE”); and
- Virgin Media.

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<sup>7</sup> See paragraphs A6.39-A6.43 of Annex 6 to the Consultation

- 2.14 These non-confidential responses have been published on our web site.<sup>8</sup> We also received one confidential response to the Consultation.

## Outline of the rest of this document

- 2.15 In our market review statements we normally publish our complete analysis, reasoning, information and other data, including what has already been published in the previous corresponding consultation(s), together with any modifications to our proposals. We believe that this approach is often advantageous to stakeholders in understanding the full reasoning of our decisions. However, given that we have decided to adopt the proposals in relation to market definition and market analysis as set out in the Consultation we have decided to take a different approach in this case.
- 2.16 For market definition and analysis (including our SMP assessment), we have reached the conclusions set out in the following Sections of this statement by relying on the analysis, reasoning, information and other data set out in the Consultation. We therefore confine this statement to setting out our conclusions and our response to stakeholders' submissions. Accordingly, this statement needs to be read in conjunction with the Consultation in order to understand our full reasoning and evidence.
- 2.17 In relation to remedies, however, this statement sets out our full reasoning in reaching our conclusions on each remedy, including our assessment of various legal tests set out in the Act. This reasoning still needs to be read in conjunction with the Consultation, where we set out (among other things) our initial impact assessment in relation to the proposed remedies.

## Representations directly connected to this market review

- 2.18 We summarise the responses relevant to this market review and our position on these in the relevant Sections of this statement. Our conclusions in this statement are drawn from the analysis presented in the Consultation and the further consideration of issues that have been raised by respondents to the Consultation.

## Other representations

- 2.19 Some respondents made representations that either concern subsequent analysis that we will undertake for the analogue WLR charge control, or which has no direct bearing on the assessment which we presented in the Consultation. For the purpose of completeness, we set out our position on these matters in Annex 3.
- 2.20 The rest of this document is structured as follows:
- Section 3 – Market definition
  - Section 4 – Market power assessment
  - Section 5 – General SMP remedies for BT and KCOM
  - Section 6 – Specific remedy for BT (WLR)
  - Section 7 – Specific remedy for BT (WLR charge control)

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<sup>8</sup> <http://stakeholders.ofcom.org.uk/consultations/review-wholesale-fixed-exchange/?showResponses=true>

- Section 8 – Revocation and amendment of regulation
- Annex 1 – Legal instruments
- Annex 2 – Legal instrument: Direction
- Annex 3 – Additional representations

## Section 3

# Market definition

## Introduction

3.1 The purpose of this section is to define the relevant wholesale markets. The structure of this Section is as follows:

- Market Definition – consultation proposals
- Summary and analysis of consultation responses
- Conclusions

## Market definition – consultation proposals

### Retail market

3.2 End users' demand for telephony services drives the demand for wholesale fixed analogue exchange lines. These wholesale services form a key element in enabling CPs to provide retail customers with line rental and access to other basic telephony services such as voice calls, fax and dial-up data services.

3.3 Therefore, before formulating our proposals in the Consultation on the relevant wholesale market we first considered the scope of the relevant retail markets. We did this assuming the absence of any SMP regulation at the wholesale level. This assessment is set out in paragraphs 3.29 to 3.37 of the Consultation. Our analysis drew on the analysis carried out for the September 2009 Wholesale Review and the September 2009 fixed narrowband retail services markets review (“the September 2009 Retail Review”)<sup>9</sup>. The key points of our overall assessment are as follows:

- Mobile and fixed access are in separate markets;
- Fixed access and calls are in separate markets;
- Digital and analogue access are in separate markets;
- Alternative forms of network infrastructure that are used to provide fixed analogue exchange lines, are in the same market;
- Residential and business access services are in separate markets; and
- There are two separate geographic markets: the UK, excluding the Hull Area, and the Hull Area.

3.4 As a result of this assessment, we did not find evidence that the retail markets identified in the September 2009 Retail Review had materially changed, or are likely to do so, in the period to April 2014. Therefore, we proposed to conclude that the

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<sup>9</sup> *Fixed Narrowband Retail Services Markets: Identification of markets and determination of market power*, Statement, 15 September 2009, at [http://stakeholders.ofcom.org.uk/binaries/consultations/retail\\_markets/statement/statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/retail_markets/statement/statement.pdf)

retail markets for fixed narrowband analogue access remain the same as those defined in the September 2009 Retail Review; that is, that there are separate retail product markets for:

- Residential fixed narrowband analogue access; and
- Business fixed narrowband analogue access.

3.5 For the retail product markets identified above we proposed to define two separate geographic markets: the UK excluding the Hull Area; and the Hull Area.

### **Wholesale market**

3.6 Having identified the relevant retail markets we then assessed the relevant markets at the wholesale level. Taking the same approach as we did when considering the retail market, we need to assume the absence of any SMP regulation at the wholesale level when making our assessment. We did, however, take any upstream SMP regulation (e.g. LLU) into account when making this assessment.

3.7 The wholesale market assessment is set out in paragraphs 3.38 to 3.90 of the Consultation. The key points of that assessment are as follows:

- Mobile and fixed access are in separate markets and this is unlikely to change in the period covered by this review;
- Alternative forms of fixed networks (e.g., cable and LLU) are in the same market based on an indirect constraint from the retail market;
- Residential and business access services are in the same market;
- Digital and analogue access are in separate markets;
- NGA deployments are unlikely to have a significant effect on this market in the period covered by this review;
- Voice over Internet Protocol (“VoIP”) is not a substitute for fixed analogue access and as such is unlikely to have any direct implications on our market definition; and
- There are two separate geographic markets; The UK excluding the Hull Area and the Hull Area.

3.8 Based on the above assessment we proposed to find that the relevant wholesale product markets are:

- Wholesale fixed analogue exchange line services in the UK, excluding the Hull Area; and
- Wholesale fixed analogue exchange line services in the Hull Area.

3.9 In undertaking our analysis of the wholesale markets, we also considered the likelihood of relevant competitive and technical developments that might affect these market definitions, concerning mainly: the deployment of NGA; increased fixed/mobile convergence (“FMC”); Voice over Internet Protocol (“VoIP”); and the likely development of existing technologies. We did not consider that any of these

developments would affect our proposed market definition over the forward looking period.

## Summary and analysis of consultation responses

3.10 We asked the following question relating to the market definition

*Do you agree with Ofcom's proposed wholesale market definition? If not, please explain why.*

### Consultation responses

- 3.11 Eight of the nine respondents to the Consultation either agreed with our proposed wholesale market definitions, or made no comment on them.
- 3.12 BT, whilst agreeing with our proposed market definition, in the context of our proposed market power assessment argued that broadband based voice products including VoIP and Femtocells (which we excluded from the product market definition) would play an increasing role in the market. As this is largely a market definition issue, we address it here.
- 3.13 KCOM was the only respondent that explicitly disagreed with our proposed market definition, arguing that we should consider more fully the constraints that alternative access solutions (specifically leased lines) place on fixed analogue exchange lines in the Hull Area before reaching a conclusion. Although KCOM have not drawn an explicit conclusion, we assume from the logic of the arguments it has made that it considers the retail and wholesale product markets for fixed analogue exchange line services to be broader than those which we have defined for the Hull Area (i.e. that they should include certain leased lines and on that basis KCOM may not have SMP).
- 3.14 KCOM supported its argument by reference to trends in their aggregate volumes of business analogue exchange lines and leased lines. Over the past 5 years KCOM has seen a seven per cent decline in analogue exchange lines and KCOM notes the decline is particularly strong for the business element. KCOM has also seen increased competition for leased line connections. They argue that recent trends suggest leased lines act as a constraint on KCOM's provision of business fixed analogue exchange line services.

### Ofcom's response

- 3.15 Regarding BT's argument we maintain for the reasons set out in paragraphs 3.74 to 3.77 of the Consultation that these should be excluded from the market definition for the purpose of this review. BT offers no new evidence to challenge this view.
- 3.16 Regarding KCOM's argument about VOIP and Femtocells we take the view that leased lines services offer customers a different set of capabilities at different price points to analogue fixed exchange lines, with substitution to alternative forms of access being quite limited. They therefore cannot be regarded as being in the same product market. More specifically:
- To the extent that they provide a constraint at all, they are much more likely to do so in the digital exchange lines market (predominantly ISDN30 access).

- The information supplied by KCOM simply describes the pattern of demand for business exchange lines, which despite some decline in KCOM's volumes, has remained relatively static. It offers no economic evidence that the constraint is sufficiently strong to include leased lines in the relevant product market.
- 3.17 In particular, regarding the second bullet point, we note that it is insufficient to judge demand-side substitutability between products by looking at trends in aggregate volumes. Even if demand for one product is growing at the expense of another, this does not necessarily mean that the products are substitutes on the basis of a SSNIP test. Customers may change their purchasing decisions as their individual requirements evolve or as new products become available. A SSNIP test requires that customers are prepared to switch between different (substitute) products in response to relative price changes. KCOM does not provide evidence on this.<sup>10</sup>
- 3.18 On the basis of the evidence presented to us by KCOM, we do not consider that either the indirect or direct constraints analysis of the wholesale market that we set out in the consultation is undermined and are therefore not proposing to revise our conclusions on market definition.

## Conclusions

### Conclusions on market definition

- 3.19 Having carefully considered all of the responses, including the detailed submission made by KCOM, we remain of the view that the relevant product markets are:
- wholesale fixed analogue exchange line services in the UK, excluding the Hull Area; and
  - wholesale fixed analogue exchange line services in the Hull Area.
- 3.20 Our conclusions on market definition in this market review are the same as those proposed in the Consultation and the same as those adopted in the September 2009 Wholesale Review. A full assessment of this market definition is given in Section 3 of the Consultation and we adopt that analysis as part of our conclusions.

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<sup>10</sup> Furthermore, even if KCOM could show that some businesses regard the two products as close substitutes it would then need to show that this group comprises a large enough proportion of all analogue exchange lines to constrain its pricing.

## Section 4

# Market power assessment

## Introduction

- 4.1 Market definition is not an end in itself. The definition of the relevant economic market is carried out in order to identify the products and the geographic area over which an assessment can be made of operators' ability to act to an appreciable extent independently of competitors, customer and consumers, i.e., whether there are any operators that hold a position of SMP within a particular market.
- 4.2 In this section we set out our conclusions on the market position of CPs in each of the relevant markets defined in Section 3. That is, we consider whether any provider in those markets is individually or jointly dominant.<sup>11</sup> The structure of this section is as follows:
- Market power assessment - consultation proposals
  - Summary and analysis of consultation responses
  - Conclusions

## Market power assessment – consultation proposals

### In the UK, excluding the Hull Area

- 4.3 In the Consultation we proposed that BT had SMP in the wholesale fixed analogue exchange line services market in the UK excluding the Hull Area. This market power assessment is set out in paragraphs 4.3 to 4.15 of the Consultation. The key points of that assessment are as follows:
- BT's market share of wholesale analogue exchange lines was shown to be over 70%, which creates a presumption of market power.
  - The significant (sunk) investment required to set up an access network presents a substantial barrier to entry. While the existence of LLU reduces the cost of deploying access network products (as it allows a CP to use BT's existing infrastructure) the investment required to deploy narrowband services over LLU remains substantial and it seems unlikely that additional CPs will enter this market based on LLU.
  - BT has significant economies of scale and scope in the wholesale fixed analogue exchange line services market, due mainly to its access infrastructure, which is able to support a range of other communication services.

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<sup>11</sup> An undertakings will be deemed to have SMP if either individually or jointly with others, it enjoys a position equivalent to dominance, that is to say a position of economic strength affording it the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.



- We did not consider that other CPs were likely to possess sufficient countervailing buyer power to undermine BT's market power given the limited availability of alternative suppliers.
- We noted that BT's prices had been charge controlled for analogue WLR and BT has so far set its analogue WLR charge to the maximum level permitted by the charge control.
- We noted that the new upstream access remedies recently introduced under the Wholesale Local Access ("WLA") market could possibly provide a competitive constraint in this market in the future, but that it was too early to assess the likely impact.
- We concluded that LLU was unlikely to have a significant effect on BT's SMP in this market in the next three and a half years; and
- We did not expect any significant changes over the next three and a half years that would affect our proposed conclusions.

4.4 Overall, we considered that BT's market share was strong evidence of SMP and that there were no features of the market that would negate the presumption of SMP.

### **The Hull Area**

4.5 In the Consultation we proposed that KCOM had SMP in the wholesale fixed analogue exchange line services market in the Hull Area. This market power assessment is set out in paragraphs 4.16 to 4.19 of the Consultation. The key points of that assessment are as follows:

- KCOM is the only supplier of wholesale fixed analogue exchange lines, and is the main supplier (98% of market share) of retail narrowband access services in the Hull Area. As KCOM has 100% of the wholesale market in the Hull Area, this creates a presumption of market power;
- The barriers to entry in the wholesale fixed analogue exchange line services market in the Hull Area are similar to those in the exchange line markets in the rest of the UK; and
- While the relevant wholesale fixed analogue exchange line services market in the Hull Area is much smaller than in the rest of the UK, the assessment of the other SMP criteria as applied to BT in the rest of the UK equally relate to KCOM and the Hull Area. This suggests that KCOM would not be constrained in its pricing of these services.

4.6 Overall we considered that KCOM's market share was strong evidence of SMP and that there were no features of the market that would negate the presumption of SMP.

### **Forward look**

4.7 For the reasons set out at paragraphs 4.20 to 4.26 of the Consultation, we explained that we did not expect any significant changes over the next three and a half years that would affect our proposed conclusions. In particular:

- We did not foresee new entry through NGA which would undermine SMP;

- We noted that the new upstream access remedies recently introduced under the Wholesale Local Access (“WLA”) market could possibly provide a competitive constraint in this market in the future, but that it was too early to assess the likely impact;
- We did not believe that fixed to mobile convergence would significantly affect the existence of SMP; and
- We concluded that LLU was unlikely to have a significant effect on BT’s SMP in this market in the next three and a half years.

4.8 After considering these possible future developments in the Consultation, our provisional view was that our assessment of market power and the findings of SMP in the relevant markets were unlikely to change in the period covered by the review.

## Summary and analysis of consultation responses

4.9 We asked the following questions relating to our market power assessment:

*Do you agree with Ofcom’s proposed assessment that BT has SMP in the wholesale fixed analogue exchange lines market in the UK, excluding the Hull Area; and KCOM has SMP in the same product market in the Hull Area? If not, please explain why.*

*Do you agree with Ofcom’s analysis of future developments that may affect these assessments? If not, please explain why.*

### Consultation responses

- 4.10 Seven of the nine respondents to the Consultation either agreed fully with our proposed findings of SMP in the defined wholesale markets and our assessment of the impact of likely market developments, or made no comment on them. Two respondents, BT and KCOM, while broadly accepting our proposals did not fully agree with our assessment. The points each of them raised are set out below.
- 4.11 BT agreed that it currently has SMP in this market but it considered that this may not be the case by the end of the market review period. In particular, BT considers that its market power will be reduced by competing suppliers’ investments in current generation access (CGA) and next generation access (NGA) deployments. In addition, they argue that the greater use of broadband based services (e.g. Femtocells) will also serve to significantly reduce its market power. Further, BT points to the growth in LLU, Virgin Media’s planned network extension and the prospective constraint imposed by the WLA upstream remedies that require BT to provide: sub-loop unbundling (“SLU”), physical infrastructure access (“PIA”) (otherwise known as duct and pole access) and virtual unbundled local access (“VULA”).
- 4.12 KCOM argued that the role of leased lines in the wholesale market is likely to reduce its market power.

### Ofcom’s response

- 4.13 While we note BT’s comments, in relation to CGA and NGA deployments, broadband based services, LLU and the other WLA remedies, we consider that we have already addressed these points in the Consultation. In particular, while we acknowledge that the infrastructure deployments identified by BT will serve to reduce BT’s market share over the period of the review, we still consider that BT will hold a high market

share by the end of the forward looking period and that the market developments will not undermine the SMP assessment that we set out in the Consultation. Further, we would note that since we exclude broadband based services from our market definition, developments in this area are not expected to impact BT's SMP even if they turn out to be large.

4.14 On BT's point about Virgin Media's planned network expansion to an additional 500,000 homes, we would note that this expansion equates to approximately two per cent of the total addressable market. Therefore, even if Virgin Media was to be highly successful in this expansion area we do not consider that it would undermine our finding that BT will continue to hold SMP over the period covered by this review.

4.15 In response to KCOM's point, since we do not agree that leased lines are in the same product market as wholesale analogue exchange lines (see Section 3), we do not consider that competition from suppliers of leased lines imposes a competitive constraint on KCOM's behaviour in the wholesale fixed analogue exchange line services market.

## Conclusions

4.16 Having carefully considered all of the responses, in particular the arguments and evidence presented by BT and KCOM, we remain of the view that:

- BT has SMP in the wholesale fixed analogue exchange line services market in the UK excluding the Hull Area; and
- KCOM has SMP in the wholesale fixed analogue exchange line services market in the Hull Area.

4.17 Our conclusions on market power assessment in this market review are the same as those proposed in the Consultation and the same as those adopted in the September 2009 Wholesale Review. A full assessment of this market power in the relevant markets is given in Section 4 of the Consultation and we adopt that analysis as part of our conclusions.

## Section 5

# General SMP remedies for BT and KCOM

## Introduction

- 5.1 In the Consultation we considered whether it was appropriate to impose general remedies (requirement to provide network access on reasonable request, requirement not to unduly discriminate, transparency obligations including accounting separation and cost orientation obligations including cost accounting) on the operators who were found to have SMP (BT and KCOM) in the wholesale fixed analogue exchange line services markets. We also considered more specific SMP remedies, such as a mandated wholesale product (analogue WLR) and the application of charge controls to it.
- 5.2 This section focuses on general remedies in the wholesale fixed analogue exchange line services markets. The structure of this section is as follows:
- Summary of our decision on SMP remedies
  - The application of SMP remedies
  - Consultation proposals
  - SMP conditions on BT and KCOM
  - Cost accounting
  - Accounting separation
  - Minor revisions
  - Overall conclusions on general SMP remedies
- 5.3 Section 6 considers the specific SMP remedy in the form of analogue WLR and Section 7 the associated analogue WLR charge controls.

## Summary of our decision on SMP remedies

- 5.4 Based on the analysis we set out in the Consultation and our consideration of the responses to the consultation, we are imposing a number of SMP remedies on BT in the UK excluding the Hull Area, and on KCOM in the Hull Area. These are detailed in Table 5.1. In light of this, we continue to believe the remedies proposed in the Consultation to be appropriate on the basis that:
- the underlying sources of BT's and KCOM's SMP have not changed since the time of our last review;
  - our proposals are proportionate and appropriate to address the competition concerns identified. In particular the set of proposed wholesale SMP remedies:

- on BT form part of a set of complementary regulatory measures that continue to be needed to promote effective competition both in the intermediate and retail markets; and
- on KCOM will support the nascent development of retail competition;
- there is no other mix of SMP remedies more appropriate; and
- they are required because competition law does not provide an appropriate remedy in the identified wholesale fixed analogue exchange line services markets.

