



Review of retail and wholesale ISDN30 markets

Statement on the markets, market power
determinations and remedies

Statement

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Section 1

Summary

Introduction

- 1.1 This statement sets out the conclusions of our review of the retail and wholesale ISDN30 markets following on from the consultation published on 4 May 2010 (*Review of retail and wholesale ISDN30 markets* referred to hereafter as ‘the May 2010 consultation’¹). The May 2010 consultation proposed that retail ISDN30 services were in a discrete product market and that wholesale ISDN30 services were also in a discrete product market.
- 1.2 We further proposed that, in these discrete markets, BT did not have significant market power (‘SMP’) in the retail market in the UK excluding the Hull area whereas KCOM had SMP in the retail market in the Hull area.
- 1.3 At the wholesale level, we proposed that Openreach² had SMP in the wholesale market in the UK excluding the Hull area and KCOM had SMP in the wholesale market in the Hull area. We proposed regulatory remedies which we considered were necessary to address the competition concerns that we had found.
- 1.4 This statement now concludes the market review. We discuss respondents’ views throughout this statement and we have considered all submissions carefully in reaching our conclusions.

Conclusions

Forward look

- 1.5 We conclude that the appropriate forward look period is four years. We adopt our analysis as set out in paragraphs 3.3 to 3.8 of the May 2010 consultation, where we recognised that IP services are likely to gain momentum in the future and may eventually be an effective substitute for ISDN30. Whilst we do not believe, however, that this is likely to happen in the time period of this review we will nonetheless continue to monitor market conditions. In the event that substitute services emerge, it may be necessary to review the market for ISDN30 services earlier than currently anticipated.

Market definition

- 1.6 We have concluded that ISDN30 services are in a distinct product market at both the retail and wholesale levels. We have concluded that there are two geographic markets at both the retail and wholesale level and these are the UK excluding the Hull area and the Hull area.

¹ <http://www.ofcom.org.uk/consult/condocs/isdn30/isbn30.pdf>

² Openreach is the access division of BT established by Undertakings in 2005. Whilst the proposed SMP services conditions in this document apply to British Telecommunications plc, Openreach is the division of BT which provides the wholesale ISDN30 services which we are proposing to regulate. Therefore, throughout this document, we refer to Openreach as the supplier of wholesale ISDN30 services. For retail markets, we refer to BT.

SMP

Retail level

- 1.7 We have concluded that no one has SMP in the retail market for the supply of ISDN30 services in the UK excluding the Hull area.
- 1.8 We have concluded that KCOM has SMP in the retail market for the supply of ISDN30 services in the Hull area.

Wholesale level

- 1.9 We have concluded that Openreach has SMP in the market for the supply of wholesale ISDN30 services in the UK excluding the Hull area. KCOM has SMP in the equivalent market in the Hull area.

Remedies

Retail level

- 1.10 We are imposing two SMP conditions on KCOM which maintain the existing obligations requiring them to:
- not discriminate unduly in the provision of retail ISDN30 services; and
 - publish retail ISDN30 prices.

Wholesale level

- 1.11 We are imposing the following requirements on both Openreach and KCOM. These are a continuation of the remedies that apply currently:
- a requirement to provide network access on reasonable terms and conditions;
 - a requirement not to discriminate unduly in the provision of ISDN30;
 - a requirement to publish a Reference Offer;
 - a requirement to notify charges, terms and conditions; and
 - a requirement to notify technical information.
- 1.12 For Openreach only, we are also imposing the following remedies which apply currently:
- a requirement to publish quality of service information;
 - a requirement to provide new network access on reasonable request;
 - a requirement to provide wholesale line rental ('WLR') ISDN30; and
 - a requirement to account separately.
- 1.13 We have also concluded that new price control and cost accounting remedies should be imposed on Openreach to address the competition concern that wholesale

charges for ISDN30 appear to be above the competitive level. The precise form and type of remedy will be determined in a subsequent review which will examine the efficient level of cost of wholesale ISDN30 provision as well as reviewing the options for a price control remedy, taking account of relevant points raised by stakeholders in their responses to the May 2010 consultation. This position reflects the concern expressed about charge controls by a number of stakeholders in their responses to the May 2010 consultation.

- 1.14 We will carry out the review of the costs of wholesale ISDN30 services alongside the review of the costs of local loop unbundling ('LLU') and analogue WLR. We would intend that, subject to consultation, any price controls that we consider are needed for wholesale ISDN30 services would take effect at the same time as any proposed controls for relevant LLU and WLR services. These are scheduled to take effect from 1 April 2011. In the interim, we have placed a cap on wholesale ISDN30 charges at their present level.
- 1.15 We are also imposing a new direction on Openreach requiring them to produce Key Performance Indicators ('KPIs') for ISDN30. This formalises the reporting position and aligns it with requirements in other WLR markets.

Section 2

Introduction

Scope of this statement

- 2.1 This statement sets out our conclusions in the review of retail and wholesale ISDN30 markets in the UK.
- 2.2 ISDN30 is a digital telephone line service that provides up to 30 lines over a common digital bearer circuit. These lines support a wide range of services including basic telephony with additional features to those available on analogue exchange lines, and data services.
- 2.3 Retail ISDN30 exchange line services are purchased by businesses with a need for 8 or more access lines at a particular site. Wholesale ISDN30 exchange line services are used by resellers to provide retail services.