Table 5.1: Summary of SMP remedies in the wholesale fixed analogue exchange line services markets

BT Obligation	KCOM Obligation
Requirement to provide Network Access on reasonable request	Requirement to provide Network Access on reasonable request
Requests for new Network Access	Requests for new Network Access
Requirement not to unduly discriminate	Requirement not to unduly discriminate
Basis of charges	Basis of charges
Requirement to publish a reference offer	Requirement to publish a reference offer
Requirement to notify charges	Requirement to notify charges
Requirement to notify technical information	Requirement to notify technical information
Cost accounting	Cost accounting
Accounting separation	Accounting separation
Transparency as to quality of service	
Obligation to provide WLR	
Charge control	

## The application of SMP remedies

### Setting of SMP Conditions

- 5.5 The Notification in Annex 1 to this document sets out the detailed SMP conditions that we are imposing on BT and KCOM.
- 5.6 In the September 2009 Wholesale Review, we adopted a new numbering system that applied to SMP conditions in that review. This new numbering system took the form AAx (for BT), AABx (for KCOM). We have adopted the same convention in this review, with the new conditions taking the form AAAx (for BT) and AAABx (for KCOM).

- 5.7 For the avoidance of doubt, the revocation and imposition of new SMP conditions and the direction, that are set out in Annex 1 and Annex 2, do not affect any other operative SMP conditions in the other wholesale digital exchange lines markets (ISDN2 and ISDN30), or any other services outside of the wholesale fixed analogue exchange line services markets. The details of the SMP conditions that we have placed on BT and KCOM in the wholesale digital exchange lines markets can be found in the September 2009 Wholesale Review (ISDN2), and the Review of retail and wholesale ISDN30 markets (“the August 2010 ISDN30 Review”)<sup>12</sup>.
- 5.8 Annex 6 to the Consultation provided a detailed outline of the legal framework for this review including the legal tests that we must satisfy in order to impose the proposed SMP conditions. We do not reproduce that Annex as part of this statement but the framework set out therein remains directly relevant. In this section we have explained the approach that we have taken in considering each possible remedy and set out the reasons why we think that the legal tests have been met.

## Consultation proposals

- 5.9 In the Consultation we considered three general options for SMP remedies for BT and KCOM, as follows:
- **Option 1:** no remedies (i.e. the removal of existing remedies);
  - **Option 2:** general SMP remedies and product-specific remedy (WLR)<sup>13</sup>; and
  - **Option 3:** pricing remedies (in addition to Option 2).
- 5.10 We set out our appraisal of these options at paragraphs 5.9 to 5.38 (in respect of BT) and paragraphs 5.39 to 5.63 (in respect of KCOM) of the Consultation and provisionally concluded that:
- there is a continued need for wholesale SMP regulation to support effective competition in the downstream narrowband access market and therefore, we did not believe that it would be appropriate to remove this level of regulation; and
  - the existing framework of supply, non-discrimination and transparency obligations is necessary going forward to support fair and effective competition in the downstream retail market.<sup>14</sup>
- 5.11 For BT, we proposed Option 2 (a suite of general SMP remedies and a product specific remedy (WLR)) and Option 3 (a general cost orientation obligation and a charge control on BT’s WLR service). In particular, we proposed that:
- generally BT’s charges for services in this market should be subject to a cost orientation obligation; and

<sup>12</sup> *Review of retail and wholesale ISDN30 markets: Statement on the markets, market power determinations and remedies*, Statement, 20 August 2010, at <http://stakeholders.ofcom.org.uk/binaries/consultations/isdn30/statement/statement.pdf>

<sup>13</sup> In the Consultation the product specific remedy (WLR) was only considered for BT.

<sup>14</sup> In respect of KCOM we proposed to impose an addition to the existing framework of remedies to require KCOM to publish guidelines on requests for new Network Access.

- a charge control should be applied to BT's WLR service, because we do not consider that a cost orientation obligation would be sufficient to constrain charges to the level that would prevail in an effectively competitive market.
- 5.12 For KCOM, we proposed Option 2 (a suite of general SMP remedies) and Option 3 (a general cost orientation obligation). In particular, we proposed that:
- KCOM's charges for wholesale fixed analogue exchange lines in this market should be subject to a cost orientation obligation; and
  - a charge control should not be introduced for KCOM because we considered the application of charge control remedies on KCOM in the particular circumstances of the Hull area where demand for wholesale provision of fixed analogue exchange lines is low would be a disproportionate use of regulation and would not therefore meet the requirements of section 47(2) of the Act.

## **SMP conditions on BT and KCOM**

### **Requirement to provide network access on reasonable request**

#### Aim and effect of regulation

##### *Consultation proposals*

- 5.13 In the Consultation we set out our proposal to retain the requirement for both BT and KCOM to provide network access to third parties on reasonable request.<sup>15</sup> We did so because this remedy is designed to promote competition in downstream markets by requiring CPs with SMP to provide wholesale access to their network facilities.
- 5.14 As our analysis in the Consultation, adopted in Section 4 of this statement, demonstrates, the level of investment required by a Third Party to build a network to compete with BT's and KCOM's acts as a significant barrier to entry. We consider that an obligation requiring dominant providers to make access to their network facilities available to third parties on reasonable request would assist in promoting competition in downstream retail markets. We consider that in the absence of such a requirement, the dominant provider would have an incentive not to provide access to preserve its position of SMP.

##### *Summary and analysis of consultation response*

- 5.15 Eight of the nine respondents either agreed that we should retain a new network access obligation on BT and KCOM or made no comment. One respondent, Network Services.com, gave a qualified agreement to our proposals.
- 5.16 Network Services.com argued that network access should not be provided to mobile network operators, which it believes operate as a cartel. Network Services.com added that calls from mobiles are the largest sector and if the mobile networks leverage their dominance by cross funding into the analogue market this will distort the market and disadvantage consumers.

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<sup>15</sup> Network Access is defined in sections 151(3) and (4) of the Act. Third Party has been defined as a person providing a public electronic communications network or a public electronic communications service, which captures CPs who are seeking to compete against the dominant providers.

- 5.17 Network Services.com made a number of assertions about the operation and competitive performance of the mobile sector that are not supported by any evidence. Further, this review concerns fixed analogue exchange line services, as mobile and fixed services are considered to be in separate economic markets.
- 5.18 On Network Services.com's specific suggestion, that mobile operator's should not be allowed to access BT's and KCOM's networks, we believe that this would discriminate against mobile operators and would therefore not be consistent with our duties under the legal framework that we operate within.
- 5.19 In response to Network Services.com's allegation that mobile operators operate as a cartel we suggest that if Network Services.com has evidence of anti-competitive conduct then it should bring this either to us or to the OFT.

### *Conclusions*

- 5.20 Having taken account of stakeholders' responses, and on the basis of the analysis set out in the Consultation and also outlined above, we remain of the view that maintaining the existing SMP obligation requiring BT and KCOM to provide network access to third parties upon reasonable request is appropriate.
- 5.21 This obligation is set out as condition AAAA1(a) and AAAB1(a) for BT and KCOM respectively in the legal instrument in Annex 1 to this statement.
- 5.22 This SMP condition also includes the power for us to make directions. This power would be used, where appropriate, to secure fairness and reasonableness in the terms, conditions and charges for providing third parties with network access. The SMP condition includes a requirement for the dominant provider to comply with any such directions, so any contravention of a direction may therefore result in a contravention of the condition itself and would then be subject to enforcement action under sections 94-104 of the Act.

### Legal tests

- 5.23 Section 87(3) of the Act authorises Ofcom to set SMP services conditions requiring the dominant provider to provide network access as it may, from time to time, direct. These conditions may, pursuant to section 87(5), include provision for securing fairness and reasonableness in the way in which requests for network access are made and responded to, and that conditions are complied with within the periods and at the times required.
- 5.24 We have also taken into account the six factors set out in section 87(4) of the Act, including, inter alia, the technical and economic viability of installing other competing facilities and the feasibility of the proposed network access.
- 5.25 We are satisfied that conditions AAAA1(a) and AAAB1(a), for BT and KCOM respectively, at Annex 1 meet the tests set out in the Act.
- 5.26 First, we have considered our duties under section 3 of the Act. We consider that, in ensuring Network Access at the reasonable request of third parties, the proposed condition would in particular further the interests of citizens in relation to communications matters and further the interests of consumers in relevant markets by the promotion of competition.



- 5.27 We have considered the European Community (“Community”) requirements as set out in section 4 of the Act. In particular, the proposed obligation would promote competition in relation to the provision of electronic communications networks and encourage the provision of Network Access for the purpose of securing efficient and sustainable competition in markets for electronic communications networks and services. We have taken account of the current existence of a requirement to provide Network Access on reasonable request in relation to wholesale fixed analogue exchange line services, and in particular that it has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK, excluding the Hull Area. We believe that removal of the requirement could harm or reverse this.
- 5.28 Second, we consider that conditions AAAA1(a) and AAAB1(a) meet the criteria set out in section 47(2) of the Act in that they are:
- objectively justifiable, as their intention is to promote retail competition by ensuring third parties are able to acquire wholesale access on fair and reasonable terms where they are unable to replicate the networks of BT or KCOM;
  - not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
  - proportionate, since without such obligations BT and KCOM could refuse to provide access and this would mean other CPs would not be able to effectively compete in markets where we are proposing BT and KCOM hold SMP, but do not require BT and KCOM to provide access where it is not technically feasible or reasonable; and
  - transparent, as it is clear that their intention is to ensure that BT and KCOM provide access to their networks in order to facilitate competition.

## Requests for new Network Access

### Aim and effect of regulation

#### *Consultation proposals*

- 5.29 In the Consultation we proposed to retain the request for new network access condition (also known as the statement of requirements (“SOR”)) on BT and to impose it, as a new condition, on KCOM. This requirement for an SOR process would serve to support the broader existing obligation on BT and KCOM to provide network access upon reasonable request.
- 5.30 In the Consultation, given we were proposing to extend the regulations applying to KCOM, we asked:

*Do you agree that Ofcom should impose a new general SMP condition on KCOM by requiring it to follow an SOR process?*

#### *Summary and analysis of consultation response*

- 5.31 Eight of the nine respondents either agreed that we should retain a new network access obligation on BT, including the requirement relating to the SOR process, or made no comment. Similarly, eight of the nine respondents either agreed that we

should impose a new network access obligation on KCOM, or made no comment. Included in those that agreed to its imposition was KCOM, noting that the new requirement served to formalise its current practice<sup>16</sup>, which it had already started to review<sup>17</sup>. One respondent, Network Services.com, gave its qualified agreement to our proposals.

- 5.32 Network Services.com suggested that access should not be allowed to all CPs that requested it. In particular, it disagreed that either network access or the provisions permitting new network access should be extended to mobile network operators unless they had a symmetric obligation imposed on them.
- 5.33 The point raised here by Network Services.com is basically the same point it raised under the requirement to provide network access. For the reasons we set out above, under requirement to provide network access, we disagree with Network Services.com arguments.

### Conclusions

- 5.34 Having taken account of stakeholders' responses, and on the basis of the analysis set out in the Consultation and also outlined above, we remain of the view that we should continue to impose the condition on BT, and to require the same of KCOM in order to assist potential market entrants.
- 5.35 This obligation is set out as condition AAAA1(b) and AAAB1(b) for BT and KCOM respectively in the legal instrument in Annex 1 to this statement.

### Legal tests

- 5.36 We are satisfied that conditions AAAA1(b) and AAAB1(b), for BT and KCOM respectively, at Annex 1 meet the tests set out in the Act.
- 5.37 First, we have considered our duties under section 3 of the Act and all the Community requirements set out in section 4 of the Act. We consider that conditions AAAA1(b) and AAAB1(b), for BT and KCOM respectively, meet these requirements. Specifically, in relation to section 3 of the Act, we consider that the condition would in particular further the interests of citizens in relation to communications matters and further the interests of consumers in relevant markets by the promotion of competition. They also address the requirement set out in section 4(8), as they have the purpose of securing efficient and sustainable competition in the markets reviewed.
- 5.38 Second, we consider that conditions AAAA1(b) and AAAB1(b) meet the criteria set out in section 47(2) of the Act in that they are:
- objectively justifiable, as they recognise that a process for handling new requests is needed but that the conditions should be flexible to allow for process improvements;

<sup>16</sup> *Kingston Communications, NEW SERVICES MANUAL*, Issue 1.32, August 2002, at [http://www.kcomplc.com/docs/regulatory-pdf/reg\\_rio\\_knsm.pdf](http://www.kcomplc.com/docs/regulatory-pdf/reg_rio_knsm.pdf)

<sup>17</sup> The review of its new services request process (SOR) having begun following our imposition of an equivalent new access obligation put in place in the Wholesale Local Access market under SMP service condition FBB2. See *Review of the wholesale local access market: Statement on market definition, market power determinations and remedies*, Statement, 7 October 2010, pp. 223-4, at [http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf)

- not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
- proportionate, as they continue to provide a SOR process based on the currently implemented process while allowing scope for industry to be involved in agreeing process improvements; and
- transparent, as their intention is to ensure that changes to BT's and KCOM's SOR process are reflective of industry feedback.

## **Requirement not to unduly discriminate**

### Aim and effect of regulation

#### *Consultation proposals*

- 5.39 In the Consultation we set out our proposal to retain the requirement on BT and KCOM not to unduly discriminate in relation to the provision of network access in the market for wholesale fixed analogue exchange line services.
- 5.40 We considered the condition to be necessary because otherwise BT and KCOM may have an incentive to provide wholesale services on terms and conditions that favour their own retail activities, in a way that would have a material adverse effect on competition. In the Consultation we considered this condition to meet our objective to promote efficient and sustainable competition as it ensures that all parties are treated on an equitable basis.

#### *Summary and analysis of consultation response*

- 5.41 No respondents disagreed with our proposals. However, Network Services.com commented that we should extend the requirement to mobile networks.
- 5.42 This review concerns wholesale fixed analogue exchange line services, as mobile and fixed services are considered to be in separate economic markets. For this reason we do not intend to address Network Services.com comment in this review.

#### *Conclusions*

- 5.43 Given that no stakeholder disagreed with our proposals and on the basis of the analysis set out in the Consultation, we remain of the view that maintaining the existing SMP obligation requiring BT and KCOM to not unduly discriminate in matters connected with Network Access is appropriate.
- 5.44 This obligation is set out as condition AAAA2 and AAAB2 for BT and KCOM respectively in the legal instrument in Annex 1 to this statement.

### Legal tests

- 5.45 Section 87(6)(a) of the Act authorises the setting of a SMP services condition requiring the dominant CP not to discriminate unduly against particular persons, or against a particular description of persons, in relation to matters connected with the provision of Network Access. Together with an obligation to provide Network Access, the proposed obligation would in particular encourage the provision of Network Access and service interoperability for the purpose of efficiency and sustainable competition in downstream markets by ensuring that BT and KCOM were not

permitted to discriminate unduly. This would ensure a competitive playing field thereby promoting competition and so furthering the interests of consumers through the increased choice in downstream markets.

- 5.46 We are satisfied that conditions AAAA2 and AAAB2, for BT and KCOM respectively, at Annex 1 meets the various tests set out in the Act.
- 5.47 First, we consider that the proposed condition in particular furthers the interests of citizens in relation to communications matters and further the interests of consumers in relevant markets by the promotion of competition in line with section 3 of the Act. We have taken account of the current existence of a requirement not to discriminate unduly in relation to the provision of wholesale fixed analogue exchange line services, and that it has, in particular been effective in enabling increasingly competitive conditions in the downstream retail market in the UK excluding the Hull Area. Furthermore, the proposed condition has also played an important role in fostering greater competition in the retail market in the Hull Area. We believe that removal of the requirement could harm or reverse this.
- 5.48 We have considered the Community requirements as set out in section 4 of the Act. The proposed condition, in particular, would encourage the provision of Network Access and service interoperability for the purpose of securing efficient and sustainable competition in the retail markets for access and calls, by ensuring BT and KCOM were not permitted to unfairly favour particular retail businesses and therefore distort competition.
- 5.49 Second, we consider that conditions AAAA2 and AAAB2 meet the criteria set out in section 47(2) of the Act in that they are:
- objectively justifiable, as they would provide a safeguard to prevent BT and KCOM from favouring their own or affiliated businesses, to the disadvantage of their competitors;
  - not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
  - proportionate, as they are intended to prohibit discrimination that is undue only, that is discrimination that would materially affect the ability of BT's and KCOM's competitors to compete on equal terms; and
  - transparent, as it is clear that their intention is to prevent discrimination that is undue.

## **Basis of charges (cost orientation)**

### Aim and effect of regulation

#### *Consultation proposals*

- 5.50 In the Consultation we set out our proposal to retain the existing requirement on BT and KCOM to comply with a basis of charges obligation (cost orientation)<sup>18</sup> in the wholesale fixed analogue exchange line services markets in which we conclude that

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<sup>18</sup> *Charge controls for Wholesale Line Rental – implementation and cost orientation*, Second Statement, 23 February 2010, at [http://stakeholders.ofcom.org.uk/binaries/consultations/wlr/statement/wlr\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wlr/statement/wlr_statement.pdf)

BT and KCOM have SMP.<sup>19</sup> In Section 6 of the Consultation we also separately specified which elements of the WLR product should be covered by this obligation.

- 5.51 Since we had provisionally concluded that these markets were not effectively competitive, competition could not be expected to provide an effective constraint, we therefore considered that this condition was necessary. Therefore, our provisional view was that without some intervention to control pricing, BT and KCOM would have the ability to charge excessive prices in order to maximise profits.
- 5.52 We also proposed that the draft condition AAAA3 would apply to all WLR charges with the exception of the WLR Core Rental service (which is subject to a charge control), and enhanced service care levels.

#### *Summary and analysis of consultation responses*

- 5.53 None of the respondents disagreed with the Consultation proposal to apply a basis of charges condition on BT and KCOM. However, while BT agreed to the principle of such an obligation it raised concerns about its specific application. C&W and Virgin Media gave qualified agreement to the proposal with Virgin Media re-expressing its view that enhanced care services should not be exempt from cost orientation, and both Virgin Media and C&W requesting that we continue to monitor BT's behaviour in relation to enhanced care services. Furthermore, C&W also asked us to investigate the detailed costs associated with WLR connection in our subsequent charge control. We deal with these points separately below.
- 5.54 Firstly, while BT did not object to the imposition of a cost orientation condition on the supply of WLR in principle, it did object to its application to individual service components. It also objected to any use of fixed and overly formulaic measures to test for compliance with the cost orientation condition. It argued that if we continue to apply cost orientation to each and every charge then we should remove the cost orientation obligation from WLR Transfer (the wholesale charge made by BT for moving an analogue WLR customer's line) and allow it to recover the costs through the WLR Rental charges.
- 5.55 We consider that, as a point of principle, cost orientation should apply to each and every charge. However, we do not believe that our application of this principle is fixed or overly formulaic. In particular, we would note that pricing between DSAC and DLRIC is a first order test for cost orientation, and this first order test is therefore not determinative. As a consequence, there is no automatic requirement for BT to bring prices inside the DLRIC-DSAC range. Whether or not BT would be required to do so in any particular case would depend on the results of a second order evaluation of other relevant factors. This interpretation of cost orientation in the wholesale fixed analogue exchange lines markets would be in accordance with the guidance on cost orientation set out in Oftel's 2001 network charge control guidelines.<sup>20</sup>
- 5.56 However, we note BT's concerns regarding the application of cost orientation to WLR Transfer. We take the view that the most appropriate place to consider any dis-application of the cost orientation condition is during our assessment of the analogue WLR charge control, which we will consult on in early 2011.

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<sup>19</sup> Throughout this statement we use basis of charges and cost orientation as interchangeable terms.

<sup>20</sup> *Guidelines on the Operation of the Network Charge Controls from October*, 5 December 2001, at [http://www.ofcom.org.uk/static/archive/oftel/publications/ind\\_guidelines/pcrg1201.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/pcrg1201.pdf)

- 5.57 Secondly, Virgin Media argued that we should apply the cost orientation obligation to enhanced care services<sup>21</sup> and so reverse our decision of February 2010 to exempt them from this condition.<sup>22</sup> However, both Virgin Media and C&W recognised that this exemption had been given less than a year ago and so asked us to continue to monitor BT's behaviour with respect to the pricing of its enhanced care services.
- 5.58 We took the decision to exempt enhanced care services from the application of a cost orientation obligation, having fully considered all representations. We continue to consider that assessment to be valid. As Virgin Media and C&W both point out, insufficient time has elapsed since that decision to be able to draw meaningful conclusions about the competitive performance of these services. Given that we have not re-considered our position on these enhanced care services during this review we do not intend to reach a different conclusion than we reached in February 2010.<sup>23</sup> We have therefore carried over the exclusion applying to these services in this statement and have inserted the relevant wording at conditions AAAA3.4 and AAAA10.5 to this effect.
- 5.59 Finally, C&W has also requested that we investigate the charges that BT currently applies, and prospective changes to them, for WLR connections in our WLR charge control assessment. Specifically, C&W has asked us to consider the network demarcation rule (three meter demarcation rule) as it currently applies, BT's proposals for changes to that rule, and the time related charges ("TRCs") that BT applies for line extension work associated with WLR line connections. In particular, they have requested that we look at the costs associated with the standard WLR line connection.
- 5.60 We note C&W's representations and the request that we consider this as part of our assessment of the WLR charge control. The WLR charge control proposals will be published in early 2011. C&W are asked to consider those proposals, including our proposals on TRCs and, where appropriate, set out in detail their considerations in response to them.

### *Conclusions*

- 5.61 Having taken account of stakeholders' responses, and on the basis of the analysis set out in the Consultation and also outlined above, we have decided to continue to require BT and KCOM to comply with a basis of charges obligation in the markets for wholesale fixed analogue exchange line services in which they hold SMP.
- 5.62 However, for BT, the basis of charges obligation will not apply to the Analogue Core WLR Rental product or to enhanced case services. As noted above, any prospective dis-application of this remedy to WLR Transfer and our position on WLR connections will be considered in the upcoming analogue WLR charge control consultation.

### Legal tests

- 5.63 Section 87(9) of the Act authorises the setting of SMP services conditions imposing on the dominant provider rules concerning the recovery of costs and cost orientation.

<sup>21</sup> Virgin Media response of 14 August 2009 to, *Charge controls for Wholesale Line Rental and related services, Consultation*, 3 July 2009, at <http://stakeholders.ofcom.org.uk/binaries/consultations/wlrcc/summary/wlrcc.pdf>

<sup>22</sup> *Charge controls for Wholesale Line Rental – implementation and cost orientation*, Second Statement, 23 February 2010, at

[http://stakeholders.ofcom.org.uk/binaries/consultations/wlr/statement/wlr\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wlr/statement/wlr_statement.pdf)

<sup>23</sup> *Ibid*

- 5.64 We consider that conditions AAAA3 and AAAB3, for BT and KCOM respectively, at Annex 1 meet the various tests set out in the Act.
- 5.65 First, we have considered our duties under section 3 of the Act and all the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition by ensuring that charges for wholesale services are at a level that enables operators to compete. We also consider that the condition in particular furthers the interests of citizens in relation to communications matters and furthers the interests of consumers in relevant markets by promotion of competition in line with section 3 of the Act.
- 5.66 Second, we consider that conditions AAAA3 and AAAB3 meet the criteria set out in section 47(2) of the Act in that they are:
- objectively justifiable, as they enable competitors to purchase services at charges that will enable them to develop competitive services to the benefit of consumers, while also allowing BT and KCOM a return to recover common costs and cost of capital;
  - not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
  - proportionate, as without such obligations the price-setting behaviour of BT and KCOM would not be constrained by competitive pressure, allowing them to set charges which could restrict the ability of other CPs to buy wholesale products that allow them to provide competitive products to consumers; and
  - transparent, as it is clear the intention is to ensure that BT and KCOM charge on a cost-oriented basis.
- 5.67 We also considered the tests set out in section 88 of the Act and having done so believe the obligation is appropriate. Further to the arguments outlined above, there is a risk that, in situations where SMP is persistent, pricing will be distorted and not at competitive levels, as dominant providers are likely to want to charge excessive prices in order to maximise profits by increasing their revenues and the costs of competing providers. The condition promotes efficiency, promotes sustainable competition and provides the greatest possible benefits to consumers by enabling competing providers to buy wholesale services at prices that might be expected in competitive market.
- 5.68 The extent of investment of the dominant operator has been taken into account as set out in section 88(2) of the Act, as the obligation provides for a mark-up for an appropriate return on capital employed.
- 5.69 In regard to the provision of WLR, in paragraph 6.8 we discuss the three elements required to provide the basic level of exchange line service required by consumers that, amongst other things, we consider it appropriate that cost orientation should apply to.

## **Transparency measures**

- 5.70 In the Consultation we proposed to retain a number of transparency measures that we considered were necessary to ensure that there was proper visibility of charges and terms and conditions in a market in which one operator has SMP. To provide transparency, we said that we intended to impose the following obligations on BT and

KCOM in the markets for wholesale fixed analogue exchange line services in which we proposed that they hold SMP:

- requirement to publish a reference offer (“RO”);
- requirement to notify charges;
- requirement to notify technical information; and
- transparency as to quality of service (BT only).

5.71 Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish all such information, and in such manner as Ofcom may direct, for the purpose of securing transparency. Section 87(6)(c) of the Act authorises the setting of SMP services conditions requiring the dominant provider to publish, in such manner as Ofcom may direct, the terms and conditions on which it is willing to enter into an access contract. Section 87(6)(d) also permits the setting of SMP services conditions requiring the dominant provider to include specified terms and conditions in the reference offer. Finally, section 87(6)(e) permits the setting of SMP services conditions requiring the dominant provider to make such modifications to the reference offer as may be directed from time to time.

#### Overall summary of consultation responses to proposals on transparency measures

- 5.72 All stakeholders that responded to the Consultation agreed with, or did not comment on, our proposals to retain the transparency obligations that were put in place in the previous market review.
- 5.73 KCOM noted that in the September 2009 Wholesale Review we set out which of the transparency remedies applied in which markets, namely wholesale analogue exchange line services, wholesale ISDN2 and ISDN30 exchange lines, call origination on fixed public narrowband networks and interconnection circuits. KCOM asked us to confirm that in the context of the current review the transparency obligations only apply in respect of wholesale fixed analogue exchange line services (e.g. WLR).

#### Overall conclusions on the application of transparency measures

- 5.74 Given the strong support from stakeholders for the continued application of transparency measures that we proposed in the Consultation, and for the reasons detailed in paragraphs 5.76 to 5.136 below, we have decided to continue to oblige BT to meet all four transparency requirements, and KCOM the first three.
- 5.75 For the avoidance of doubt, the decisions that we have taken in relation to transparency measures (RO, notification of charges and technical information, and (for BT) quality of services transparency conditions) in this market review:
- apply to the provision of Network Access by both BT and KCOM. Therefore, they apply in respect of anything that falls within that definition. It follows from this that the transparency requirements do not just apply to the Network Access mandated in the SMP conditions (i.e. WLR) but all forms of Network Access in the applicable markets; and
  - relate solely to the markets for wholesale fixed analogue exchange line services. Furthermore, the transparency measures conditions that relate to the other



markets KCOM identifies in its response (namely wholesale ISDN2 and ISDN30 exchange lines, call origination and fixed public narrowband networks and interconnection circuits) are contained in separate market reviews and are unaffected by the decisions that we have made here.

## **Requirement to publish a reference offer**

### Aim and effect of regulation

#### *Consultation proposals*

- 5.76 In the Consultation we proposed that BT and KCOM should continue to be required to produce ROs for products in the markets for wholesale fixed analogue exchange line services in which they hold SMP.
- 5.77 The requirement to make a RO assists with transparency and monitoring of potential anti-competitive behaviour by providing visibility of the terms and conditions on which other providers would be able to purchase wholesale access services. In turn this supports the development and stability of the market by ensuring that investments are not inappropriately distorted. This helps to ensure stability in markets and, without it incentives to invest might be undermined and market entry made less likely.
- 5.78 The publication of a RO would potentially allow for faster negotiations, and avoid possible disputes. Together with a no undue discrimination requirement, the publication of a RO would give confidence to those purchasing wholesale fixed analogue exchange line services that they were being provided on non-discriminatory terms. Without this, market entry might be deterred to the detriment of the long-term development of competition and hence consumers. In particular, we considered that the current RO publications requirements had been effective in enabling increasingly competitive conditions in the downstream retail markets for fixed narrowband access. We also considered that the removal of the requirement could harm the future development of downstream competition.
- 5.79 The condition proposed in the Consultation document requires the publication of a RO and specifies the information to be included in that RO (set out below) and how the RO should be published. It prohibits the dominant provider from departing from the charges and terms and conditions in the RO and requires it to comply with any directions that we make from time to time under the condition. Specifically, we indicated in the Consultation that the published RO should include:
- a clear description of the services on offer;
  - terms and conditions including charges and ordering, provisioning, billing and dispute resolution procedures. The RO should provide sufficient information to enable providers to make technical and commercial judgements such that there is no material adverse effect on competition;
  - information relating to technical interfaces and points of interconnection. Such information should ensure that CPs were able to make full and effective use of all the services provided;
  - conditions relating to maintenance and quality (service level agreements and guarantees). The inclusion of service levels, as part of the contractual terms of the RO, that provide for a minimum acceptable level of service, would ensure that

services would be provided in a fair, reasonable, timely and non-discriminatory fashion; and

- terms and conditions that are fair and reasonable. This would ensure that products are offered on similar terms and conditions as would apply in a competitive market and that they were sensible, practical, and did not impose a margin squeeze on competitors.

5.80 The list of network components that comprise the services detailed in the reference offer is contained within the regulatory financial reporting obligations on BT and KCOM<sup>24</sup> and associated Directions made from time to time amending the list of network components.

5.81 In addition, we indicated in the Consultation that BT and KCOM must include in the RO the amounts charged to their own retail activities (transfer charges) and the underlying components from which those amounts are derived, for the equivalent service that they provide to competing providers.

#### *Summary and analysis of consultation responses*

5.82 All stakeholders either agreed with our proposal to require BT and KCOM to publish a reference offer, or made no comment.

5.83 However, Network Services.com commented that we should extend the requirement to mobile networks.

5.84 As noted above, this review concerns wholesale fixed analogue exchange line services, as mobile and fixed services are considered to be in separate economic markets. For this reason we do not intend to address Network Services.com comment in this review.

#### *Conclusions*

5.85 Having taken account of stakeholders' responses, and on the basis of the analysis set out in the Consultation and above, we have decided to continue to require BT and KCOM to publish a reference offer in the wholesale fixed analogue exchange line services markets in which they hold SMP.

#### Legal tests

5.86 We consider that conditions AAAA5 and AAAB4, for BT and KCOM respectively, at Annex 1 meet the various tests set out in the Act.

5.87 We have considered our duties under section 3 of the Act and all the Community requirements set out in section 4 of the Act. We consider in particular that the conditions further the interests of citizens and further the interests of consumers in relevant markets by the promotion of competition.

5.88 We consider that the conditions meet the Community requirements set out in section 4 of the Act. In particular, the conditions promote competition and encourage the provision of Network Access and service interoperability for the purpose of securing

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<sup>24</sup> *The regulatory financial reporting obligations on BT and Kingston Communications, Final Statement and notification: Accounting separation and cost accounting*, Statement, 22 July 2004, at [http://stakeholders.ofcom.org.uk/consultations/fin\\_reporting/fin\\_report\\_statement](http://stakeholders.ofcom.org.uk/consultations/fin_reporting/fin_report_statement)

efficient and sustainable competition for the maximum benefit for consumers. The publication of a RO would mean that other CPs would have the necessary information readily available to allow them to make informed decisions about entry into the market.

5.89 We consider that the conditions meet the criteria set out in section 47(2) of the Act in that the conditions are:

- objectively justifiable, in that they require that terms and conditions are published giving competing CPs the ability to ensure they are receiving offers that did not discriminate unduly in favour of the dominant CP's own retail operations, therefore encouraging competition to the benefit of consumers;
- not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
- proportionate, in that only information that is necessary to ensure that there is no material adverse effect on competition is required to be provided; and
- transparent, as it is clear the obligations are designed to ensure that potential competitors have sufficient information to make investment decisions about entry into the retail markets.

## **Requirement to notify charges**

### Aim and effect of regulation

#### *Consultation proposals*

5.90 In the Consultation we proposed that BT and KCOM should continue to be required to publish any planned changes to wholesale charges in advance of those changes taking place for wholesale fixed analogue exchange line services.

5.91 Notification of charges at the wholesale level can further assist competition, as it means that other CPs would have the opportunity to consider whether these changes require amendments to their own retail offerings.

5.92 The notification of charges at the wholesale level has the joint purpose to assist transparency for the monitoring of potential anti-competitive behaviour and to give advanced warning of charge changes to competing providers who purchase wholesale fixed analogue exchange line services. The latter purpose ensures that competing providers would have sufficient time to plan for such changes. Notification of charges to wholesale charges therefore helps to ensure stability in markets without which incentives to invest might be undermined and market entry made less likely.

5.93 We consider that the notification notice should include:

- a description of the access service;
- the location of terms and conditions in the RO;
- the effective date or period from which the changes will have effect;
- the current and proposed charge and the relevant usage factors applied to each network component; and

- other charges for services that would be directly affected by the proposed change.
- 5.94 Furthermore, we also stated that we continue to consider that the following charge notification periods are appropriate for wholesale fixed analogue exchange line services:
- 90 days for BT's Wholesale Line Rental charge;
  - 90 days for KCOM's Wholesale Line Rental charge; and
  - 28 days for all other services.
- 5.95 The proposed condition would apply to BT and KCOM in the markets for wholesale fixed analogue exchange line services.

#### *Summary and analysis of consultation responses*

- 5.96 The majority of respondents agreed with our proposal to maintain the form, content and period of notification for BT and KCOM in the market for provision of wholesale fixed analogue exchange line services markets. The exception to this was Network Services.com who argued that Ofcom should revert to a 90 day notification period for all charges to provide CPs with time to communicate the changes to their end users.
- 5.97 In the September 2009 Wholesale Review we considered this matter in detail. In setting the current notification periods we recognised that CPs require sufficient time to consider and implement a price change once notified. In particular, not only do CPs need to consider the impact of any changes, they may also need to go through their own internal governance processes if they are changing retail prices. They would also need to update billing systems, reproduce marketing material and notify existing customers. For this reason, we retained a 90 day notification period for the Wholesale Line Rental charge. However, we also recognised that there would be benefits in moving to 28 days for other services. This combination of notification periods therefore aim to provide CPs with the protection they need for the ongoing monthly charge, while also providing flexibility.
- 5.98 The Consultation did not set out any proposals to revise any of these notification periods as we considered that they struck the right balance for the reasons that we set out in the September 2009 Wholesale Review.

#### *Conclusions*

- 5.99 Having taken account of stakeholders' responses and on the basis of the analysis set out above, we have decided to continue to require BT and KCOM to notify charges for services in the markets for wholesale fixed analogue exchange line services.
- 5.100 We consider that the content and term of the charge notifications provide CPs with sufficient time to consider and implement changes, while also providing some pricing flexibility. The charge notices issued by BT and KCOM should therefore continue to contain the information specified in paragraph 5.93, and will continue to be subject to a 90 day notification period for BT's and KCOM's Wholesale Line Rental charge, and 28 days for all other services.

## Legal tests

- 5.101 We are satisfied that conditions AAAA6(a) and AAAB5(a), for BT and KCOM respectively, at Annex 1 meet the various tests set out in the Act.
- 5.102 The requirement to notify charges, in combination with a requirement not to discriminate unduly, allows CPs to make informed decisions about wholesale investment. Further, the obligation promotes the interests of purchasers of wholesale analogue exchange line services by enabling them to adjust their downstream offerings in competition with BT and KCOM in response to changes in BT's or KCOM's charges. The obligation also makes it easier for us to monitor any instances of discrimination.
- 5.103 We have taken account of the existence of a current requirement to notify charges, terms and conditions for wholesale fixed analogue exchange line services. In particular, the existing obligation has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK, excluding the Hull Area. It is also likely to have been a key factor in informing market entry in the Hull Area, and will support the development of nascent competition in the retail market.<sup>25</sup> We believe that removal of the requirement could harm or reverse these developments.
- 5.104 For the reasons set out above, we consider that the condition in particular furthers the interests of citizens in relation to communications matters and furthers the interests of consumers in relevant markets by the promotion of competition in line with section 3 of the Act.
- 5.105 We consider that the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition could promote competition and secure efficient and sustainable competition and the maximum benefit for customers by ensuring that CPs have the necessary information to allow them to make informed decisions about competing in the relevant market.
- 5.106 We consider that conditions AAAA6(a) and AAAB5(a) meet the criteria set out in section 47(2) of the Act in that they are:
- objectively justifiable, because general and reliable visibility of a dominant CP's charges is needed to enable competitors to set prices for their services that are based on purchasing the regulated inputs. It would also allow CPs and us to monitor BT and KCOM's charges for possible anti-competitive behaviour;
  - not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
  - proportionate, in that only information that other CPs need to know would have to be notified. The periods are the minimum required to allow changes to be reflected in retail offers; and
  - transparent, as their intention is to ensure that BT and KCOM notify CPs who purchase wholesale access of changes to charges.

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<sup>25</sup> While KCOM has yet to notify a charge change for its wholesale analogue exchange line offering, KCOM is now providing a wholesale exchange lines product.  
[http://www.kcomplc.com/aboutus/regulatoryinformation/charge\\_change\\_notices.asp](http://www.kcomplc.com/aboutus/regulatoryinformation/charge_change_notices.asp)

## Requirement to notify technical information

### Aim and effect of regulation

#### *Consultation proposals*

- 5.107 In the Consultation we proposed that we should continue to retain a requirement on BT and KCOM to notify technical information a minimum of 90 days in advance of providing new wholesale fixed analogue exchange line services, or amending existing technical terms and conditions.
- 5.108 The aim of this obligation is to ensure that competing CPs have sufficient time to respond to changes that may affect them. For example, a competing CP may need to introduce new equipment or modify existing equipment or systems to support a new or changed technical interface.
- 5.109 Technical information includes new or amended technical characteristics, including information on network configuration, locations of the points of Network Access and technical standards (including any usage restrictions and other security issues). Relevant information about network configuration is likely to include information about the function and connectivity of points of access, for example, the connectivity of exchanges to end users and other exchanges.
- 5.110 The proposed condition, as with the existing condition, requires the notification of new technical information 90 days in advance of providing new wholesale services or amending existing technical terms and conditions. We continue to believe that 90 days notice is the minimum time that competing CPs would need to make modifications to their network to support changes.
- 5.111 This condition for 90 days notice relates to changes to technical information related to SMP services. All CPs are required to comply with General Condition 2,<sup>26</sup> which obliges them to apply compulsory standards, or in the absence of these, voluntary standards. Such changes should be agreed through the NICC.<sup>27</sup> Therefore, agreement of such standards should normally have been agreed at NICC prior to this 90 day period.
- 5.112 For major changes to the existing network and migration to NGA networks, we consider that industry consultation (including through the NICC) continues to be an appropriate way to progress modifications. This consultation and agreement phase would not fall within the notice period; therefore the formal 90 day notification period would follow the industry process. That is, the notification should be made only following the conclusion of the industry consultation process.
- 5.113 The proposed condition would apply to BT in the market for wholesale fixed analogue exchange line services in the UK, excluding the Hull Area, and to KCOM in the market for wholesale fixed analogue exchange line services in the Hull Area.

#### *Summary and analysis of consultation responses*

- 5.114 All of the respondents either agreed with our proposals, or made no comment.