Background

- 2.4 This review builds on and is further to the analyses carried out in two consultation documents published on 19 March 2009 (*Fixed Narrowband Retail Services Markets*³ and *Review of the fixed narrowband services wholesale markets*⁴) ('the retail consultation' and 'the wholesale consultation' or 'the March 2009 consultations'). The March 2009 consultations considered competition in the provision of retail and wholesale ISDN30 services. Both documents concluded provisionally that BT had significant market power ('SMP') in the relevant retail and wholesale services markets in the UK excluding the Hull area. KCOM was provisionally found to have SMP in the equivalent retail and wholesale services markets in the Hull area.
- 2.5 The narrowband market reviews were concluded in September 2009 with the publication of two statements (*Fixed Narrowband Retail Services Markets*⁵ and *Review of the fixed narrowband services wholesale markets*⁶) ('the retail statement' and 'the wholesale statement' or 'the September 2009 statements'). We stated in these that, as a result of comments made in response to the March 2009 consultations, we intended to assess further the markets for supply of retail and wholesale ISDN30 services.
- 2.6 On 4 May 2010 we published the consultation document entitled *Review of retail and wholesale ISDN30 markets* (referred to hereafter as 'the May 2010 consultation'⁷). The May 2010 consultation set out our proposals in relation to retail and wholesale market definition, our proposals following our significant market power ('SMP') analyses, and the regulatory remedies which we considered should apply.

³ http://www.ofcom.org.uk/consult/condocs/retail_markets/fnrsm_condoc.pdf

⁴ http://www.ofcom.org.uk/consult/condocs/review_wholesale/fnwm.pdf

⁵ http://www.ofcom.org.uk/consult/condocs/retail_markets/statement/statement.pdf

⁶ http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/main.pdf

⁷ <http://www.ofcom.org.uk/consult/condocs/isdn30/isbn30.pdf>

- 2.7 To assist us in this review, we sent formal information requests to a number of communications providers ('CPs') seeking information about the way in which they provide services to businesses. In these requests, we asked CPs whether they use ISDN30 and/or IP-based solutions to provide retail services to businesses.
- 2.8 We also conducted user surveys to understand businesses' views on the services that they purchase.
- 2.9 The evidence that we have gathered, including the responses received to the May 2010 consultation⁸, has enabled us to reach the conclusions set out in this statement.

Section 3 – our general duties

- 2.10 Under the Communications Act 2003 ('the Act'), our principal duty in carrying out functions is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 2.11 In so doing, we are required to secure a number of specific objectives and to have regard to a number of matters set out in section 3 of the Act. As to the prescribed specific statutory objectives in section 3(2), we consider that the objective of securing the availability throughout the UK of a wide range of electronic communications services is particularly relevant to this review.
- 2.12 In performing our duties, we are also required to have regard to a range of other considerations, as appear to us to be relevant in the circumstances. In this context, we consider that a number of such considerations are relevant, namely:
- the desirability of promoting competition in relevant markets; and
 - the desirability of encouraging investment and innovation in relevant markets.
- 2.13 We have also had regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed, as well as the interest of consumers in respect of choice, price, quality of service and value for money.
- 2.14 We have, however, a wide measure of discretion in balancing our statutory duties and objectives. We have taken account of all relevant considerations, including responses to the May 2010 consultation, in reaching our conclusions.

Section 4 – European Community requirements for regulation

- 2.15 Our functions exercised in this review fall under the Common Regulatory Framework. As such, section 4 of the Act requires us to act in accordance with the six European Community requirements for regulation.
- 2.16 In summary, these six requirements are:
- to promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;

⁸ <http://stakeholders.ofcom.org.uk/consultations/isdn30/?showResponses=true>

- to contribute to the development of the European internal market;
- to promote the interests of all persons who are citizens of the European Union;
- to take account of the desirability of Ofcom's carrying out of its functions in a manner which, so far as practicable, does not favour one form of or means of providing electronic communications networks, services or associated facilities over another, i.e. to be technologically neutral;
- to encourage, to such extent as Ofcom considers appropriate for certain prescribed purposes, the provision of network access and service interoperability, namely securing efficient and sustainable competition and the maximum benefit for customers of communications providers; and
- to encourage compliance with certain standards in order to facilitate service interoperability and secure freedom of choice for the customers of communications providers.

2.17 We consider that the first and fifth of those requirements are of particular relevance to the matters under review and that no conflict arises in this regard with those specific objectives in section 3 of the Act that we consider are particularly relevant in this context.

Impact Assessment

2.18 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 practice policy-making. This is reflected in section 7 of the Act, 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. For further information about our approach to impact assessments, see the guidelines *Better policy-making: Ofcom's approach to impact assessment*⁹.

2.19 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 May 2010 consultation and sets out any additional information and responses to that consultation. In particular, in Sections 3 and 5 we explain our conclusions on market definition. In Sections 4 and 6 we conclude as to whether or not any CP holds SMP in a particular market and in Sections 7 and 8 we consider what the appropriate remedies are for each market where we have proposed SMP. Taking all of our analysis from the May 2010 consultation and this statement into account, we have discussed all of the relevant considerations and options that we have considered, including their impact, before we reach our conclusions.

Equality Impact Assessment

2.20 We are separately required to assess the functions, policies, projects and practices on race, disability and gender equality. Equality impact assessments (EIAs) also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.

⁹ http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

- 2.21 We have therefore also considered what (if any) impact the issues under consideration may have on equality. We do not consider the impact of the decisions made in this statement to be to the detriment of any group within 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.
- 2.22 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 in relation to people of different gender or ethnicity, or consumers in Northern Ireland or on disabled consumers compared to consumers in general.

Outline of the rest of this document

- 2.23 In many of our statements concluding on market review proposals, we normally publish full statements that contain analysis, reasoning, information and other data including what has already been set out 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 our proposals in relation to market definition and market analysis as set out in the May 2010 consultation without any of the updated information and consultation responses affecting the analysis and reasoning set out in that consultation, we have decided to take a different approach in this case.
- 2.24 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 May 2010 consultation. We therefore confine this statement to setting out our conclusions and our response to responses to the May 2010 consultation. Accordingly, this statement needs to be read with the May 2010 consultation for our full reasoning and evidence in reaching the conclusions set out in the following sections.
- 2.25 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 May 2010 consultation, where we set out (among other things) our initial impact assessment in relation to proposed remedies.
- 2.26 The rest of the main part of this document is structured as follows:
- Section 3 – Retail market definition;
 - Section 4 – Retail market power assessment;
 - Section 5 – Wholesale market definition;
 - Section 6 – Wholesale market power assessment;
 - Section 7 – Retail remedies for KCOM; and
 - Section 8 – Wholesale remedies for Openreach and KCOM.
- 2.27 The legal instruments to implement the decisions set out in this document are in Annexes 2 and 3.

Section 3

Retail market definition

Introduction

3.1 The May 2010 consultation set out our approach to market definition (Section 3 of the May 2010 consultation) and our proposals in relation to the definition of the relevant retail market (Section 4 of the May 2010 consultation) for the purposes of this review.

3.2 In this section we set out respondents' views relating to our proposed market definitions, our response to them, and our conclusions.

Conclusions

3.3 We have concluded that:

- the relevant retail product market is the market for retail ISDN30 exchange line services;
- the relevant geographic markets are:
 - the market for retail ISDN30 services in the UK excluding the Hull area; and
 - the market for retail ISDN30 services in the Hull area.

3.4 As set out in paragraphs 2.23 and 2.24, our conclusions reflect the analysis and proposals set out in the May 2010 consultation.

Forward look

3.5 We conclude that the appropriate forward look period is four years. We adopt our analysis as set out in paragraphs 3.3 to 3.8 of the May 2010 consultation, where we recognised that IP services are likely to gain momentum in the future and may eventually be an effective substitute for ISDN30. Whilst we do not believe, however, that this is likely to happen in the time period of this review we will nonetheless continue to monitor market conditions. In the event that substitute services emerge, it may be necessary to review the market for ISDN30 services earlier than currently anticipated.

The May 2010 consultation

3.6 In the May 2010 consultation we identified the following set of products which could potentially be substitutes for ISDN30:

- Analogue exchange lines;
- ISDN2;
- Leased lines; and

- IP solutions including SIP Trunking¹⁰, IP Centrex¹¹ and Hosted VoIP¹².
- 3.7 A description of each of the products referred to above was set out at paragraphs 4.7 to 4.19 of the May 2010 consultation. In the May 2010 consultation at paragraph 4.15 we stated that we were not aware of any CP providing ISDN30 via LLU. We have since found that one CP was providing ISDN30 via LLU and we have taken this into account. We do not consider that this affects the analysis we set out in the May 2010 consultation, nor our reasoning for reaching the conclusions that our proposals in this regard should be adopted. We considered whether each product was a demand-side and/or supply-side substitute for ISDN30¹³. We found that, for a variety of reasons, including price and technical characteristics, none of these products were demand-side or supply-side substitutes for ISDN30 at the present time.
- 3.8 We paid particular attention to IP based products in our market definition analysis because there has been a shift toward these products in the last few years. We undertook significant analysis in this area including a market research survey¹⁴ of ISDN30 and IP users to understand the length of time businesses are likely to continue using ISDN30, and the likely migration path to IP technologies. We also gathered information from CPs through a formal information request.
- 3.9 The evidence gathered showed that SIP Trunking was likely to be the closest functional substitute to ISDN30. However, the responses by CPs also revealed the relative immaturity of SIP Trunking products which had only been launched fairly recently (or in some cases CPs were planning to start offering services in 2010). Our discussions with stakeholders suggested that businesses still need to be convinced that IP services can match the functionality and stability of ISDN30 services. Additionally, businesses do not appear to be in a hurry to migrate to IP services and, as a consequence, take-up of IP services remains comparatively low. Our survey showed that 84% of ISDN30 users were not currently considering switching away from ISDN30.
- 3.10 We recognised that IP services are likely to gain momentum in the future and may eventually be an effective substitute for ISDN30. However, we do not think this is likely to happen over the next four years. We proposed that a narrow market definition based on ISDN30 only was appropriate but we recognised the competitive constraints from IP services in the SMP assessment.
- 3.11 We then considered the geographic extent of the relevant markets and proposed that there were two geographic markets: the UK excluding the Hull area and the Hull area.
- 3.12 We also considered the application of the European Commission's three criteria test in relation to each of the proposed markets.