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<sup>26</sup> [http://www.ofcom.org.uk/telecoms/ioi/g\\_a\\_regime/](http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/)

<sup>27</sup> NICC is a technical forum for the UK communications sector that develops interoperability standards for public communications networks and services in the UK. See <http://www.niccstandards.org.uk/>.

## *Conclusions*

5.115 Having taken account of stakeholders' responses, and on the basis of the analysis set out in the Consultation and above, we have decided to continue to require BT and KCOM to notify technical information in the wholesale fixed analogue exchange line services markets in which they hold SMP.

## Legal tests

5.116 We are satisfied that conditions AAAA6(b) and AAAB5(b), for BT and KCOM respectively, at Annex 1 meets the various tests set out in the Act.

5.117 We consider that, by ensuring that CPs' systems are interoperable with any changes to technical specifications that might affect their businesses, the proposed condition in particular furthers the interests of citizens in relation to communications matters and furthers the interests of consumers in relevant markets by the promotion of competition in line with section 3 of the Act.

5.118 We consider that the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition could promote competition and secure efficient and sustainable competition and the maximum benefits for customers by ensuring that CPs have sufficient notification of technical changes to the dominant CP's network to enable them to compete. We have taken account of the current existence of a requirement to notify technical information in relation to wholesale fixed analogue exchange line services, and that, in particular, it has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK, excluding the Hull Area. It is also likely to have been a factor in informing market entry in the Hull Area, and will support the development of nascent competition in the retail market in the Hull Area. We believe that removal of the requirement could harm or reverse this.

5.119 We consider that conditions AAAA6(b) and AAAB5(b) meet the criteria set out in section 47(2) of the Act in that they are:

- objectively justifiable, as it would enable CPs to make full and effective use of Network Access. The period would allow CPs time to react to proposed changes without imposing an unnecessarily long notification period on BT and KCOM that may restrict their ability to develop and deploy new features or products;
- not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
- proportionate, in that 90 days notice is considered the minimum period necessary to allow CPs to modify their networks; and
- transparent, in that it is clear in its intention that BT and KCOM notify technical information.

## Transparency as to quality of service

### Aim and effect of regulation

#### *Consultation proposals*

5.120 In the Consultation, we proposed that we should continue to require BT to give transparency as to the quality of service it provides in the relevant market. We did this as we considered that BT would have the ability to favour its own downstream or affiliated businesses over third party CPs, by differentiating on price or terms and conditions including quality of service (either in service provision and maintenance or in the quality of network service). We considered that this would have the potential to distort competition at the retail level by placing third party CPs at a disadvantage in terms of the services they can offer to consumers.

5.121 We therefore considered it important to propose a transparency of quality of service remedy to monitor whether any undue discrimination is occurring. In particular, we required that BT publish data regarding the delivery of wholesale services to downstream BT businesses and other third party CPs.

5.122 Our proposals sought to adopt the quality of services remedy imposed in the September 2009 Wholesale Review. They also reflected our continued belief that effective reporting of BT's service provision and fault repair performance are critical to ensuring transparency of the quality of service. In particular, we proposed that BT should:

- provide us with a set of KPIs to enable us to effectively monitor potential instances of service level discrimination;
- provide CPs with sight of industry average performance across those same KPIs, and
- it make available a key set of KPIs that we have identified on an individual CP basis to enable each CP buying WLR services to evaluate the service performance they have received from BT. Given the sensitive nature of that information, we took the view that BT should provide access to that information using a confidential link to an appropriate website.<sup>28</sup>

5.123 We did not propose to introduce a transparency condition for the quality of service provided by KCOM as we considered it would be disproportionate given the size of the Hull market and the limited demand for wholesale services.

#### *Summary and analysis of consultation responses*

5.124 No respondents suggested that the existing measures were no longer appropriate, or that the KPIs required of BT, as set under the KPI Direction as part of the September 2009 Wholesale Review should be revised or amended. Furthermore, no CP argued that we should introduce the same or a similar obligation on KCOM in the Hull Area.

5.125 BT made a number of observations in respect of the proposals, including a number of comments on the KPI Direction detailed in Part II of Annex 7 of the Consultation. In

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<sup>28</sup> We noted that, for the avoidance of doubt, where BT makes company specific KPI data available to each third party that is using WLR, which it can access at its own discretion using the confidential link, then this qualifies as providing that information by the specified means.



particular, BT argued that one of the provisions of the KPI Direction was particularly onerous, requiring it to potentially generate 450 CP specific KPI reports each month. BT requested that we amend the wording of the KPI Direction relating to that reporting requirement to give it a greater degree of flexibility in meeting the KPI information needs of its customers. BT's proposal would remove the requirement currently on it to provide CP specific KPI reports. BT also sought clarification on whether we were intending to mandate KPI Online.

- 5.126 BT identified a number of inconsistencies between the proposed KPI Direction detailed in Part II of Annex 7 of the Consultation and the KPI Direction set out in the September 2009 Wholesale Review. It requested that we update the proposed KPI Direction to reflect the KPI Direction set under the September 2009 Wholesale Review. BT is correct in its observations and, as requested, we have updated the KPI Direction detailed in Annex 2 of this statement accordingly.
- 5.127 In response to BT's comments in relation to its requirement to supply CP specific KPI reports and its request that we amend the wording of clause 6 of Annex A to the KPI Direction we take the following view. No other respondents to the Consultation said that the existing KPI reporting obligations are no longer needed, including the requirement for BT to provide CP specific KPI reports. Furthermore, we continue to consider it important that individual CPs are able to obtain the KPIs so that they can evaluate the service performance they have received from BT. However, we recognise that certain CPs may not actually want these monthly reports and for this reason we have decided that it is appropriate to modify the form of the obligation, allowing BT to provide these reports on the basis of CP demand. It is BT's choice how it complies with the KPI Direction. BT may wish to develop KPI Online as a means of meeting this obligation but, for the avoidance of doubt, we have not, nor are we now requiring, that BT use KPI Online to meet the requirements set out in the KPI Direction.

### *Conclusions*

- 5.128 Having taken account of stakeholders' responses, and on the basis of the analysis set out above, we have decided to continue to require BT to report the set of metrics, which are defined in the KPI Direction in Annex A to Annex 2 of this statement but we have revised clause 6 making the provision of CP specific reports "upon request".
- 5.129 We consider that the KPIs are unlikely to change frequently or drastically during the review period and in the event that a change to the KPIs was requested by BT and industry, Ofcom could address this through a short consultation, as allowed for under section 49 of the Act.

### Legal tests

- 5.130 We are satisfied that condition AAAA7 for BT, at Annex 1 meets the various tests set out in the Act.
- 5.131 We consider that by ensuring Network Access provided to third party CPs is of the same quality as that provided to downstream BT divisions, the condition, in particular, furthers the interests of citizens in relation to communications matters and furthers the interests of consumers in relevant markets by the promotion of competition in line with section 3 of the Act.
- 5.132 We have considered the Community requirements in section 4 of the Act and believe that the condition promotes competition and secures efficient and sustainable

competition by ensuring transparency through comparison of the service quality levels BT provides to itself versus other third party CPs.

5.133 We consider that the condition AAAA7 meets the criteria set out in section 47(2) of the Act in that it is:

- objectively justifiable, because in the absence of a requirement to publish specific KPIs, it would not be possible to monitor if there is any undue discrimination in the quality of service provided by BT;
- not unduly discriminatory, as it only applies to operators that hold a position of SMP and who supply wholesale fixed analogue exchange line services in sufficient volume. We will not impose this obligation on KCOM as we do not consider that such an obligation would be justifiable as the information provided would not be statistically meaningful given the number of CPs active in the Hull area and their scale;
- proportionate, as BT will only be required to publish data related to key business processes; and
- transparent, as it is clear that its intention is to monitor for undue discrimination in the quality of service provided by BT.

5.134 We consider that the KPI Direction meets the requirements in section 49 of the Act. We are satisfied that the direction is:

- objectively justifiable, as we have identified a need to publish specific KPIs to ensure that we can monitor any undue discrimination in the market;
- not unduly discriminatory, as it only applies to BT and it is only BT that is subject to the SMP transparency condition;
- proportionate, as BT is only required to publish specific KPI data related to key business processes. Further, BT is already supplying such data and therefore has systems and procedures in place; and
- transparent, as it is clear from the Direction as to what information would be required to be published and supplied by BT.

5.135 The KPI Direction replaces a virtually identical KPI Direction which is revoked by virtue of SMP condition AAA7 itself being revoked. In withdrawing the previous KPI Direction we have taken account of the tests set out in section 49(2) of the Act and we believe that the withdrawal is:

- objectively justifiable – the Directions relate to the requirement upon BT to publish KPIs as part of the transparency requirement. This requirement has been reviewed and updated as part of this market review;
- not unduly discriminatory – the direction only applied to BT and is being withdrawn in its entirety;
- proportionate – the withdrawal means that BT will now be subject to a revised and updated requirement; and

- transparent – in formally withdrawing this Direction, in tandem with the imposition of a new Direction, we are ensuring that there is clarity as to what information BT is required to publish in this area.

5.136 We have also taken account of our duties under sections 3 and 4 of the Act and consider that this withdrawal is consistent with those duties.

## Cost accounting

### Aim and effect of regulation

#### *Consultation proposals*

5.137 In the Consultation we proposed to retain the cost accounting obligations on BT and KCOM as a means of ensuring the effective monitoring of the proposed cost orientation and non-discrimination requirements. Specifically, we proposed that BT and KCOM should continue to be required to comply with obligations governing cost accounting systems and processes as set out in an Ofcom statement published in 2004 (“the financial reporting statement”)<sup>29</sup>. The outputs of that compliance would include:

- Generic cost orientation and non-discrimination requirements:
  - Preparation of a variety of financial statements;
  - Preparation of extensive supporting documentation explaining how the financial statements have been put together;
  - Provision of an independent assurance statement;
  - Publication of most of the information; and
  - Preparation of reconciliation statements;
- Basis of charges (cost orientation) specific requirements:
  - Preparation of service level cost data (LRIC and Fully Allocated Cost (“FAC”)) compared to average charges;
  - Preparation of costs of network components used to deliver services; and
  - Analysis of service cost stack by component;
- Non-discrimination specific requirements:
  - Analysis of internal and external sales including volume data.

5.138 As we discussed in the Consultation, we also said that the cost accounting obligations will require BT and KCOM to demonstrate that their charges are cost orientated on the basis of Long Run Incremental Cost (“LRIC”) with an appropriate

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<sup>29</sup> ‘The regulatory financial reporting obligations on BT and Kingston Communications, Statement and notification: Accounting separation and cost accounting’, 22 July 2004, [http://www.ofcom.org.uk/consult/condocs/fin\\_reporting/fin\\_report\\_statement/](http://www.ofcom.org.uk/consult/condocs/fin_reporting/fin_report_statement/)

mark-up for the recovery of common costs, and therefore meet the cost orientation obligation. We also noted that this will provide information necessary for us to set, monitor and review charge control obligations for BT.

### *Summary and analysis of consultation responses*

5.139 All respondents agreed with or did not comment on our proposals to impose cost accounting obligations on BT and KCOM in the specified markets.

### *Conclusions*

5.140 Having taken account of stakeholders' responses, and on the basis of the analysis set out above, we have decided to continue to require BT and KCOM to meet cost accounting obligations in the relevant markets in which they hold SMP. Specifically, the cost accounting obligations apply to: BT in the market for wholesale fixed analogue exchange line services in the UK, excluding the Hull Area; and to KCOM in the market for wholesale fixed analogue exchange line services in the Hull Area.

### Legal tests

5.141 Under sections 87(9) to 87(11) and 88 of the Act, appropriate cost accounting obligations may be imposed on dominant providers in respect of the provision of Network Access, the use of the relevant network and the availability of relevant facilities. Cost accounting rules may be made in relation to charge controls, the recovery of costs and cost orientation.

5.142 We are satisfied that cost accounting conditions set out in Schedule 2 to Annex 2 (in respect of BT) and Annex 3 (in respect of KCOM) to the financial reporting statement meet the various tests set out in the Act.

5.143 We have considered our duties under section 3 of the Act. In particular, the imposition of a cost accounting obligation on BT and KCOM is justifiable and proportionate to promote competition in relation to the provision of electronic communications networks and services; to ensure the provision of Network Access and service interoperability for the purpose of securing efficient and sustainable competition and the maximum benefit for the persons who are customers of CPs. This is because the imposition of the obligation ensures that obligations designed to curb potentially damaging exploitation of market power – in particular the setting of charges at seemingly excessive levels – can be effectively monitored and enforced.

5.144 We have considered the Community requirements set out in section 4 of the Act and believe that the condition meets the requirements. Specifically, the condition meets the requirement under sections 4(7) and 4(8) to encourage the provision of network access for the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services.

5.145 We consider that the conditions meet the criteria set out in section 47(2) of the Act in that they are:

- objectively justifiable, as they relate to the need to ensure competition develops fairly, to the benefit of consumers;
- not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;

- proportionate, as they are necessary as a mechanism to allow third parties sight of regulatory accounts to ensure compliance with cost orientation remedies; and
- transparent, as it is clear the intention is to monitor compliance with specific remedies and the particular cost accounting requirements of BT and KCOM are clearly documented.

## Accounting separation

### Aim and effect of regulation

#### *Consultation proposals*

- 5.146 In the Consultation we proposed to retain an accounting separation obligation on BT and KCOM.
- 5.147 The proposed accounting separation obligation requires BT and KCOM to account separately for internal and external 'sales', which would allow us and third party CPs to monitor their activities to ensure that they do not discriminate in favour of their own downstream activities. Paragraphs 5.85-5.96 of the Consultation set out our arguments for why and in which markets we propose to impose a non-discrimination remedy. Integral to this would be the requirement on BT and KCOM to continue to produce a range of outputs, which support compliance with a no undue discrimination remedy, according to requirements set out in the financial reporting statement.
- 5.148 The proposed condition would apply to BT in the market for provision of wholesale fixed analogue exchange line services in the UK, excluding the Hull Area, and to KCOM in the market for wholesale fixed analogue exchange line services in the Hull Area.

#### *Summary and analysis of consultation responses*

- 5.149 All respondents agreed with or did not comment on our proposals to impose an accounting separation obligation on BT and KCOM in the specified markets.

#### *Conclusions*

- 5.150 Having taken account of stakeholders' responses, and on the basis of the analysis set out in the Consultation and also outlined above, we have decided to continue to require BT and KCOM to comply with the accounting separation obligation.

### Legal tests

- 5.151 Under section 87(7) and 87(8) of the Act, appropriate accounting separation obligations may be imposed on the dominant provider in respect of the provision of Network Access, the use of the relevant network and the availability of relevant facilities. This means that the dominant provider may be required to maintain a separation for accounting purposes between such different matters relating to Network Access or the availability of relevant facilities.
- 5.152 We are satisfied that accounting separation conditions set out in Schedule 2 to Annex 2 (in respect of BT) and Annex 3 (in respect of KCOM) to the financial reporting statement meet the various tests set out in the Act.

- 5.153 We have considered our duties under section 3 of the Act and consider that the application of an accounting separation obligation on BT and KCOM is justifiable to promote competition in relation to the provision of electronic communications networks and service to ensure the provision of Network Access and service interoperability for the purpose of securing efficient and sustainable competition and the maximum benefit for end consumers.
- 5.154 We have considered the Community requirements set out in section 4 of the Act and believe that the conditions meet the requirements. Specifically, the conditions meet the requirement under sections 4(7) and 4(8) to encourage the provision of network access for the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant providers do not favour their own downstream businesses, thereby disadvantaging third party CPs.
- 5.155 We consider that the conditions meet the criteria set out in section 47(2) of the Act in that they are:
- objectively justifiable, as they relate to the need to ensure competition develops fairly, to the benefit of consumers;
  - not unduly discriminatory, as they only apply to providers with SMP and both BT and KCOM are subject to the same obligation;
  - not unduly discriminatory, as they only apply to providers with SMP and as the providers that hold SMP both BT and KCOM are subject to the same obligation;
  - proportionate, as they are necessary as a mechanism to allow Ofcom and third parties to monitor for discriminatory behaviour by dominant providers; and
  - transparent, as it is clear the intention is to monitor compliance with specific remedies and the particular accounting separation requirements of BT and KCOM are clearly documented.

## Minor revisions

- 5.156 In the Consultation, the draft notification set out the proposed basis of charges condition applying to BT (condition AAAA3). There was an error in the paragraph numbering of this condition whereby the second paragraph was denoted by, 'AAA3.2'. This numbering error has been corrected in the final notification attached to this statement and is now 'AAAA3.2'.
- 5.157 We have also removed the words “where that Analogue Core WLR Rental charge is subject to a charge control” from the proposed SMP condition, which was incorrectly numbered AAA3.2. These words had been inserted to address the risk, arising out of a delay to the review of the Analogue Core WLR Rental (among others) charge control, that no cost orientation obligation would apply to Analogue Core WLR Rental in the period between the expiry of the current charge control and the replacement control. However, we have removed this wording in light of the voluntary commitment from BT to abide by certain charge ceilings, including in respect of Analogue Core WLR Rental, from 1 April 2011 until the start of new control.<sup>30</sup>

<sup>30</sup> See <http://stakeholders.ofcom.org.uk/binaries/consultations/lcc/statement/charges>

5.158 In the Consultation, there was an error in the final paragraph (A6.47) of Annex 6. This paragraph is amended to read, “Accordingly, we are seeking to apply the SMP conditions as relevant to BT and KCOM as well as to any BT or KCOM subsidiary or holding company, or any subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006.”

## **Overall conclusions on general SMP remedies**

5.159 We consider that this package of remedies is appropriate and proportionate to address BT’s and KCOM’s SMP in the wholesale fixed analogue exchange line services markets in which they have SMP. The package of remedies are intended to promote competition and secure efficient and sustainable competition for the maximum benefit of consumers. Specifically, the chosen remedies will ensure that both BT and KCOM provide network access on fair, reasonable and non-discriminatory terms, the charges for which should in general be cost orientated. In addition, the remedies will ensure that competing providers can make requests for new or modified forms of Network Access and are provided with the necessary commercial and technical information in a timely manner. Finally, the remedies will ensure that it is possible to monitor BT’s quality of service.

## Section 6

# Specific remedy for BT (WLR)

## Introduction

- 6.1 In the Consultation we considered whether, and in which markets, we should mandate the supply of an analogue wholesale line rental product. This is a product specific requirement that would be in addition to the general remedies already proposed.
- 6.2 This section sets out how we reached our decision to continue to require BT to supply an analogue Wholesale Line Rental (“WLR”) product. The structure of this section is as follows:
- The requirement to provide WLR
  - Consultation proposals on WLR
  - Consultation questions
  - Consultation responses and supplementary analysis
  - Conclusions

## The requirement to provide WLR

- 6.3 In the September 2009 Wholesale Review, we imposed an obligation on BT to provide an analogue WLR product as a remedy to its SMP. KCOM was not subject to such a requirement.
- 6.4 Analogue WLR is the regulated wholesale exchange line service provided by BT both to its own downstream businesses and to competing CPs. It is either onward sold to different retail providers, or used by the purchaser to provide retail narrowband access services e.g. a line rental service or as part of a bundle of services. When using WLR providers take on the full retail relationship with the customer and can offer a ‘single bill’ to end-users.

## Consultation proposals on WLR

### Aim and effect of regulation

#### Consultation proposals

##### *Proposed obligation on BT to provide analogue WLR*

- 6.5 In the Consultation we proposed to retain the current requirement on BT to provide analogue WLR, as this remedy allows third party CPs to compete with BT’s downstream businesses. We took the view that this remedy has been, and continues to remain, a central service supporting effective competition in the provision of fixed narrowband services at the retail level (as evidenced by our finding that BT no longer



holds SMP in the provision of retail analogue access services).<sup>31</sup> We further noted that the remedy also has the ability to enhance the carrier pre-selection (“CPS”) and carrier selection (“CS”) (referred to as indirect access (“IA”) in the UK) remedies that we imposed in the calls markets in the September 2009 Wholesale Review, by exposing a greater part of the value chain to competition.