¹⁰ This is sometimes referred to as IP Business Trunks or IP Trunks.

¹¹ Typically, special IP telephones are used which communicate with a call server located in the CP's network via an IP access connection and a data local area network ('LAN') within the business premises. As with SIP Trunking, IP is used for voice and data transmission and SIP for telephony signalling.

¹² This is sometimes referred to as Hosted Telephony.

¹³ We also considered whether LLU was a supply side substitute for ISDN30.

¹⁴ This survey was published at the same time as the May 2010 consultation and can be found at <http://stakeholders.ofcom.org.uk/binaries/consultations/isdn30/narrowband.pdf>

Respondents' views

Product market definition

- 3.13 The UK Competitive Telecommunications Association (UKCTA)¹⁵, the Federation of Communication Services (FCS)¹⁶, the Communications Management Association (CMA) and a confidential respondent agreed with our assessment.
- 3.14 Cable & Wireless Worldwide (C&W) agreed with our proposed market definition, but suggested that we may have underestimated the pace of change and that the market may be wider than ISDN30 services in three to four years time. It was of the view that newer technologies will increasingly substitute for ISDN30 services.
- 3.15 C&W noted that our ISDN30 user survey might understate the pace of adoption of new technology because it believed that, as is the case with most research of this type, there is a natural tendency for end users to support the status quo as it represents the known and understood quantity.
- 3.16 BT stated that the relevant retail market may now be, or may be at some time in the near future, wider than the market definition we proposed. It stated that IP based solutions are an increasing competitive constraint on the retail ISDN30 market. It stated that market analysts consider that IP Voice is a credible mainstream technology and this is being driven by cost savings. BT quoted one analyst report which predicts that by 2014 IP Voice will capture 50% of the business voice market.
- 3.17 The European Commission noted that we had found that businesses were likely increasingly to choose to move to IP-based alternatives to ISDN30 at the time of more general system upgrades. The European Commission stated that, this being the case, we needed to monitor market developments to ensure that the market definition and regulatory remedies that we proposed remained appropriate going forward.
- 3.18 KCOM broadly accepted our conclusions in relation to retail market definition.

Our response

- 3.19 We noted in the May 2010 consultation that IP based services were likely to gain momentum in the future. We acknowledged, however, that there is some uncertainty over exactly when this will happen. We consider that, based on the evidence collected from our ISDN30 business survey, it is unlikely that significant substitution to IP based solutions will occur over the next 4 years. As noted in the May 2010 consultation, 84% of ISDN users are not currently considering switching away from ISDN30, with 64% planning to keep it for more than two years and 17% planning to use it for more than 10 years.
- 3.20 In addition, the main triggers for switching from ISDN30 to IP services would appear to be event driven with 51% of businesses that responded to our survey stating that a general upgrade triggered the switch and 23% stating that a PBX replacement triggered the change. This type of 'upgrade' activity is likely to happen relatively infrequently as it can represent a large overhead.

¹⁵ A trade association which promotes the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets

¹⁶ A trade association representing the communications services industry

- 3.21 We note C&W's point that end users may tend to support the status quo when questioned about future plans in a survey. However, the respondents to our survey were medium to large businesses (with at least 20 employees). With the exception of the very smallest of these businesses, they are unlikely to make decisions about whether to change technology (e.g. from ISDN30 to IP services) suddenly and are likely to have a reasonably good view of their plans. For example, changing communications technology will generally involve a period of procurement and planning to ensure a smooth transition.
- 3.22 We believe it is unlikely that a significant number of the businesses surveyed who had no plans to switch to IP services then switched technology in the short term. Furthermore, even if there is a tendency for some respondents to support the status quo, it is unlikely to overturn our conclusions given that a significant majority (84%) of ISDN30 users were not currently considering switching from ISDN30.
- 3.23 Where the evidence of substitutability is ambiguous we stated in the May 2010 consultation that we would adopt a cautious approach and retain our previous market definitions while recognising any increased competitive constraint from greater substitutability in our SMP assessment. Given the uncertainty around when IP services (particularly SIP Trunking) will become mass market products, we remain of the view that a narrower market definition based on ISDN30 only is appropriate for this market review.
- 3.24 We recognise, however, the need to monitor market developments and adjust remedies at both the retail and wholesale levels as appropriate to reflect market changes. At the retail level, as explained in Section 4, we have concluded that the ISDN30 market in the UK excluding the Hull area is effectively competitive. Therefore even if IP based services become established quicker than anticipated this would be likely to reinforce our finding of no SMP in this market.
- 3.25 We do not consider that the responses received to the May 2010 consultation should lead us to change our view that the appropriate market definition to apply to the retail product market is ISDN30 exchange line services.

Geographic Market Definition

- 3.26 No respondents disagreed with our proposed geographic market definition.
- 3.27 We confirm the proposals set out in the May 2010 consultation where we proposed that the relevant geographic markets were ISDN30 services in the UK excluding the Hull area and, separately, the market for ISDN30 services in the Hull area.

Section 4

Retail market power assessment

Introduction

- 4.1 The May 2010 consultation set out our approach to market power assessment (Section 3 of the May 2010 consultation) and our proposals in relation to whether any firm held market power in the relevant retail markets (Section 5 of the May 2010 consultation).
- 4.2 In this section we set out respondents' views relating to our proposed market power assessment, our response to them, and our conclusions.

Conclusions

- 4.3 We have concluded that:
- no company has SMP in the retail ISDN30 market in the UK excluding the Hull area; and
 - KCOM holds SMP in the retail ISDN30 market in the Hull area.
- 4.4 As set out in paragraphs 2.23 and 2.24 our conclusions reflect the analysis and proposals set out in the May 2010 consultation.

Our Approach

- 4.5 Our approach to the market power assessment was set out in detail in the May 2010 consultation.
- 4.6 In summary, to assess whether a firm has SMP, in this market review we regard the following criteria as most important:
- market shares;
 - barriers to entry and expansion;
 - prices and profitability; and
 - customer switching costs and the intensity of competition in the market.
- 4.7 In making our SMP assessment we have considered the impact of the different competitive constraints in the round. It is important to bear in mind that in overall assessments on SMP it is possible that some markets will display both features consistent with a no SMP finding and features consistent with an SMP finding. That is, by its very nature a binary SMP finding (either SMP or no SMP) summarises a much richer assessment of the competitive conditions in a particular market.

UK excluding the Hull area

The May 2010 consultation

- 4.8 In the May 2010 consultation we proposed that BT no longer had SMP in the retail ISDN30 access market. The key reasons for this proposal were as follows:
- the wholesale remedies had led to the development of products which enable CPs to replicate the services offered by BT without making significant infrastructure investments. This had lowered barriers to entry and growth and over 300 ISDN30 WLR CPs had entered the market;
 - BT's market share had fallen by around 20% since 2004 and was at 45% (Q3 2009). The decline in market share showed no sign of abating and had been steeper than we anticipated; and
 - the increasing competitive constraint of IP based solutions in the forward look, and anticipated decline in the ISDN30 market.
- 4.9 Our detailed market power assessment was set out in Section 5 of the May 2010 consultation.
- 4.10 Given our proposal that BT no longer had SMP we acknowledged that the current retail SMP conditions applied to BT in the ISDN30 market must be revoked¹⁷ and the proposed market would no longer be subject to *ex ante* regulation.

Respondents' views

- 4.11 BT agreed with our assessment. It noted that there is extensive competition on price, as well as on service offerings and bundles, meaning customers have a wide range of prices and packages to choose from which has led to customers switching away from BT. BT stated that its competitors are offering increasingly aggressive prices to customers and the current economic conditions are driving many customers to make savings wherever possible. It noted that some of the larger CPs are offering ISDN30 free of charge, either as part of a package or as a loss leader, with the ultimate aim of attracting the customer to migrate all of their business away from BT. BT stated that, due to the current regulatory constraints, it is unable to match many of these offers. BT also noted that consumers are switching away to new technologies such as SIP Trunking to achieve costs savings and as a gateway to unified communications.
- 4.12 C&W and UKCTA did not believe the market for ISDN30 services is sufficiently competitive to conclude that BT no longer has SMP. They both noted the high market share of BT as evidence of SMP.
- 4.13 The FCS accepted that BT's market share had fallen but also noted that BT still enjoyed a significant position in the market. It suggested that we should continue to monitor BT's behaviour to ensure that there is no unfair leveraging of this position.
- 4.14 A confidential respondent believed it is possible that BT no longer possessed SMP in the retail ISDN30 exchange line market due to the number of competing providers and evidence of falling market share. However, it also stated that a no SMP finding

¹⁷ As this is a mandatory requirement under section 84(4) of the Act it is not appropriate for us to consider an option of retaining any regulation.

should be contingent upon close monitoring of developments in the area and, in particular, the effects of removing the price publication and no undue discrimination regulatory remedies.

Our response

4.15 Stakeholders who disagreed with our assessment have focused on BT's market share as evidence of SMP. We note that BT's market share is relatively high but this is only one factor within an SMP assessment, which must make a thorough and overall analysis of the economic characteristics of the relevant market during the forward looking period covered by the market review before coming to a conclusion. While the European Commission discusses market shares as one indicator of market power, it also notes that:

“It is important to stress that the existence of a dominant position cannot be established on the sole basis of large market shares. ...the existence of high market shares simply means that the operator concerned might be in a dominant position. Therefore, NRAs should undertake a thorough and overall analysis of the economic characteristics of the relevant market before coming to a conclusion as to the existence of significant market power.”¹⁸

4.16 A high market share alone is not sufficient to find SMP.

4.17 We have observed that barriers to entry in this market are low due to the wholesale remedies in place. This is clearly evidenced by the significant entry in this market (over 300 CPs) and the fact that BT's market share has fallen significantly since 2004. Since the May 2010 consultation was published we have received further information through our regular market intelligence gathering on the provision of ISDN30 channels. This showed that the declining trend in BT's market share has been maintained, falling from 45% in Q3 2009 to 44% in Q4 2009. There is clear evidence that ISDN30 users are willing and able to switch providers – our user survey showed that 16% of companies had switched their ISDN30 supplier in the last year.