- 6.6 In light of the limited number of developments that have impacted competition in this market we also proposed to retain the direction that removed the basis of charges obligation from certain specific enhanced care services.

#### *No specific product obligation on KCOM*

- 6.7 In the Consultation, we did not propose that KCOM should be required to provide a specific wholesale fixed analogue exchange line product, e.g., like WLR. While we recognised that in principle the arguments for mandating the provision of such a product in the Hull market were similar to those made for the rest of the UK we did not consider it a proportionate requirement in the absence of a clear and demonstrable demand by CPs. In particular, it is not clear precisely what form a wholesale product in the Hull Area should take. However, should a requesting party require a product similar to the BT WLR product then we took the view that it is likely to be a reasonable request for Network Access, subject to the specific technical and commercial requirements. We noted that the only KCOM supplied wholesale product in use in the Hull Area was that used by Nexus and that this was not the same as the BT WLR product.

#### *Proposals concerning the basis of charges obligation and the proposed obligation on BT to provide WLR*

- 6.8 In the Consultation, we proposed to continue to oblige BT to provide products in the wholesale fixed analogue exchange line services market on a cost orientated basis, and considered it appropriate that cost orientation should apply to, amongst others, the three elements required to provide the basic level of exchange line service required by consumers. These are:

- Rental charges;
- Connection, rearrangement and termination charges; and
- Network features that comprise the basic service.

- 6.9 The proposed obligation maintained the regulatory approach currently applying under SMP conditions.

#### *Next generation access networks (NGA) developments*

- 6.10 In the Consultation we did not propose to mandate the provision of an emulated analogue WLR product to be supplied over NGA networks. However, we noted that if BT supplies a voice line rental service over its NGA network then we would consider this to be an analogue fixed exchange line product which is within the scope of this market review. We set out that in those circumstances we may need to consider what specific access remedy should be adopted in order for BT to comply with its access obligations.

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<sup>31</sup> *Review of Fixed Narrowband Retail Services Markets*, Statement, 15 September 2009, at [http://www.ofcom.org.uk/consult/condocs/retail\\_markets/statement/](http://www.ofcom.org.uk/consult/condocs/retail_markets/statement/)

- 6.11 When considering BT's planned NGA deployments, we noted that it intends to deploy two different technologies – Fibre-To-The-Cabinet (“FTTC”) and Fibre-To-The-Premises (“FTTP”).
- 6.12 In the case of its FTTC deployments BT intends to leave the existing voice service unchanged. This means that BT will continue to provide the existing WLR service and accordingly BT's FTTC deployments will not have any impact in the wholesale fixed analogue exchange line services market.
- 6.13 In the case of its brownfield FTTP deployments BT intends to deploy the fibre network as an overlay to the existing copper network. This means that the existing 'copper' connection will continue to be available and accordingly BT will be able to provide the existing WLR service. In this regard BT's FTTP deployments will not have any impact in the wholesale fixed analogue exchange line services market. However, it is our understanding that, in situations where an end user purchases a high speed broadband service over the FTTP network, BT intends to offer an optional voice line service over the FTTP network also. Thus, in this situation BT will be required to provide a wholesale version of this 'FTTP-based' voice line service in order to comply with its access obligations.
- 6.14 Given that FTTP is an entirely new network there is no reason to assume that wholesale access to it will be the same as the current WLR service. Further, we understand that BT is currently planning to provide a Fixed Voice Access product which will allow access to and control of an analogue telephone adaptor (“ATA”) – an arrangement that is termed 'Open ATA'<sup>32</sup>. Whether or not Open ATA becomes the standard wholesale exchange line access remedy on BT's FTTP network will depend on the extent to which it meets the needs of BT's customers.
- 6.15 As discussed above, in brownfield FTTP deployments the existing WLR service remains as an option. However, in green-field FTTP deployments this will not be the case. The issue of the wholesale exchange line access remedy on BT's FTTP network therefore becomes more important in greenfield situations, as there is no 'copper' WLR option. This being said we noted that the total coverage of BT's greenfield FTTP deployments is expected to be very small over the period covered by this review.
- 6.16 Due to the nascent nature of this technology we felt that it was too early for us to prescribe a specific solution. We, therefore, decided that it was better to allow industry to consider this further and to rely on the general access requirement.

## Consultation questions

- 6.17 In the Consultation we asked three questions concerning the provision of a mandated wholesale analogue exchange lines product. Specifically:

*Do you agree that Ofcom should impose an obligation on BT to provide analogue WLR products in the wholesale fixed analogue exchange lines market? If not, please explain why.*

*Do you agree that it is not currently necessary to require KCOM to provide a wholesale analogue exchange line product? If not, please explain why.*

<sup>32</sup> BT now terms Open ATA as 'Fibre Voice Access'.

*Do you agree that additional requirements for wholesale analogue exchange products, arising as a result of NGA deployments should for the time being be met under the terms of the general access obligation?*

## Consultation responses and supplementary analysis

### Obligation on BT to provide analogue WLR

#### *Requirement on BT to provide WLR*

6.18 All of the respondents agreed that it was necessary to impose an obligation on BT to provide an analogue WLR product.

#### *No specific product obligation on KCOM*

6.19 Eight of the nine respondents agreed with our proposal not to mandate a specific wholesale fixed analogue exchange line product in the Hull Area. In its response, KCOM noted that reliance on the general access remedies had proved successful in delivering the service and functionality required by competitors while avoiding the potential costly and lengthy development work if it was obliged to provide a WLR equivalent product without evidence of reasonable demand for it. KCOM further suggested that a mandated product might also remove the flexibility it has in meeting the requirements of other wholesale customers.

6.20 Network Services.com disagreed with our proposal arguing that its national customer required it to provide a national solution and that under the current (and proposed) arrangements it was not able to do so.

### Next generation access networks (NGA) developments

6.21 FCS, SSE and the confidential respondent all raised concerns that we were not proposing to mandate a WLR equivalent product for BT's NGA networks. In particular, FCS and SSE identified four common concerns. Specifically:

- Ofcom should mandate an NGA WLR product to ensure the level of competitive intensity is maintained. SMP products delivered by BT should meet the needs of all CPs, including those that don't have the necessary infrastructure to consume Open ATA;
- WLR service providers have not had a proper opportunity to be involved in the development of NGA voice products. Either one of the existing industry fora (e.g. the Copper Product Commercial Group ("CPCG")), or a new forum, should be opened to all CPs and given an all encompassing remit to manage the NGA product transition;
- The principle of EOI is being diluted when Openreach's development decisions are framed by BT Retail's consumption choices, which is evidenced by Openreach's decision to discontinue its VONGA development; and
- Greenfield FTTP deployments are going to be much more significant than Ofcom estimates (e.g. BT intends to deploy FTTP in the Olympic village, supplying 3,000 apartments on the site that will become legacy housing after the games, and this FTTP deployment is further likely to "ripple" out to the surrounding area).

## Ofcom's response

### Obligation on BT to provide analogue WLR

#### *Requirement on BT to provide WLR*

6.22 Given that no stakeholders objected to us retaining an obligation on BT to provide analogue WLR we consider that we should stick with our proposal.

#### *No specific product obligation on KCOM*

6.23 While Network Services.com is currently unable to offer a common UK wide WLR product from a sole provider, it is able to supply that customer using KCOMs existing wholesale exchange lines offering or request that KCOM develop a WLR-like product (or alternative fit-for-purpose wholesale fixed analogue exchange lines product). As we set out in paragraph 6.7 above, we recognise the principle for mandating the provision of a wholesale fixed analogue exchanges lines product in the Hull market but continue to take the view that the general access conditions that we have imposed provides KCOM with an appropriate degree of flexibility to respond to wholesale demand and that an obligation mandating provision would be disproportionate. We have therefore decided not to impose a requirement on KCOM to provide a specified wholesale fixed analogue exchange lines product.

### Next generation access networks (NGA) developments

6.24 As discussed in the Consultation and summarised above, NGA (in particular FTTP) is an entirely new network and as such there is no reason to assume that wholesale access to it will be the same as the current WLR service. Further, given the nascent stage of these developments and the corresponding lack of information on supply costs and demand we consider that there would be a high risk of specifying an inappropriate access remedy at this time – noting that today BT has about 100 to 200 customers connected using FTTP technology. We therefore consider that the general network access requirement provides the flexibility for industry to develop NGA wholesale access products that are technically, economically and commercially viable. For these reasons we are not mandating a specific NGA access product at this time.

6.25 CPs are not excluded from engaging with BT on the development of its NGA product portfolio, either on an individual basis or through the various industry fora. We would encourage CPs to discuss how best to engage with it and at which of these fora. Furthermore, where CPs consider that there is a gap in these groups, we would also encourage them to bring this to BT's attention and to work with it to find the most appropriate resolution. We would also note that we recently wrote to the Office of the Telecommunications Adjudicator ("OTA") requesting it to extend its remit to include, amongst other things, BT's NGA products GEA/VULA, so allowing it to take a view of BT's developments across all access remedies.

6.26 We understand that the principle of EOI referred to by the respondents relates to the framework established under the BT Undertakings, rather than the SMP framework. However, we would note that this comment highlights the fact that there is unlikely to be a single EOI point or product which all CPs agree on. This supports our view that industry needs to consider this issue further so that the different options, and their relative pros and cons, can be identified. It is also possible that BT Retail's consumption choice is driven, to some extent, by the underlying economics and accordingly where the strongest competition is likely to develop.

6.27 We continue to take the view that greenfield FTTP deployment is likely to be limited over the period covered by this review. As discussed above BT currently has only 100 to 200 FTTP customers and while a 3,000 unit development appears significant in absolute terms, it is a very small proportion of the total market for wholesale fixed analogue exchange lines.

## Legal tests

6.28 We are satisfied that condition AAAA10, for BT at Annex 1 meets the various tests set out in the Act.

6.29 We consider that the condition furthers the interests of citizens in relation to communications matters and furthers the interests of consumers in relevant markets, where appropriate by the promotion of competition in line with section 3 of the Act.

6.30 We also consider that the condition meets the requirements set out in Section 4 of the Act. In particular, the condition promotes competition and secures efficient and sustainable competition and the maximum benefit for customers by enabling providers to compete in downstream access markets.

6.31 We consider the condition meets the criteria set out in section 47(2) of the Act. The condition is:

- objectively justifiable in that it relates to the need to ensure that competition develops to the benefit of consumers. The growth of competition based on WLR has delivered benefits to consumers in terms of competition. Removing the obligation to provide WLR may result in BT withdrawing the product or otherwise changing it to the detriment of the retail competition that has developed;
- not unduly discriminatory as the obligation on KCOM to provide Network Access on reasonable request is sufficient based on the market conditions of the Hull area;
- proportionate in that it is necessary to enable competition but is not unduly burdensome on BT; and
- transparent in that it is clear in its intention to ensure that BT provides WLR products.

6.32 In addition, we have taken into account the factors set out in section 87(4) and, in particular, the economic viability of service providers building an alternative access network and the feasibility of providing WLR themselves.

6.33 Finally, we consider that the tests in section 88 of the Act have been met. There is risk that in situations where SMP is persistent, pricing will be distorted and not at competitive levels as dominant providers are likely to want to charge excessive prices in order to maximise profits by increasing their revenues and the costs of competing providers. The proposed condition is appropriate in order to promote efficiency and sustainable competition and confer the greatest possible benefits on end users by enabling competing providers to buy wholesale services at levels that might be expected in a competitive market.

6.34 The condition would apply to the wholesale fixed analogue exchange line services market in which we have concluded that BT holds SMP.

- 6.35 The findings that we have reached here do not affect the specific WLR SMP remedy that we imposed on BT in the wholesale ISDN2 exchange lines market under the September 2009 Wholesale Review, or any other product specific remedies that apply in other defined markets in the September 2009 Wholesale Review, or the subsequent August 2010 ISDN30 Review.

## **Conclusions**

- 6.36 For the reasons set out above and presented in the Consultation document and having carefully considered all of the responses to the Consultation and taking account of the relevant legal tests, we are imposing an obligation on BT to provide WLR.

## Section 7

# Specific remedy for BT (WLR charge control)

## Introduction

- 7.1 In this section we set out our conclusion, and the rationale supporting it, in relation to the imposition of a charge control on BT's WLR product.
- 7.2 This Section is structured as follows:
- The aim and effect of a charge control
  - Consultation questions
  - Summary and analysis of consultation responses
  - Conclusions

## The aim and effect of a charge control

### Consultation proposals

#### Proposed charge control obligation on BT

- 7.3 In the Consultation, we proposed that we retain a charge control on BT's analogue WLR product. We made the proposal because we considered there to be a risk that BT could use its SMP to set charges for analogue WLR at an excessively high level and that that would damage competition in the retail narrowband markets and harm consumers. Having identified the risk to competition we considered the requirements of section 88 of the Act and proposed the introduction of a charge control remedy.
- 7.4 We considered that while a basis of charges condition would act to constrain BT's pricing a charge control was still needed. This was because a cost orientation on its own would provide BT with considerable pricing freedom and would not incentivise BT to improve its efficiency. A charge control was therefore thought to be required to ensure CPs could purchase analogue WLR at a wholesale rate that would be expected in a competitive market. In particular, we noted that our expectation was that the charge control would result in prices being based on a forward-looking view of the costs<sup>33</sup> related to the provision of wholesale fixed analogue exchange line services over the charge control period, taking into account efficiency improvements and possible future investment by BT.
- 7.5 We therefore proposed to introduce a further analogue WLR charge control after the current control expires on 31 March 2011.

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<sup>33</sup> We will consider the specifics of the charge control, including the relevant costs, in a separate consultation that will be published in early 2011.

*Minor modification to the existing charge control obligation*

- 7.6 As set out in Section 5, 6 and 7 of the Consultation, we also noted that the existing WLR charge control operates in tandem with the general basis of charges obligation. That means that the obligation for costs to be based on LRIC+ continues to apply to the services subject to the WLR charge control, with the exception of the Analogue Core WLR Rental and enhanced care services, which are both specifically exempted from the basis of charges obligation.
- 7.7 We proposed to revoke the relevant 2009 obligations and replace them with new obligations that would include a minor modification in the legal instrument to update the cross reference in the existing WLR charge control Condition AAA4(WLR). This would replace the reference to the existing basis of charges obligation (AAA3) with the proposed basis of charges obligation (AAAA3). We also proposed replacing the cross reference to the existing SMP condition concerning the provision of Wholesale Line Rental (AAA10) in condition AAA4(WLR) with the reference to the new proposed equivalent obligation (AAAA10).

No proposed charge control obligations on KCOM

- 7.8 In the Consultation (paragraphs 7.20 to 7.22), we did not propose any charge controls on KCOM in the Hull Area, as we considered it to be a disproportionate means to encourage market entry, given the limited demand for network access or new product development to date. We also recognised that such a requirement would be a regulatory burden on KCOM, the costs of which would ultimately need to be recovered from KCOM's retail customers.

**Consultation questions**

- 7.9 In the Consultation we asked two questions relating to the imposition of any charge controls:

*Do you agree that Ofcom should impose charge controls on BT in its provision of wholesale fixed analogue exchange lines? If not please explain why.*

*Do you agree that it would be disproportionate to impose charge controls on KCOM in wholesale analogue exchange lines? If not, please explain why.*

**Summary and analysis of consultation responses**

- 7.10 Bt accepted, and all other respondents agreed, that we need to impose a charge control on BT's analogue WLR product. However, in its response, BT re-iterated that with the existence of upstream remedies made available to address BT's SMP in the WLA market it becomes unclear whether we will need to mandate the ongoing provision of analogue WLR.
- 7.11 Eight of the nine respondents agreed that we do not need to impose a charge control on a wholesale analogue exchange lines product supplied by KCOM. One respondent, Network Services.com disagreed, arguing that all CPs should have equal access to all monopoly markets.<sup>34</sup>

<sup>34</sup> Network Services.com made the point that all CPs should have equal access to the monopoly markets in which the alleged mobile cartel operates. As we noted in paragraph 5.42, this market review concerns wholesale fixed analogue exchange line services. As mobile and fixed services are



- 7.12 In response to the point raised by BT, while the upstream remedies imposed on BT in the WLA market provide a source of competitive constraints to BT's SMP in the downstream wholesale fixed analogue exchange line services market, these were taken into account in our market power assessment. In that assessment we concluded that BT's SMP is likely to remain throughout the period covered by this review.
- 7.13 In response to Network Services points, we continue to take the view that requiring KCOM to provide a wholesale fixed analogue exchange lines product would be disproportionate, as would the imposition of a charge control. We confirmed our decision in this statement to require KCOM to offer network access (paragraphs 5.20 to 5.22) and imposed additional regulation relating to new network access that requires it to provide an SOR process (paragraphs 5.34 to 5.35). We consider these network access provisions, which are complemented by the other general SMP conditions, cost accounting and accounting separation provisions detailed in Section 5 to be the most appropriate and proportionate means of ensuring market access in the Hull Area. We have therefore decided not to impose a requirement on KCOM to provide a specified wholesale fixed analogue exchange lines product. Therefore, we have decided not to impose a charge control on KCOM.

### Legal tests

- 7.14 A future WLR charge control can only be set if the relevant condition meets the requirements of section 88 of the Act. Specifically, if:
- There is a relevant risk of adverse effects arising from price distortion;
  - The setting of the condition is appropriate for the purposes of:
    - (i) promoting efficiency;
    - (ii) promoting sustainable competition; and
    - (iii) conferring the greatest possible benefits on the end users of public electronic communications services; and
  - we have taken into account the extent of the investment by the BT.
- 7.15 We are of the view that a charge control would promote efficiency by requiring BT to price at the level of an efficient firm in the absence of competitive constraints in this market. Depending on the specific form of control BT would likely be incentivised to improve its efficiency ahead of the efficiency improvements built into the charge control. It would also likely promote sustainable competition at the retail level by restricting BT's ability to price excessively with the aim of making it more difficult for other providers to compete. We expect that the benefits of this pricing would eventually flow through to consumers.
- 7.16 In this statement we are concluding that a charge control is required but are not specifying the form, level or duration of that control. We will consult separately on the specifics of the charge control in the early 2011.

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considered to be in separate economic markets we do not intend to consider the latter in this review. Furthermore, see paragraph 5.19 for our response to Network Services.com's allegation that there is a mobile cartel in operation.

7.17 Furthermore, we consider that the charge control on WLR would meet the criteria set out in section 47(2) of the Act, since it is objectively justifiable, non-discriminatory, proportionate and transparent. This is for the reasons below.

- objectively justifiable, as BT has SMP in the market, it is unlikely to be incentivised to reduce its costs and set prices at the competitive level;
- not unduly discriminatory, as it only applies to providers with SMP. Ofcom does not propose to impose this obligation on KCOM as, based on our analysis, we do not think that such an imposition would be proportionate;
- proportionate, as we will ensure that it will allow BT to make a return on investment whilst acting to constrain BT's ability to set prices above the competitive level which may result in consumers paying higher retail prices; and
- transparent, in that the condition, when we formulate our detailed proposals, will be clear in its intention.

7.18 For the reasons set out above, we consider that the imposition of a charge control would in particular further the interests of citizens and further the interests of consumers in relevant markets by the promotion of competition in line with section 3 of the Act. Further, we consider that, in line with section 4 of the Act, the proposed condition in particular promotes competition in relation to the provision of electronic communications networks and encourages the provision of Network Access for the purpose of securing efficiency and sustainable competition in downstream markets for electronic communications networks and services and the maximum benefit for customers.