4.18 We also recognise the increasing competitive constraint of IP services over the forward look. BT and C&W both noted that IP services are becoming increasingly substitutable for ISDN30 as discussed in the responses to the market definition analysis above. As the retail ISDN30 market declines and IP solutions become more popular the competitive constraints are likely to increase.

4.19 To conclude, having carefully considered all of the submissions made in response to the May 2010 consultation, and taking into account the available evidence, we remain of the view that the ISDN30 market in the UK excluding the Hull area is effectively competitive. Over the forward look period we believe that the competitive constraints are likely to increase as IP products become more widespread as a business solution.

4.20 We will continue to monitor the competitive environment going forward. If there is evidence that conditions change materially, suggesting that competitive pressures are lessening, we would consider conducting a further review.

¹⁸ See “Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services”, paragraph 78

The Hull area

The May 2010 consultation

- 4.21 In the May 2010 consultation we proposed that KCOM had SMP in the retail ISDN30 access market in the Hull area. The key reasons for this conclusion were as follows:
- there are no significant competitors in the market; and
 - threat of entry is limited.
- 4.22 Our detailed market power assessment was set out in Section 5 of the May 2010 consultation.

Respondents' views

- 4.23 C&W and FCS agreed with our assessment.
- 4.24 KCOM suggested that we had not considered sufficiently the impact of alternative providers' services using leased lines and suggested that this imposes a greater constraint than we had identified.
- 4.25 KCOM noted that in December 2008 we concluded that KCOM no longer had SMP in the retail market for low bandwidth traditional interface leased lines based largely on KCOM's low market share of 25%. KCOM suggested that this indicates extensive use of alternative access methods by customers both for PSTN and ISDN services. KCOM believed that this alternative provision provided a greater constraint than we provisionally concluded.
- 4.26 KCOM also felt that as the ISDN30 market nears the end of its lifecycle the competitive constraints may increase. KCOM considers that the provision of services by other providers using alternative technologies to be a very real constraint on the terms on which they offer ISDN30 services in the market, and they expect this constraint to become more marked over time.

Our response

ISDN30 and leased lines

- 4.27 Paragraphs 4.26 and 4.27 of the May 2010 consultation explained why we considered that ISDN30 and leased lines were not in the same product market. The fundamental difference between ISDN30 and leased lines is that the former provides switched voice and data access services whereas the latter provides transmission capacity only. Therefore a retail customer cannot purchase leased lines alone as a demand substitute for ISDN30.
- 4.28 We did note in the market power assessment that some CPs offer ISDN30 via alternative means such as leased lines in the Hull area. However, this is only likely to be on a very small scale and these alternatives are only likely to be economically attractive for larger businesses. We remain of the view that there is not significant enough substitution between these products to constrain the price of ISDN30.

ISDN30 and alternative technologies

- 4.29 We accept that the provision of services using other technologies may eventually be a competitive constraint on the provision of ISDN30 in the Hull area. However, we noted in the market definition discussion that alternative technologies (such as SIP Trunking) are still relatively immature and are not yet in widespread use. We have no evidence to suggest that these alternative technologies will be taken up any sooner in the Hull area and do not have any compelling evidence to suggest that alternative technologies are likely to be a significant competitive constraint on ISDN30 services in the Hull area over the next four years. We therefore remain of the view that KCOM has SMP in the market for ISDN30 exchange line services in the Hull area.

Section 5

Wholesale market definition

Introduction

- 5.1 The May 2010 consultation set out our approach to market definition (Section 3 of the May 2010 consultation) and our proposals in relation to the definition of the relevant wholesale market (Section 6 of the May 2010 consultation) for the purposes of this review. We proposed that the relevant economic market was the supply of wholesale ISDN30 exchange lines on a narrowband network.
- 5.2 In this section we set out respondents' views relating to our proposed market definition, our response to them, and our conclusions

Conclusions

- 5.3 We have concluded that:
- the relevant wholesale product market is the market for wholesale ISDN30 exchange line services;
 - the relevant geographic markets are:
 - the market for wholesale ISDN30 services in the UK excluding the Hull area; and
 - the market for wholesale ISDN30 services in the Hull area.
- 5.4 As set out in paragraphs 2.23 and 2.24, our conclusions reflect the analysis and proposals set out in the May 2010 consultation.

Forward look

- 5.5 As explained in section 3, we consider the appropriate forward look period for this review is four years, and this forward look period applies equally to the wholesale markets under review.

The May 2010 consultation

- 5.6 In summary, we considered that there were no direct demand-side constraints for wholesale ISDN30 exchange lines, while supply-side substitution was neither feasible nor likely because of the sunk costs in providing switches and the limited time period over which such investments could be recouped. Although we noted that there were likely to be some competitive constraint from higher wholesale charges inducing consumers to switch away from ISDN30 to substitute products, our critical loss analysis suggested that consumers would be highly unlikely to switch away from ISDN30 in sufficient numbers to make a 10% increase in the wholesale charge unprofitable.
- 5.7 We acknowledged the growing influence of IP solutions, and in particular SIP Trunking. We concluded provisionally, however, that competition from IP solutions had not developed to the point where it was likely to impose a sufficient competitive

constraint on the price of ISDN30 exchanges lines to warrant inclusion in the relevant wholesale market.

- 5.8 We also considered whether our proposed market definitions satisfied the European Commission's three criteria test. We found that, for both the UK excluding the Hull area and in relation to the Hull area, the three criteria test had been met.

Respondents' views

- 5.9 Openreach argued that our analysis was not conclusive, especially with regard to the speed with which substitution to IP-based alternatives were likely to develop. Taking the requisite forward-looking view, Openreach considered that a wider market definition was likely to be appropriate. Openreach suggested that ISDN30 is increasingly competing with new technologies such as IP-based products¹⁹ and that our analysis did not sufficiently take these into account.
- 5.10 Openreach believed that the key features of SIP Trunking, the cost benefits of IP-based voice alternatives over ISDN30 and the capability to deploy broader unified communication and collaboration solutions, to which IP Voice is a gateway, provide compelling propositions for ISDN30 customers. Openreach compared the main features of ISDN30 with those of SIP Trunking and its analysis suggested that the latter can provide customers with all the features deemed important including high quality audio and resilience.
- 5.11 Openreach explained that 76% of European firms have deployed or are deploying or are piloting IP-PBXs (i.e. voice switches at a customer site) and these firms are likely to consider SIP Trunking as part of their strategic network planning. The cost of incorporating SIP Trunking is therefore no longer a barrier given the wide availability of IP ready PBX switches.
- 5.12 Openreach also suggested that we placed too much emphasis on our business user survey and ignored analyst reports which forecast strong growth in the adoption of SIP Trunking services. It also stated that we had not determined the reasons why businesses were running both IP-based services and ISDN30, a factor we suggested indicated a complex substitution pattern. Openreach suggested that a more likely interpretation is that these customers have decided to switch and "that dual running is a necessary but transitory step in relying solely on IP-based alternatives".
- 5.13 A report by dot.econ commissioned by Openreach also suggested that our survey understated switching from ISDN30 to SIP Trunking as we suggested that switching mainly occurs when firms replace existing PBXs. Openreach suggested that there are other triggers for switching.
- 5.14 C&W supported our proposed market definition at this point in time, but believed that in the medium term and possibly within the next three to five years, the market will have changed to such an extent that the product market may be wider than the present finding. C&W believed that as newer technologies evolve they are likely to increasingly be substitutes for ISDN30 at the retail level and act as a constraint against BT's pricing of legacy ISDN products at the wholesale level.

¹⁹ For instance, BT and Openreach suggested that IP Centrex, Hosted VoIP and SIP Trunking services could be used to supply services to businesses needing 8 or more lines and offered similar functionality to ISDN30.

- 5.15 UKCTA agreed that on the basis of the available evidence the market definition was appropriate. It believed that while the underlying technology and popularity of next generation network ('NGN') services are developing all the time, at this point in time our conclusions were right and that only ISDN30 services should be considered within the relevant wholesale market.
- 5.16 The FCS agreed with our market definition and specifically that customers' acceptance of IP based services such as SIP Trunking services had not yet reached the stage which would make these services genuine alternatives to ISDN30. The CMA agreed with our assessment although they also indicated that the market will eventually move to IP-based services.
- 5.17 A confidential respondent agreed with our market definition. It supported the view that it would not be appropriate to broaden the product market to include alternatives to ISDN30. Its response stated that alternative or substitutable products were not sufficiently mature or well developed at the present to constitute a constraint on ISDN30 services. Nor did they consider that they were likely to place a constraint on ISDN30 services for the prospective period of the review.
- 5.18 As explained in section 3, the European Commission stated that we should monitor market developments to see whether IP solutions become more prevalent in the market for business services.
- 5.19 KCOM broadly accepted our conclusions in relation to wholesale market definition.

Our response

- 5.20 We acknowledge that many firms now have an IP enabled PBX. Indeed our business survey found that 62% of firms using ISDN30 that had a switch (PBX or equivalent) had an IP-enabled switch. This is unsurprising given that almost all PBXs sold today are IP enabled. While this makes it easier for firms to switch from ISDN30 to IP solutions, it does not necessarily imply that firms are either using (or planning to use) IP solutions. For example, our survey found that while 62% of ISDN30 users who have a switch have it IP enabled, only 41% of ISDN30 companies use IP solutions, i.e. a number of companies have an IP enabled switch but do not use IP based services.
- 5.21 We explained in the May 2010 consultation that many firms who use IP solutions continue to purchase ISDN30 either to be used in a different setting, or as a back-up to IP services. Openreach suggested that these companies have decided to switch and the reason for dual running of ISDN30 and IP-based alternatives is that this is a "necessary but transitory step in relying solely on IP-based alternatives". We agree that companies may use ISDN30 and IP services concurrently as a transitory measure, and noted this in the May 2010 consultation²⁰. However, it is also not always the case that companies who trial IP services decide to implement IP solutions. Our survey showed that less than half (44%) of companies who had trialled IP services proceeded to implement IP solutions. In addition, a significant proportion of ISDN30 users are not planning to switch for several years and are unlikely to be even considering a trial at this stage – 65% of ISDN30 companies surveyed plan to use ISDN30 for two years or more, and 17% plan to use it for more than 10 years.