## Conclusions

7.19 Having considered the responses and taking account of the relevant legal tests, we are imposing a charge control obligation on BT in relation to analogue WLR.

7.20 The current analogue WLR charge control expires on 31 March 2011. We are not intending to revoke any of the current SMP service conditions relating to the charge controls and will consult on the setting and implementation of the future charge controls early in 2011.

7.21 We consider that placing a charge control obligation on KCOM would be an inappropriate and disproportionate remedy to its SMP in this market.

## Annex 1

# Legal instruments

## SETTING OF, AND MODIFICATION TO, SMP CONDITIONS

### NOTIFICATION UNDER SECTIONS 48(1) AND 79(4) OF THE COMMUNICATIONS ACT 2003

#### Identifying markets, making market power determinations and the setting of SMP services conditions in relation to BT and KCOM under section 45 of the Communications Act 2003

##### Background

1. On 22 July 2004, Ofcom published '*The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification (Accounting separation and cost accounting: Final statement and notification)*'.<sup>35</sup>
2. On 15 September 2009, Ofcom published a '*Review of the fixed narrowband services wholesale markets: Statement on the markets, market power determinations and remedies including further consultation*'.<sup>36</sup> This found (among others) that BT had SMP in wholesale analogue exchange line services in the UK, excluding the Hull Area, and that KCOM had SMP in wholesale analogue exchange line services in the Hull Area.
3. On 26 October 2009, Ofcom published '*Charge controls for Wholesale Line Rental and related services: Statement and consultation*'<sup>37</sup>, with reference to Ofcom's findings in the 2009 Notification.
4. On 23 February 2010, Ofcom published '*Charge controls for Wholesale Line Rental – implementation and cost orientation*'<sup>38</sup> which removed the basis of charges (cost orientation) obligation on specific higher care services linked to WLR arising out of the SMP conditions imposed by the 2009 Notification.
5. On 15 October 2010, Ofcom published a '*Review of the wholesale fixed analogue exchange lines markets*'<sup>39</sup>, a consultation on proposals reviewing market definitions, market analyses and where appropriate, the setting of SMP services conditions. The 2010 Consultation proposed markets for wholesale analogue fixed analogue exchange lines services for the UK excluding the Hull Area and the Hull Area, and that BT and KCOM had SMP in those respective markets, and that appropriate SMP conditions should be imposed on each of BT and KCOM.

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<sup>35</sup> 'The regulatory financial reporting obligations on BT and Kingston Communications, Final Statement and notification: Accounting separation and cost accounting', 22 July 2004,

[http://www.ofcom.org.uk/consult/condocs/fin\\_reporting/fin\\_report\\_statement/](http://www.ofcom.org.uk/consult/condocs/fin_reporting/fin_report_statement/)

<sup>36</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/wnmr\\_statement\\_consultation/summary/main.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wnmr_statement_consultation/summary/main.pdf)

<sup>37</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/wlr/summary/wlrcondoc.pdf>

<sup>38</sup> [http://stakeholders.ofcom.org.uk/binaries/consultations/wlr/statement/wlr\\_statement.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/wlr/statement/wlr_statement.pdf)

<sup>39</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/summary/main.pdf>

6. On 18 November 2010 the consultation period for the 2010 Consultation closed. Ofcom received responses from communications providers and individuals and the European Commission. Ofcom has carefully considered all responses received.

### **Decisions on market definition and market power analysis**

7. Ofcom hereby makes, in accordance with sections 48(1) and 79(4) of the Ac, the following decisions identifying markets, making market power determinations and the setting of SMP services conditions by reference to such determinations ("SMP conditions").

8. Ofcom has identified the following markets for the purpose of making market power determinations:

- (a) for the United Kingdom, excluding the Hull Area wholesale fixed analogue exchange line services; and
- (b) for the Hull Area wholesale fixed analogue exchange line services;

9. Ofcom has decided to make market power determinations that the following persons have significant market power:

- (a) in relation to the market set out in paragraph 8(a) above, BT;
- (b) in relation to the market set out in paragraph 8(b) above, KCOM.

### **Decisions to set SMP service conditions**

10. Ofcom has decided, with effect from the date of this Notification, to set on the persons referred to in paragraph 9(a) above:

- (a) the SMP conditions as set out in Schedule 1 to this Notification; and
- (b) SMP conditions OA1 to OA28, OA32 and OA33 as set out in Schedule 2 to Annex 2 of the financial reporting statement.

11. Ofcom has decided, with effect from the date of this Notification, to set on the persons referred to in paragraph 9(b) above:

- (a) The SMP conditions as set out in Schedule 2 to this Notification; and
- (b) SMP conditions OB1 to OB27, OB31 and OB32 as set out in Schedule 2 to Annex 3 of the financial reporting statement.

12. The effect of, and Ofcom's reasons for making, the decisions to identify the markets set out in paragraph 8 above and to make the market power determinations set out in paragraph 9 above are contained in Sections 3 and 4 of the explanatory statement accompanying this Notification, which should be read in conjunction with Sections 3 and 4 of the associated consultation, *Review of the wholesale fixed analogue exchange lines markets*, published on 15 October 2010;

13. The effect of, and Ofcom's reasons for making, the proposals to set the SMP conditions set out in Schedules 1 and 2 to this Notification and the SMP conditions set out in the financial reporting statement are contained in Sections 5 to 7 of the explanatory statement accompanying this Notification.

### **Decisions to modify SMP service conditions**

14. Ofcom has decided, with effect from the date of this Notification, to make a minor modification to SMP Condition AAA4(WLR) (as modified) to ensure that it cross-references to the new SMP conditions concerning basis of charges and the provision of Wholesale Line Rental (see paragraph 10 above) in light of the decision to revoke the existing SMP Condition AAA3 and AAA10 (see paragraph 16 below). Accordingly:

- (i) in paragraph AAA4(WLR).3 of SMP Condition AAA4(WLR) (as modified) as set out in Schedule 1 to the 2009 Second Notification, for the reference to Condition AAA3, there shall be substituted the reference to Condition AAAA3, and Condition AAA4(WLR).3 shall be read accordingly; and
- (ii) in paragraph AAA4(WLR).12 of SMP Condition AAA4(WLR) (as modified) as set out in Schedule 1 to the 2009 Second Notification, for the reference to Condition AAA10.1(a), there shall be substituted the reference to Condition AAAA10.1, and Condition AAA4(WLR).12 shall be read accordingly.

15. The effect of, and Ofcom's reasons for making, these decisions are contained in Sections 5 to 7 of the explanatory statement accompanying this Notification.

### **Decisions to revoke SMP service conditions**

16. Ofcom has decided, with effect from the date of this Notification, to revoke existing SMP service conditions, as detailed in paragraph 17 below, insofar as they relate to the following markets:

- (i) in relation to BT only, the market for wholesale fixed analogue exchange line services in the United Kingdom, excluding the Hull Area; and
- (ii) in relation to KCOM only, the market for wholesale fixed analogue exchange line services in the Hull Area.

17. The SMP conditions referred to in paragraph 16, above, are as follows:

- (a) the SMP conditions (as modified) set out in Schedule 1 to the 2009 Notification but excluding Condition AAA4(WLR); and
- (b) the SMP conditions (as modified) set out in Schedule 2 to the 2009 Notification.

18. The effect of, and Ofcom's reasons for making, the decisions to revoke the SMP conditions set out in paragraphs 16 and 17 above are contained in Section 5 of the consultation document accompanying this Notification.

19. For the avoidance of doubt, Ofcom neither proposed, or has decided, to revoke any of the SMP services conditions set out in the 2009 Notification in relation to the following markets:

- (a) for the United Kingdom, excluding the Hull Area:
  - (i) wholesale ISDN2 exchange line services;
  - (ii) wholesale call origination on a fixed narrowband network;
  - (iii) wholesale fixed geographic call termination on each individual network;

- (iv) local-tandem conveyance and transit on fixed public narrowband networks;  
and
- (b) for the Hull Area:
  - (i) wholesale ISDN2 exchange line services; and
  - (ii) wholesale call origination on a fixed narrowband network.

### **Ofcom's duties and legal tests**

20. In identifying and analysing the markets referred to in paragraph 8 above, and in considering whether to make the corresponding decisions, Ofcom has, in accordance with section 79 of the Act, taken due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of a Community instrument, and relate to market identification and analysis or the determination of what constitutes significant market power.

21. Ofcom considers that the SMP conditions referred to above comply with the requirements of sections 45 to 47, 87, 88 and 90 of the Act, as appropriate and relevant to each such SMP condition.

22. In making all of the decisions referred to in paragraphs 7 to 19 of this Notification, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act and the six Community requirements in section 4 of the Act.

23. Copies of this Notification and the accompanying explanatory statement have been sent to the Secretary of State for Business, Innovation and Skills in accordance with section 50(1)(a) and 81(1) of the Act, the European Commission and to the regulatory authorities of every other member State in accordance with sections 50(2) and 81(2) of the Act.

### **Interpretation**

24. Save as to referring to markets identified in paragraph 8 of this Notification and except as otherwise defined in paragraph 25 of this Notification, words or expressions used shall have the same meaning as they have been ascribed in the Act.

25. In this Notification:

- (a) **"2009 Notification"** means the notification under sections 48(1) and 79(4) of the Act set out at Annex 7 of the Review of the fixed narrowband services wholesale markets: Statement on the markets, market power determinations and remedies including further consultation, dated 15 September 2009;
- (b) **"2009 Second Notification"** means the notification under sections 48(1) and 79(4) of the Act set out at Annex 6 of the Charge controls for Wholesale Line Rental and related services: Statement and consultation, dated 26 October 2009;
- (c) **"2010 Consultation"** means the notification under sections 48(2) and 80 of the Act set out at Annex 7 of the consultation 'Review of the wholesale fixed analogue exchange lines markets' dated 15 October 2010,
- (d) **"the Act"** means the Communications Act 2003 (c. 21);

(e) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;

(f) “**Hull Area**” means the area defined as the 'Licensed Area' in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communication (Hull) plc;

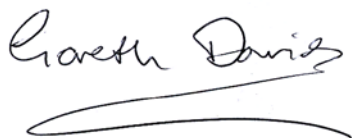
(g) “**KCOM**” means KCOM Group plc, whose registered company number is 2150618, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006,

(h) “**financial reporting statement**” means ‘*The regulatory financial reporting obligations on BT and Kingston Communications Final statement and notification (Accounting separation and cost accounting: Final statement and notification)*’ published on 22 July 2004.

(i) “**Ofcom**” means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002; and

(j) “**United Kingdom**” has the meaning given to it in the Interpretation Act 1978 (c. 30).

**Signed**

A handwritten signature in black ink, appearing to read 'Gareth Davies', with a long horizontal flourish underneath.

**Gareth Davies**  
**Competition Policy Director**

**A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002**

**20 December 2010**

## SCHEDULE 1

**The SMP services conditions imposed on BT under sections 45, 87, 88 and 90 of the Communications Act 2003 as a result of the analysis of the markets set out in paragraph 8(a) of the Notification in each of which it is determined that BT has significant market power (“SMP conditions”)**

### **Part 1: Application, definitions and interpretation relating to the SMP conditions in Part 2**

1. The SMP conditions in Part 2 of this Schedule 1 shall, except insofar as it is otherwise stated therein, apply to all of the market identified in paragraph 8(a) of the Notification.
2. In this Schedule 1:
  - (a) “**Act**” means the Communications Act 2003 (c. 21);
  - (b) “**Access Charge Change Notice**” has the meaning given to it in Condition AAAA6(a).2;
  - (c) “**Access Contract**” means:
    - (i) a contract for the provision by the Dominant Provider to another person of Network Access to the Dominant Provider’s Electronic Communications Network;
    - (ii) a contract under which Associated Facilities in relation to the Dominant Provider’s Public Electronic Communications Network are made available by the Dominant Provider to another person;
  - (d) “**Analogue Core WLR Rental**” means, unless Ofcom directs otherwise from time to time for the purpose of the meaning of this expression, such services as the Dominant Provider is required to provide under SMP services condition AAAA10.1(a) and which on the date this Condition takes effect include:
    - (i) the rental of an analogue exchange line for control and billing purposes;
    - (ii) maintenance which is part of the service provided by the Dominant Provider in consideration of the charge for an Exchange Line and includes a maintenance service level with a fault repair time of no more than provided for Level 1 service care level for Basic lines, as defined in the Dominant Provider’s standard terms and conditions; and
    - (iii) one main directory listing per telephone number, comprising of either:
      - (i) a residential style listing; or
      - (ii) a business style listing, where the Dominant Provider provides to the Third Party a WLR3 service, as defined in the Dominant Provider’s standard terms and conditions;”



- (e) “**Directory**” means a printed document containing Directory Information on Relevant Subscribers of Publicly Available Telephone Services in the United Kingdom which is made available to members of the public;
- (f) “**Directory Information**” means, in the case of a Directory, the name and address of the Relevant Subscriber and the Telephone Number assigned to the Relevant Subscriber for his use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Relevant Subscriber or information that such a Telephone Number of the Relevant Subscriber may not be supplied;
- (g) “**Directory Enquiry Facility**” means Directory Information provided by means of a Public Telephone Network;
- (h) “**Dominant Provider**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
- (i) “**Exchange Line**” means Apparatus comprised in the Dominant Provider’s Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;
- (j) “**Existing Line Transfer**” means the combination of transactions consisting of a customer (including but not limited to a customer who is a provider of a Public Electronic Communications Service) of the Dominant Provider for an Exchange Line terminating his contract (‘the customer contract’) with the Dominant Provider for the Exchange Line, and the Dominant Provider entering into a contract for that Exchange Line with a provider of a Public Electronic Communications Service (‘the Third Party contract’), except where the Third Party contract is entered into after the Dominant Provider has ceased the Exchange Line (in which case the Third Party contract shall be deemed to be a New Line Installation);
- (k) “**Local Exchange**” means a telephone exchange to which Customers are connected, usually via a remote or locally sited concentrator unit, which telephone exchange supports the provision of either analogue or digital Exchange Lines;
- (l) “**Network Component**” means, to the extent they are used in the Services Market, the network components specified in any direction given by Ofcom from time to time for the purpose of these SMP conditions.
- (m) “**Network Termination and Testing Apparatus**” means an item of Apparatus comprised in an Electronic Communications Network installed in a fixed position on Served Premises which enables:
- (a) Approved Apparatus to be readily connected to, and disconnected from, the Network;

(b) the conveyance of Signals between such Approved Apparatus and the Network;

(c) the due functioning of the Network to be tested, but the only other functions of which, if any, are:

(i) to supply energy between such Approved Apparatus and the Network;

(ii) to protect the safety or security of the operation of the Network; or

(iii) to enable other operations exclusively related to the running of the Network to be performed or the due functioning of any system to which the Network is or is to be connected to be tested (separately or together with the Network);

(n) “**Network Termination Point**” means the physical point at which a Relevant Subscriber is provided with access to a Public Electronic Communications Network and, where it concerns Electronic Communications Networks involving switching or routing, that physical point is identified by means of a specific network address, which may be linked to the Telephone Number or name of a Relevant Subscriber. Where a Network Termination Point is provided at a fixed position on Served Premises, it shall be within an item of Network Termination and Testing Apparatus;

(o) “**New Line Installation**” means a service for the installation of an Exchange Line, where some or all external (or internal) wiring has to be provided, or brought into use, by the Dominant Provider. For purposes of this definition, “external wiring” means wiring from the distribution point to the protection box (or where one would be fitted) at the premises at which the Network Termination and Testing Apparatus is located and “internal wiring” means wiring from the protection box up to and including the first main socket, block terminal or other Network Termination Point;

(p) “**Numbering Plan**” means the National Telephone Numbering Plan published from time to time by Ofcom pursuant to sections 56 and 60 of the Act;

(q) “**Ordinary Maintenance**” means maintenance which is part of the service provided by the Dominant Provider in consideration of the charge for an Exchange Line and includes normal fault repair, as defined in the Dominant Provider's standard terms and conditions;

(r) “**Point of Connection**” means a point at which the Dominant Provider's Electronic Communications Network and another person's Electronic Communications Network are connected;

(s) “**Public Pay Telephone**” means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or prepayment cards, including cards for use with dialling codes;

(t) “**Public Telephone Network**” means an Electronic Communications Network which is used to provide Publicly Available Telephone Services; it supports the transfer between Network Termination Points of speech communications, and also other forms of communication, such as facsimile and data;

(u) “**Publicly Available Telephone Services**” means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End-users with disabilities or with special social needs and/or the provision of non-geographic services;

(v) “**Reference Offer**” means the terms and conditions on which the Dominant Provider is willing to enter into an Access Contract;

(w) “**Relevant Subscriber**” means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such Services;

(x) “**Services Market**” means all of the market set out in paragraph 8(a) of the Notification;

(y) “**Subscriber**” means any person who is party to a contract with the provider of Publicly Available Telephone Services for the supply of such Services in the United Kingdom;

(z) “**Third Party**” means either:

(i) a person providing a Public Electronic Communications Network; or

(ii) a person providing a Public Electronic Communications Service;

(aa) “**Usage Factor**” means the average usage by any Communications Provider (including the Dominant Provider itself) of each Network Component in using or providing a particular product or service or carrying out a particular activity;

(bb) “**Wholesale Analogue Line Rental**” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an analogue Exchange Line;

(ee) “**Wholesale Line Rental**” means Wholesale Analogue Line Rental provided by the Dominant Provider:

(ff) “**Wholesale Line Rental Charge**” means the annual charge levied by the Dominant Provider for Wholesale Line Rental including packages containing a line rental charge and any included levels of service sold as part of a single marketed product;

(gg) “**Wholesale Line Rental Per Customer Line Set-up Costs**” means the costs incurred by the Dominant Provider in providing Wholesale Line Rental Per Customer Line Set-up Facilities;

(hh) “**Wholesale Line Rental Per Customer Line Set-up Facilities**” means the Wholesale Line Rental facilities required from the Dominant Provider by a Third Party in order for the Third Party to be able to set up Wholesale Line Rental on

the Exchange Line of a Subscriber to whom the Dominant Provider provides a Publicly Available Telephone Service by means of a Public Telephone Network;

(ii) **“Wholesale Line Rental Per Provider On-going Costs”** means the costs incurred by the Dominant Provider in providing Wholesale Line Rental Per Provider On-going Facilities;

(jj) **“Wholesale Line Rental Per Provider On-going Facilities”** means those Wholesale Line Rental facilities required from the Dominant Provider by any individual Third Party which enable the Third Party to continue on an on-going basis to offer Wholesale Line Rental to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as product management;

(kk) **“Wholesale Line Rental Per Provider Set-up Costs”** means the costs incurred by the Dominant Provider in providing Wholesale Line Rental Per Provider Set-up Facilities;

(ll) **“Wholesale Line Rental Per Provider Set-up Facilities”** means those Wholesale Line Rental facilities required from the Dominant Provider by any individual Third Party in order for the Third Party to be able to offer Wholesale Line Rental to Subscribers to whom the Dominant Provider provides Publicly Available Telephone Services by means of a Public Telephone Network, including (without limitation to the generality of the foregoing) activities such as the setting up of arrangements for the electronic transfer of customer orders;

(mm) **“Wholesale Line Rental Services”** means any and all of the following specific services provided by the Dominant Provider:

- (i) Wholesale Analogue Line Rental (residential quality of service);
- (ii) Wholesale Analogue Line Rental (business quality of service);
- (iii) Existing Line Transfer of a single analogue Exchange Line or multiplexes thereof (residential quality of service);
- (iv) Existing Line Transfer of a single analogue Exchange Line or multiplexes thereof (business quality of service);
- (v) New Line Installation (analogue) (residential quality of service); and
- (vi) New Line Installation (analogue) (business quality of service);

(nn) **“Wholesale Line Rental System Set-up Costs”** means the costs incurred by the Dominant Provider in developing and implementing Wholesale Line Rental System Set-up Facilities; and

(oo) **“Wholesale Line Rental System Set-up Facilities”** means those Wholesale Line Rental Facilities required by the Dominant Provider in order for the Dominant Provider to be able to provide Wholesale Line Rental facilities, such as the software and any alterations needed on the Dominant Provider’s switches and the modifications required for the Dominant Provider’s support systems.

3. For the purpose of interpreting the SMP conditions in Part 2:

(a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 of this Part above and otherwise any word or expression shall have the same meaning as it has in the Act;

(b) the Interpretation Act 1978 (c. 30) shall apply as if each of the SMP conditions in Part 2 were an Act of Parliament; and

(c) headings and titles shall be disregarded.

## Part 2: The SMP conditions

### Condition AAAA1(a) - Requirement to provide Network Access on reasonable request

**AAAA1(a).1** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

**AAAA1(a).2** The provision of Network Access in accordance with paragraph AAAA1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**AAAA1(a).3** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAAA1(a).

**AAAA1(a).4** The Direction made in the document 'BT's use of Cancel Other' published on 28 July 2005, shall continue to have force, until such time it is modified or withdrawn, for the purposes of this condition from the date that this Condition AAAA1(a) enters force.

### Condition AAAA1(b) - Requests for new Network Access

**AAAA1(b).1** The Dominant Provider shall, for the purposes of transparency, publish reasonable guidelines, in relation to requests for new Network Access made to it. Such guidelines shall detail:

- (a) the form in which such a request should be made;
- (b) the information that the Dominant Provider requires in order to consider a request for new Network Access; and
- (c) the time-scales in which such requests will be handled by the Dominant Provider.

**AAAA1(b).2** These guidelines shall meet the following principles:

- (a) the process should be documented end-to-end;
- (b) the timescales for each stage of the process shall be reasonable;
- (c) the criteria by which requests will be assessed shall be clearly identified; and
- (d) any changes to the guidelines be agreed between BT and industry.

**AAAA1(b).3** The Dominant Provider shall, upon a reasonable request from a Third Party considering making a request for new Network Access, provide that Third Party with information so as to enable that Third Party to make a request for new Network Access. Such information shall be provided within a reasonable period.

**AAAA1(b).4** On receipt of a written request for new Network Access, the Dominant Provider shall deal with the request in accordance with the guidelines described at paragraph AAAA1(b).1 above. A modification of a request for new Network Access which has previously been submitted to the Dominant Provider, and rejected by the Dominant Provider, shall be considered as a new request.

**AAAA1(b).5** The Dominant Provider is required to provide Ofcom with a description of the processes it has put in place to ensure compliance with this Condition AAAA1(b). The Dominant Provider shall keep those processes under review to ensure that they remain adequate for that purpose. Where changes to the process are agreed with industry, BT should notify Ofcom of those changes.

### **Condition AAAA2 - Requirement not to unduly discriminate**

**AAAA2.1** The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

**AAAA2.2** In this Condition, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider.

### **Condition AAAA3 - Basis of charges**

**AAAA3.1** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

**AAAA3.2** For the avoidance of doubt, except for the charge for Analogue Core WLR Rental, where the charge offered, payable or proposed for Network Access covered by Condition AAAA1(a) is for a service which is subject to a charge control under Condition AAAA4(WLR) the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that such a charge satisfies the requirements of paragraph AAAA3.1 above.

**AAAA3.3** The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition AAAA3.

**AAAA3.4** The Direction regarding removal of cost orientation obligation for enhanced service level care made in the document 'Charge controls for Wholesale Line Rental – implementation and cost orientation' published on 23 February 2010, shall continue to have force, until such time it is modified or withdrawn, for the purposes of this condition from the date that this Condition AAAA3 enters force.

### **Condition AAAA5 - Requirement to publish a Reference Offer**

**AAAA5.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.

**AAAA5.2** Subject to paragraph AAAA5.8 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes at least the following:

- (a) a description of the Network Access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of the Network Access);
- (b) the locations of the points of Network Access;

- (c) the technical standards for Network Access (including any usage restrictions and other security issues);
- (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- (e) any ordering and provisioning procedures;
- (f) relevant charges, terms of payment and billing procedures;
- (g) details of interoperability tests;
- (h) details of traffic and network management;
- (i) details of maintenance and quality as follows:
  - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- (j) details of measures to ensure compliance with requirements for network integrity;
- (k) details of any relevant intellectual property rights;
- (l) a dispute resolution procedure to be used between the parties;
- (m) details of duration and renegotiation of agreements;
- (n) provisions regarding confidentiality of non-public parts of the agreements;
- (o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts);
- (p) the standard terms and conditions for the provision of Network Access;
- (q) in relation to those products and services subject to Conditions AAAA3 and AAA4(WLR), the amount applied to:
  - (i) each Network Component used in providing Network Access with the relevant Usage Factors; and



(ii) the Transfer Charge for each Network Component or combination of Network Components described above,

reconciled in each case to the charge payable by a Communications Provider other than the Dominant Provider.

**AAAA5.3** In relation to those products and services subject to Conditions AAAA3 and AAAA4(WLR), to the extent that the Dominant Provider provides to itself Network Access that:

- (a) is the same, similar or equivalent to that provided to any other Third Party; or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party,

in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it publishes a Reference Offer in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs AAAA5.2(a) to (q) above.

**AAAA5.4** The Dominant Provider shall update and publish the Reference Offer in relation to any amendments or in relation to any further Network Access provided after the date this Condition AAAA5 enters into force.

**AAAA5.5** Publication referred to above shall be effected by:

- (a) placing a copy of the Reference Offer on any relevant website operated or controlled by the Dominant Provider; and
- (b) sending a copy of the Reference Offer to Ofcom.

**AAAA5.6** The Dominant Provider shall send a copy of the current version of the Reference Offer to any person at that person's written request (or such parts which have been requested).

**AAAA5.7** The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

**AAAA5.8** The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.

**AAAA5.9** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAAA5.

## **Condition AAAA6(a) - Requirement to notify charges**

**AAAA6(a).1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below.

**AAAA6(a).2** Except where new or amended charges are directed or determined by Ofcom or where such charges are required by a notification or an enforcement notification given by Ofcom under sections 94 or 95 of the Act, the Dominant Provider shall send to Ofcom and to every Third Party with which it has entered into an Access Contract covered by Condition AAAA1(a) a written notice of any amendment to the charges on which it provides Network

Access or in relation to any charges for new Network Access (an “Access Charge Change Notice”):

- (a) where the proposed amendment relates to the Wholesale Line Rental Charge, not less than 90 days before any such amendment comes into effect; and
- (b) in any other case, not less than 28 days before any such amendment comes into effect.

**AAAA6(a).3** The Dominant Provider shall ensure that an Access Charge Change Notice includes:

- (a) a description of the Network Access in question;
- (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 date on which or the period for which any amendments to charges will take effect (the “effective date”);
- (d) in relation to those products and services subject to Conditions AAAA3 and AAA4(WLR), the current and proposed new charge and the relevant Usage Factors applied to each Network Component comprised in that Network Access, reconciled in each case with the current or proposed new charge;
- (e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies; and
- (f) in relation to those products and services subject to Conditions AAAA3 and AAA4(WLR) , the relevant network tariff gradient.

**AAAA6(a).4** The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

**AAAA6(a).5** In relation to those products and services subject to Conditions AAAA3 and AAA4(WLR) , to the extent that the Dominant Provider provides to itself Network Access that:

- (a) is the same, similar or equivalent to that provided to any other Third Party; or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party, in a manner that differs from that detailed in an Access Charge Change Notice in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it sends to Ofcom an Access Charge Change Notice in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs AAAA6(a).3(a) to (f).

### **Condition AAAA6(b) - Requirement to notify technical information**

**AAAA6(b).1** Save where Ofcom consents otherwise, where the Dominant Provider:

- (a) proposes to provide Network Access covered by Condition AAAA1(a), the terms and conditions for which comprise new:

- (i) technical characteristics (including information on network configuration where necessary to make effective use of the Network Access);
- (ii) locations of the points of Network Access; or
- (iii) technical standards (including any usage restrictions and other security issues), or

(b) proposes to amend an existing Access Contract covered by Condition AAAA1(a) by modifying the terms and conditions listed in paragraph AAAA6(b).1(a)(i) to (iii) above on which the Network Access is provided,

the Dominant Provider shall publish a written notice (the “Notice”) of the new or amended terms and conditions not less than 90 days before either the Dominant Provider enters into an Access Contract to provide the new Network Access or the amended terms and conditions of the existing Access Contract come into effect. This obligation for prior notification shall not apply where new or amended terms and conditions are directed or determined by the Office of Communications (“Ofcom”) or are required by a notification or an enforcement notification given by Ofcom under sections 94 or 95 of the Act.

**AAAA6(b).2** The Dominant Provider shall ensure that the Notice includes:

- (a) a description of the Network Access in question;
- (b) a reference to the location in the Dominant Provider’s Reference Offer of the relevant terms and conditions;
- (c) the date on which or the period for which the Dominant Provider may enter into an Access Contract to provide the new Network Access or any amendments to the relevant terms and conditions will take effect (the “effective date”).

**AAAA6(b).3** The Dominant Provider shall not enter into an Access Contract containing the terms and conditions identified in the Notice or apply any new relevant terms and conditions identified in the Notice before the effective date.

**AAAA6(b).4** Publication referred to in paragraph AAAA6(b).1 shall be effected by:

- (a) placing a copy of the Notice on any relevant website operated or controlled by the Dominant Provider;
- (b) sending a copy of the Notice to Ofcom; and
- (c) sending a copy of the Notice to any person at that person’s written request, and where the Notice identifies a modification to existing relevant terms and conditions, to every Third Party with which the Dominant Provider has entered into an Access Contract covered by Condition AAAA1(a). The provision of such a copy of the Notice may be subject to a reasonable charge.

## **Condition AAAA7 - Transparency as to quality of service**

**AAAA7.1** The Dominant Provider shall publish all such information for the purposes of securing transparency as to the quality of service in relation to Network Access provided by the Dominant Provider, in such manner and form as Ofcom may from time to time direct.

**AAAA7.2** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAAA7.

**Condition AAAA10 - Requirement to provide Wholesale Line Rental etc.**

**AAAA10.1** The Dominant Provider shall provide Wholesale Line Rental as soon as is reasonably practicable, or as directed by Ofcom, on reasonable terms to every Third Party who makes a reasonable request in relation to wholesale analogue exchange line services.

**AAAA10.2** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges of providing WLR services in paragraph AAAA10.1 are based on the forward looking long-run incremental cost, except where the Dominant Provider and Third Party have agreed another basis for the charges.

**AAAA10.3** The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAAA10.

**AAAA10.4** This Condition AAAA10 is without prejudice to the generality of the provisions in Conditions AAAA1(a) to AAAA7 above.

**AAAA10.5** The Direction regarding removal of cost orientation obligation for enhanced service level care made in the document 'Charge controls for Wholesale Line Rental – implementation and cost orientation' published on 23 February 2010, shall continue to have force, until such time it is modified or withdrawn, for the purposes of this condition from the date that this Condition AAAA10 enters force.

## SCHEDULE 2

**The SMP services conditions imposed KCOM under sections 45, 87, 88 and 90 of the Communications Act 2003 as a result of the analysis of the markets set out in paragraph 8(b) of the Notification in each of which it is determined that KCOM has significant market power (“SMP conditions”)**

### **Part 1: Application, definitions and interpretation relating to the SMP conditions in Part 2**

1. The SMP conditions in Part 2 of this Schedule 1 shall, except insofar as it is otherwise stated therein, apply to all of the market identified in paragraph 8(b) of the Notification.
2. In this Schedule 2:
  - (a) “**Act**” means the Communications Act 2003 (c. 21);
  - (b) “**Access Charge Change Notice**” has the meaning given to it in Condition AAAB5(a).2;
  - (c) “**Access Contract**” means:
    - (i) a contract for the provision by the Dominant Provider to another person of Network Access to the Dominant Provider’s Electronic Communications Network;
    - (ii) a contract under which Associated Facilities in relation to the Dominant Provider’s Public Electronic Communications Network are made available by the Dominant Provider to another person;
  - (d) “**Directory**” means a printed document containing Directory Information on Relevant Subscribers of Publicly Available Telephone Services in the United Kingdom which is made available to members of the public;
  - (e) “**Directory Information**” means, in the case of a Directory, the name and address of the Relevant Subscriber and the Telephone Number assigned to the Relevant Subscriber for his use of Publicly Available Telephone Services and, in the case of a Directory Enquiry Facility, shall be either such a Telephone Number of the Relevant Subscriber or information that such a Telephone Number of the Relevant Subscriber may not be supplied;
  - (f) “**Directory Enquiry Facility**” means Directory Information provided by means of a Public Telephone Network;
  - (g) “**Dominant Provider**” means KCOM Group plc, whose registered company number is 2150618, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
  - (h) “**Exchange Line**” means Apparatus comprised in the Dominant Provider’s Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the

Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;

(i) “**Local Exchange**” means a telephone exchange to which Customers are connected, usually via a remote or locally sited concentrator unit, which telephone exchange supports the provision of either analogue or digital Exchange Lines;

(j) “**Network Component**” means, to the extent they are used in the Services Market, the network components specified in any direction given by Ofcom from time to time for the purpose of these SMP conditions.

(k) “**Network Termination and Testing Apparatus**” means an item of Apparatus comprised in an Electronic Communications Network installed in a fixed position on Served Premises which enables:

(a) Approved Apparatus to be readily connected to, and disconnected from, the Network;

(b) the conveyance of Signals between such Approved Apparatus and the Network;

(c) the due functioning of the Network to be tested,

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

(i) to supply energy between such Approved Apparatus and the Network;

(ii) to protect the safety or security of the operation of the Network; or

(iii) to enable other operations exclusively related to the running of the Network to be performed or the due functioning of any system to which the Network is or is to be connected to be tested (separately or together with the Network);

(l) “**Network Termination Point**” means the physical point at which a Relevant Subscriber is provided with access to a Public Electronic Communications Network and, where it concerns Electronic Communications Networks involving switching or routing, that physical point is identified by means of a specific network address, which may be linked to the Telephone Number or name of a Relevant Subscriber. Where a Network Termination Point is provided at a fixed position on Served Premises, it shall be within an item of Network Termination and Testing Apparatus;

(m) “**Public Pay Telephone**” means a telephone available to the general public, for the use of which the means of payment may include coins and/or credit/debit cards and/or prepayment cards, including cards for use with dialling codes;

(n) “**Public Telephone Network**” means an Electronic Communications Network which is used to provide Publicly Available Telephone Services; it supports the transfer between Network Termination Points of speech communications, and also other forms of communication, such as facsimile and data;

(o) “**Publicly Available Telephone Services**” means a service available to the public for originating and receiving national and international calls and access to Emergency Organisations through a number or numbers in a national or international telephone numbering plan, and in addition may, where relevant, include one or more of the following services: the provision of operator assistance services, Directory Enquiry Facilities, Directories, provision of Public Pay Telephones, provision of service under special terms, provision of specific facilities for End Users with disabilities or with special social needs and/or the provision of non-geographic services;

(p) “**Reference Offer**” means the terms and conditions on which the Dominant Provider is willing to enter into an Access Contract;

(q) “**Relevant Subscriber**” means any person who is party to a contract with a provider of Public Electronic Communications Services for the supply of such Services;

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

(s) “**Services Market**” means all of the market set out in paragraph 8(b) of the Notification;

(t) “**Subscriber**” means any person who is party to a contract with the provider of Publicly Available Telephone Services for the supply of such Services in the United Kingdom;

(u) “**Third Party**” means either:

(i) a person providing a Public Electronic Communications Network; or

(ii) a person providing a Public Electronic Communications Service;

(v) “**Transfer Charge**” means the charge or price that is applied, or deemed to be applied, by the Dominant Provider to itself for the use or provision of an activity or group of activities. For the avoidance of doubt, such activities or group of activities include, amongst other things, products and services provided from, to or within the Services Market and the use of Network Components in that Services Market;

(w) “**Usage Factor**” means the average usage by any Communications Provider (including the Dominant Provider itself) of each Network Component in using or providing a particular product or service or carrying out a particular activity; and

(x) “**Wholesale Analogue Line Rental**” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an analogue Exchange Line;

(y) “**Wholesale Line Rental**” means Wholesale Analogue Line Rental provided by the Dominant Provider:

(z) “**Wholesale Line Rental Charge**” means the annual charge levied by the Dominant Provider for Wholesale Line Rental including packages containing a

line rental charge and any included levels of service sold as part of a single marketed product.

3. For the purpose of interpreting the SMP conditions in Part 2:

(a) except in so far as the context otherwise requires, words or expressions shall have the meaning assigned to them in paragraph 2 of this Part above and otherwise any word or expression shall have the same meaning as it has in the Act;

(b) the Interpretation Act 1978 (c. 30) shall apply as if each of the SMP conditions in Part 2 were an Act of Parliament; and

(c) headings and titles shall be disregarded.



## Part 2: The SMP conditions

### Condition AAAB1(a) - Requirement to provide Network Access on reasonable request

**AAAB1.1(a)** Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

**AAAB1.2(a)** The provision of Network Access in accordance with paragraph AAAB1.1 shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

**AAAB1.3(a)** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAAB1.

### Condition AAAB1(b) - Requests for new Network Access

**AAAB1(b).1** The Dominant Provider shall, for the purposes of transparency, publish reasonable guidelines, in relation to requests for new Network Access made to it. Such guidelines shall detail:

- (a) the form in which such a request should be made;
- (b) the information that the Dominant Provider requires in order to consider a request for new Network Access; and
- (c) the time-scales in which such requests will be handled by the Dominant Provider.

**AAAB1(b).2** These guidelines shall meet the following principles:

- (a) the process should be documented end-to-end;
- (b) the timescales for each stage of the process shall be reasonable;
- (c) the criteria by which requests will be assessed shall be clearly identified; and
- (d) any changes to the guidelines be agreed between the Dominant Provider and industry.

**AAAB1(b).3** The Dominant Provider shall, upon a reasonable request from a Third Party considering making a request for new Network Access, provide that Third Party with information so as to enable that Third Party to make a request for new Network Access. Such information shall be provided within a reasonable period.

**AAAB1(b).4** On receipt of a written request for new Network Access, the Dominant Provider shall deal with the request in accordance with the guidelines described at paragraph AAAB1(b).1 above. A modification of a request for new Network Access which has previously been submitted to the Dominant Provider, and rejected by the Dominant Provider, shall be considered as a new request.

**AAAB1(b).5** The Dominant Provider is required to provide Ofcom with a description of the processes it has put in place to ensure compliance with this Condition AAAB1(b). The

Dominant Provider shall keep those processes under review to ensure that they remain adequate for that purpose. Where changes to the process are agreed with industry, The Dominant Provider should notify Ofcom of those changes.

## **Condition AAAB2 - Requirement not to unduly discriminate in the Hull Area**

**AAAB2.1** The Dominant Provider shall not unduly discriminate against particular persons or against a particular description of persons in relation to matters connected with Network Access.

**AAAB2.2** In this Condition, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider.

## **Condition AAAB3 - Basis of charges in the Hull Area**

**AAAB3.1** Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAAB1 is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

**AAAB3.2** The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition AAAB3.

## **Condition AAAB4 - Requirement to publish a Reference Offer in the Hull Area**

**AAAB4.1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish a Reference Offer and act in the manner set out below.

**AAAB4.2** Subject to paragraph AAAB4.8 below, the Dominant Provider shall ensure that a Reference Offer in relation to the provision of Network Access includes at least the following:

- (a) a description of the Network Access to be provided, including technical characteristics (which shall include information on network configuration where necessary to make effective use of the Network Access);
- (b) the locations of the points of Network Access;
- (c) the technical standards for Network Access (including any usage restrictions and other security issues);
- (d) the conditions for access to ancillary, supplementary and advanced services (including operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing);
- (e) any ordering and provisioning procedures;
- (f) relevant charges, terms of payment and billing procedures;
- (g) details of interoperability tests;

- (h) details of traffic and network management;
- (i) details of maintenance and quality as follows:
  - (i) specific time scales for the acceptance or refusal of a request for supply and for completion, testing and hand-over or delivery of services and facilities, for provision of support services (such as fault handling and repair);
  - (ii) service level commitments, namely the quality standards that each party must meet when performing its contractual obligations;
  - (iii) the amount of compensation payable by one party to another for failure to perform contractual commitments;
  - (iv) a definition and limitation of liability and indemnity; and
  - (v) procedures in the event of alterations being proposed to the service offerings, for example, launch of new services, changes to existing services or change to prices;
- (j) details of measures to ensure compliance with requirements for network integrity;
- (k) details of any relevant intellectual property rights;
- (l) a dispute resolution procedure to be used between the parties;
- (m) details of duration and renegotiation of agreements;
- (n) provisions regarding confidentiality of non-public parts of the agreements;
- (o) rules of allocation between the parties when supply is limited (for example, for the purpose of co-location or location of masts); and
- (p) the standard terms and conditions for the provision of Network Access; and
- (q) the amount applied to:
  - (i) each Network Component used in providing Network Access with the relevant Usage Factors; and
  - (ii) the Transfer Charge for each Network Component or combination of Network Components described above, reconciled in each case to the charge payable by a Communications Provider other than the Dominant Provider.

**AAAB4.3** To the extent that the Dominant Provider provides to itself Network Access that:

- (a) is the same, similar or equivalent to that provided to any other Third Party; or
- (b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party, in a manner that differs from that detailed in a Reference Offer in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it publishes a Reference Offer in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs AAAB4.2(a) to (q) above.

**AAAB4.4** The Dominant Provider shall update and publish the Reference Offer in relation to any amendments or in relation to any further Network Access provided after the date this Condition AAAB4 enters into force.

**AAAB4.5** Publication referred to above shall be effected by:

- (a) placing a copy of the Reference Offer on any relevant website operated or controlled by the Dominant Provider; and
- (b) sending a copy of the Reference Offer to Ofcom.

**AAAB4.6** The Dominant Provider shall send a copy of the current version of the Reference Offer to any person at that person's written request (or such parts which have been requested).

**AAAB4.7** The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

**AAAB4.8** The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart therefrom either directly or indirectly.

**AAAB4.9** The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAAB4.

### **Condition AAAB5(a) - Requirement to notify charges in respect of Network Access in the Hull Area**

**AAAB5(a).1** Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges and act in the manner set out below.

**AAAB5(a).2** The Dominant Provider shall send to Ofcom and to every Third Party with which it has entered into an Access Contract covered by Condition AAAB1 a written notice of any amendment to the charges on which it provides Network Access or in relation to any charges for new Network Access (an "Access Charge Change Notice"):

- (a) where the proposed amendment relates to the Wholesale Line Rental Charge, not less than 90 days before any such amendment comes into effect; and
- (b) in any other case, not less than 28 days before any such amendment comes into effect.

**AAAB5(a).3** The Dominant Provider shall ensure that an Access Charge Change Notice includes:

- (a) a description of the Network Access in question;
- (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; and
- (c) the date on which or the period for which any amendments to charges will take effect (the "effective date").
- (d) in relation to those products and services subject to Condition AAAB3, the current and proposed new charge and the relevant Usage Factors applied to each

Network Component comprised in that Network Access, reconciled in each case with the current or proposed new charge;

(e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies; and

(f) in relation to those products and services subject to Condition AAAB3, the relevant network tariff gradient.

**AAAB5(a).4** The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

**AAAB5(a).5** In relation to those products and services subject to Condition AAAB3, to the extent that the Dominant Provider provides to itself Network Access that:

(a) is the same, similar or equivalent to that provided to any other Third Party; or

(b) may be used for a purpose that is the same, similar or equivalent to that provided to any other Third Party, in a manner that differs from that detailed in an Access Charge Change Notice in relation to Network Access provided to any other Third Party, the Dominant Provider shall ensure that it sends to Ofcom an Access Charge Change Notice in relation to the Network Access that it provides to itself which includes, where relevant, at least those matters detailed in paragraphs AAAB5(a).3(a) to (f).

### **Condition AAAB5(b) - Requirement to notify technical information**

**AAAB5(b).1** Save where Ofcom consents otherwise, where the Dominant Provider:

(a) proposes to provide Network Access covered by Condition AAAB1, the terms and conditions for which comprise new:

(i) technical characteristics (including information on network configuration where necessary to make effective use of the Network Access);

(ii) locations of the points of Network Access; or

(iii) technical standards (including any usage restrictions and other security issues),

or

(b) proposes to amend an existing Access Contract covered by Condition AAAB1 by modifying the terms and conditions listed in paragraph AAAB5(b).1(a)(i) to (iii) above on which the Network Access is provided, the Dominant Provider shall publish a written notice (the "Notice") of the new or amended terms and conditions not less than 90 days before either the Dominant Provider enters into an Access Contract to provide the new Network Access or the amended terms and conditions of the existing Access Contract come into effect.

**AAAB5(b).2** The Dominant Provider shall ensure that the Notice includes:

(a) a description of the Network Access in question;

(b) a reference to the location in the Dominant Provider's Reference Offer of the relevant terms and conditions;

(c) the date on which or the period for which the Dominant Provider may enter into an Access Contract to provide the new Network Access or any amendments to the relevant terms and conditions will take effect (the "effective date").

**AAAB5(b).3** The Dominant Provider shall not enter into an Access Contract containing the terms and conditions identified in the Notice or apply any new relevant terms and conditions identified in the Notice before the effective date.

**AAAB5(b).4** Publication referred to in paragraph AAAB5(b).1 shall be effected by:

(a) placing a copy of the Notice on any relevant website operated or controlled by the Dominant Provider;

(b) sending a copy of the Notice to Ofcom; and

(c) sending a copy of the Notice to any person at that person's written request, and where the Notice identifies a modification to existing relevant terms and conditions, to every Third Party with which the Dominant Provider has entered into an Access Contract covered by Condition AAAB1. The provision of such a copy of the Notice may be subject to a reasonable charge.

## Annex 2

# Legal Instrument: Direction

**Direction made under section 49 of the Communications Act 2003 and Condition AAAA7 as a result of the analysis of the wholesale fixed analogue exchange line services markets in the *Review of the wholesale fixed analogue exchange lines markets* dated 20 December 2010**

### Background

1. On 20 December 2010 Ofcom concluded its *Review of the wholesale fixed analogue exchange lines markets* in which it identified markets, made market power determinations and set appropriate SMP conditions as set out in the Notification at Annex 1 to the review, and explained in the accompanying explanatory statement.
2. Ofcom determined in the review referred to in paragraph 1 above, that BT, as a Dominant Provider, has significant market power in the wholesale fixed analogue exchange line services market in the United Kingdom, excluding the Hull Area.
3. SMP service Condition AAAA7 (Transparency as to quality of service) was set in relation to, amongst others, the market referred to in paragraph 2.
4. This Direction concerns matter to which Condition AAAA7 relates.
5. For the reasons set out in Section 5 of the explanatory statement accompanying this Direction Ofcom is satisfied that, in accordance with section 49(2) of the Act, this Direction is:
  - i. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - ii. not such as to discriminate unduly against particular persons or against a particular description of persons;
  - iii. proportionate to what it is intended to achieve; and
  - iv. in relation to what it is intended to achieve, transparent.
6. For the reasons set out in Section 5 of the explanatory statement accompanying this Direction, Ofcom is satisfied that it has acted in accordance with the relevant duties set out in sections 3 and 4 of the Act.
7. Ofcom has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

### Direction

8. Ofcom hereby, pursuant to section 49 of the Act and proposed Condition AAAA7 in Schedule 1 to the Notification, directs the Dominant Provider to act as prescribed in paragraphs 9 to 14 below.
9. The Dominant Provider shall publish the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Wholesale Line Rental, as required in paragraph 12 below.

10. The Dominant Provider shall provide to individual Third Parties the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Wholesale Line Rental, as required in paragraph 12 below.
11. The Dominant Provider shall provide to Ofcom, by means of electronic mail to such person in Ofcom as notified from time to time, the information specified in Parts 1 and 2 of Annex A to this Direction in relation to the provision of Wholesale Line Rental, as required in paragraph 12 below.
12. The information required by paragraphs 9, 10 and 11 above shall be published and provided as required by the Dominant Provider within 14 Working Days of the last Working Day of every month in respect of that month.
13. Annex A to this Direction forms part of the Direction.
14. Nothing in this Direction shall require the Dominant Provider to publish confidential information relating to its business or that of a Third Party.
15. For the purpose of interpreting this Direction the following definitions shall apply:
  - “Act” means the Communications Act 2003;
  - “Committed Order” means an Order which has passed validation and has been registered on the Dominant Provider’s operational support system and a Contract Delivery Date has been confirmed;
  - “Completed Order” means an Order which has been provisioned and for which all other related work has been carried out;
  - “Contract Delivery Date” means the date agreed between the Dominant Provider and a Third Party for an Order to become a Completed Order;
  - “Dominant Provider” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
  - “Exchange Line” means Apparatus comprised in the Dominant Provider’s Electronic Communications Network and installed for the purpose of connecting a telephone exchange run by the Dominant Provider to a Network Termination Point comprised in Network Termination and Testing Apparatus installed by the Dominant Provider for the purpose of providing Electronic Communications Services at the premises at which the Network Termination and Testing Apparatus is located;
  - “Fault” means a degradation or problem or with Wholesale Line Rental which is identified by the Dominant Provider or a Third Party and which is registered on the Dominant Provider’s operational support system;
  - “Hull Area” means the area defined as the ‘Licensed Area’ in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;



“Installed Base” means the average number of Wholesale Line Rental lines that are in use during the Reporting Period;

“KPI” means key performance indicator;

“Level 1 Care” means the level of care provided by the Dominant Provider which provides the standard level of response to a Fault on an Exchange Line, provided as part of the basic line rental;

“Level 2 Care” means the level of care provided by the Dominant Provider which provides an enhanced level of response to a Fault on an Exchange Line, guaranteeing a response within a specified time;

“Level 3 Care” means the level of care provided by the Dominant Provider which provides an enhanced level of response to a Fault on an Exchange Line, guaranteeing a response within a specified time and providing cover 24 hours per day, seven days a week including public and bank holidays;

“Newly Provisioned Lines” means an Order where any Wholesale Line Rental product/Exchange Line Service is not being provided by the Dominant Provider to the Third Party at the time of order;

“Notification” means the Notification at Annex 1 to the statement ‘Review of the wholesale fixed analogue exchange lines markets’ dated 20 December 2010;

“Order” means a request for Wholesale Line Rental submitted to the Dominant Provider by a Third Party;

“Pending Order” means an Order which has been approved by the Dominant Provider and is awaiting a Contractual Delivery Date;

“Rejected Order” means an Order which cannot be placed by the Dominant Provider on its operational support system;

“Reporting Period” means the month in respect of which the Dominant Provider is required to publish or provide to Ofcom as required the Wholesale Line Rental KPIs;

“Restored Service” means the point at which the Wholesale Line Rental in relation to which a Fault was registered becomes available again for use by the Third Party;

“Scheduled Outages” means the defined periods of time whereby the Dominant Provider’s operational support system is not available for use by Third Parties in order for the Dominant Provider to perform certain tasks including, but not limited to, routine maintenance, changing configurations, software upgrades and updating facilities and may include specific maintenance activities whereby the Dominant Provider must have given as much notice as reasonably practicable and in any event not less than seven calendar days

“Third Party” means either:

- i. a person providing a Public Electronic Communications Network; or
- ii. a person providing a Public Electronic Communications Service;

“Transferred Lines” means an Order where Wholesale Line Rental is being provided to the Third Party by another Third Party (including those provided by the Dominant Provider) at the time of order;

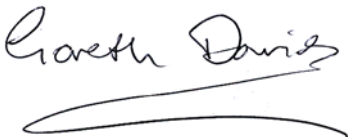
“Wholesale Analogue Line Rental” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an analogue Exchange Line;

“Wholesale Line Rental” means Wholesale Analogue Line Rental provided to Third Parties’ End Users; and, for the avoidance of doubt, any requirement to publish or provide to Ofcom as required the Wholesale Line Rental KPIs shall be a requirement to publish or provide that information separately in relation to each of the above

“Working Day” means any day other than Saturdays, Sundays, public holidays or bank holidays in the United Kingdom.

16. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act, or if it has no meaning there, in Part 1 of Schedule 1 to the Notification.
17. For the purpose of interpreting this Direction:
  - i. headings and titles shall be disregarded; and
  - ii. the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.
18. This Direction shall take effect on the day that it is published.

**Signed**



**Gareth Davies**  
**Competition Policy Director**

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

**20 December 2010**

## **Annex A Wholesale Line Rental KPIs**

### **Part 1: Indicators**

1. The Dominant Provider shall publish the information required in KPIs (i) to (viii) below in relation to the provision of Wholesale Line Rental, in at least the detail outlined below:
  - a) an industry average (for the avoidance of doubt this includes provision by the Dominant Provider to itself where it does so).
2. The Dominant Provider shall also publish the information required in KPIs (ii) to (vi) below in relation to the provision of Wholesale Line Rental to itself.
3. In relation to KPIs (ii) to (vi), the Dominant Provider should publish separate KPI results where options exist for third parties to purchase different WLR line rental packages.
4. The Dominant Provider shall provide to Ofcom KPIs (i) to (viii) as described in paragraphs 1, 2 and 3 above by electronic mail to the designated person.
5. The Dominant Provider shall also provide to Ofcom data relating to specific third parties upon request.
6. The Dominant Provider shall provide to each third party upon request, on a confidential basis, the information required in KPIs (i) to (viii) below for that third party.
7. Where the Dominant Provider does not provide Wholesale Line Rental to itself, it shall instead publish or provide as required the information required in relation to the equivalent implicit wholesale product provided by the Dominant Provider to itself in order for it to provide downstream services to End Users.

#### **KPI(i) - Percentage of orders rejected**

the percentage of Committed Orders that became Rejected Orders during the Reporting Period;

#### **KPI(ii) - Percentage of orders provisioned on time**

the percentage of Completed Orders that were completed by the Contract Delivery Date during the Reporting Period in relation to each of:

- (a) Newly Provisioned Lines; and
- (b) Transferred Lines;

#### **KPI(iii) - Percentage of new provisions reported as faulty**

the percentage of Completed Orders that were reported as having a Fault during the Reporting Period whereby that Fault was reported within 30 calendar days of the date that it became a Completed Order;

#### **KPI(iv) - Percentage of installed base reported as faulty**

the number of network faults at the end of the Reporting Period, measured as a percentage of the mean of the Installed Base;

**KPI(v) - Average time to restore service**

the average time (in working hours) during the Reporting Period for the Dominant provider to achieve Restored Service after a Fault has been registered in relation to each of:

- (a) Level 1 Care;
- (b) Level 2 Care; and
- (c) Level 3 Care;

**KPI(vi) - Percentage of repeat faults**

the percentage of Faults that were reported as having a further Fault during the Reporting Period whereby the further Fault was registered within 30 calendar days of the Dominant Provider achieving Restored Service of the previous Fault;

**KPI(vii) - Gateway availability (1)**

the percentage of actual availability of the Dominant Provider's ordering gateway during the Reporting Period compared to the potential availability during the same period as published by the Dominant Provider, excluding any Scheduled Outages; and

**KPI(viii) - Gateway availability (2)**

the percentage of actual availability of the Dominant Provider's ordering gateway during the Reporting Period compared to the potential availability during the same period as published by the Dominant Provider, including any Scheduled Outages.

**Part 2: Volumes**

1. The Dominant Provider shall publish the information required in KPIs (i) to (iv) below in relation to the provision of Wholesale Line Rental to all Third Parties (as an aggregate figure which, for the avoidance of doubt includes provision by the Dominant Provider of Wholesale Line Rental to itself);
2. The Dominant Provider shall provide to Ofcom by electronic mail the information required in KPIs (i) to (iv) below in relation to the provision of End User Access to itself. BT shall also provide to Ofcom data relating to specific third parties upon request.
3. Where the Dominant Provider does not provide End User Access to itself, it shall instead publish or provide as required the information required in relation to the equivalent implicit wholesale product provided by the Dominant Provider to itself in order for it to provide downstream services to End Users.

**KPI(i) - Volume of orders submitted**

the total number of Orders that became Pending Orders during the Reporting Period;

**KPI(ii) - Volume of orders completed**

the total number of Committed Orders that became Completed Orders during the Reporting Period in relation to each of:

- (a) Newly Provisioned Lines; and
- (b) Transferred Lines;

**KPI(iii) - Volume of Installed Base**

the Installed Base during the Reporting Period;

**KPI(iv) - Volume of faults reported**

the number of Faults where the Dominant Provider subsequently achieves Restored Service during the Reporting Period in relation to each of:

- (a) Level 1 Care;
- (b) Level 2 Care; and
- (c) Level 3 Care.

## Annex 3

# Additional representations

## Introduction

A3.1 This annex sets out the additional representations that we received in response to the Consultation and our comments on them.

## Other issues raised in the Consultation

### Specific analogue WLR remedy – Creation of WLR Core and concern with product development

A3.2 C&W has reported that since BT has only been required to offer a single analogue WLR product (WLR Core with business directory listing), it has detected an associated BT preference for developing products for residential users. In particular, the majority of development work has focused on improving the residential user experience and attaining efficiency improvements for this user category. C&W argue that the corollary has been slow progress on developments for the corporate market e.g. complex phonebook entries.

A3.3 We do not consider that either the requirement to provide a single WLR Core product in the September 2009 Wholesale Review, or our proposal to retain that requirement has, or would, serve to distort BT's product development incentives in a way that it would favour residential, over business. For this reason we do not consider the development outcome described by C&W has been driven by product specific regulation placed on BT in the September 2009 Wholesale Review, nor will retaining the analogue WLR remedy determine the distribution of development effort in the future.

A3.4 C&W's reported observations are more likely to be correlated with the implementation of a new set of Openreach Industry Commitments ("OICs") covering the delivery of service developments. One of the OICs was concerned with the Management of complex directory entries and special phonebook entries on WLR3 ("complex phonebook entries"). Following discussion with industry, including C&W, and in accordance with the agreed change control process this development was revised. While complex phonebook entries was substituted for an alternative product development a solution delivering a tactical capability was subsequently agreed by industry, including C&W, and delivered. We consider that the change control process removing the original strategic development was followed correctly and while the tactical development was later than C&W wished for it meets industry needs.

### KCOM's request to re-engage with us on the business calls market in the Hull Area

A3.5 Outside of this market review, KCOM has reported that it would like to re-engage with us on the business calls market in the Hull Area and in particular the impact of alternative connectivity options on KCOM's position in the business calls market.

- A3.6 We note KCOM's representations on the business calls market in the Hull Area. As we set out in the September 2009 Retail Review, we will consider any evidence that KCOM brings to us on this matter.