²⁰ Where we said, "It is likely that some companies, who ultimately plan to switch to IP services, will migrate to IP services slowly and may well have a period of dual running (e.g. they may 'try out' IP services prior to full implementation)." (paragraph 4.46 of the May 2010 consultation)

- 5.22 We also acknowledge that IP solutions are growing and are likely to continue to grow, and that this retail competition is likely to provide an increasing (indirect) competitive constraint on the price of wholesale ISDN30. However, for the reasons set out in our May 2010 consultation, we continue to believe that this indirect competitive constraint is unlikely to be sufficient to prevent a hypothetical monopoly supplier of wholesale ISDN30 raising prices permanently by 10%. In particular, our survey suggested that business users are largely prompted to switch to IP solutions as part of an upgrade or when they need to replace a switch, and that the relative price of ISDN30 and IP solutions played only a limited role in switching decisions.
- 5.23 Our business user survey asked open questions and it was only responses to the survey that informed our view on businesses' decisions to switch to IP solutions. In relation to the triggers for moving away from ISDN30 to IP services, a range of reasons were mentioned. The most widely cited of these were a general system upgrade (51%) and switch replacement (23%). 12% mentioned cost reduction as the trigger, 7% mentioned a change of supplier and only 5% mentioned relocation (5% cited other reasons and 18% did not know)²¹.
- 5.24 In response to the European Commission's view, we recognise that there will be a continuing need to monitor market developments more generally.
- 5.25 Responses received to the May 2010 consultation document have not led us to change our view that the appropriate market definition to apply to the wholesale product market is ISDN30 exchange line services. We therefore maintain the position set out in the May 2010 consultation and above which is that the product market is wholesale ISDN30 services

Geographic Market Definition

- 5.26 No respondents disagreed with our proposed geographic market definition.
- 5.27 We confirm the proposals set out in the May 2010 consultation where we proposed that the relevant geographic markets were wholesale ISDN30 services in the UK excluding the Hull area and, separately, wholesale ISDN30 services in the Hull area.

²¹ See page 26 <http://stakeholders.ofcom.org.uk/binaries/consultations/isdn30/narrowband.pdf>

Section 6

Wholesale market power assessment

Introduction

- 6.1 The May 2010 consultation set out our approach to market power assessment (Section 3 of the May 2010 consultation) and our proposals in relation to whether any firm held market power in the relevant wholesale markets (Section 7 of the May 2010 consultation).
- 6.2 In this section we set out respondents' views relating to our proposed market power assessment, our response to them, and our conclusions.

Conclusions

- 6.3 We have concluded that:
- Openreach holds SMP in the supply of wholesale ISDN30 exchange services in the UK excluding the Hull area; and
 - KCOM holds SMP in the supply of wholesale ISDN30 exchange services in the Hull area.
- 6.4 These conclusions are unchanged from the proposals set out in the May 2010 consultation.

Our Approach

- 6.5 Our approach to SMP assessment was presented in detail in the May 2010 consultation.
- 6.6 In summary, to assess whether a firm has SMP, in this market review, we regard the following criteria as most important in this review:
- market shares;
 - barriers to entry and expansion;
 - prices and profitability; and
 - countervailing buyer power.

UK excluding the Hull area

The May 2010 consultation

- 6.7 The key reasoning that we made to support the proposals set out in the May 2010 consultation were:
- Openreach's market share was higher than our previous estimates at 71% (compared to 68%);

- competition did not appear to be very aggressive. For example, the wholesale price of ISDN30 plays a minor role in self-supply decisions (which is the most prevalent form of competition). There had been almost no variation in Openreach's wholesale market share over the last 5 years;
- demand and supply-side substitution was limited – for example, the emergence of indirectly substitutable services like SIP Trunking had not resulted in significantly lower demand for ISDN30 at the retail or wholesale levels; and
- Openreach's reported profitability in the RFS was very significantly in excess of the cost of capital, and we believed that this was *prima facie* evidence that wholesale charges for ISDN30 might be above the competitive level.

6.8 We also explained that retailers have no effective choice of wholesaler. C&W and Virgin Media have limited commercial incentive to supply wholesale services to CPs as these CPs compete with their downstream retail businesses. Openreach, on the other hand, has to provide wholesale services to downstream customers. It has to do so, however, on terms which do not discriminate and therefore lowering wholesale charges would benefit everyone and not just downstream BT businesses. We explained that we did not consider that Openreach would experience a net benefit by reducing wholesale charges as a reduction in charges would be unlikely to lead to a significant market expansion for ISDN30 services given market maturity.

Respondents' views

- 6.9 Openreach stated that its market power, especially on a forward looking basis, was limited in scope. It stated that:
- lack of market entry in a declining market is not surprising and is not indicative of market power;
 - Openreach is not able to pass on price increases without the risk of losing out to existing suppliers of alternative technologies at a faster rate than would otherwise occur. The number of CPs offering IP-based voice alternatives is testament to the fact that few barriers prevent the market entry, either in the short or the medium terms. Therefore, there are effective constraints that mean that Openreach is limited in its ability to set prices independent of these alternatives means of supply;
 - the wholesale price remaining flat in nominal terms over time is not a strong indication of market power but should be considered in relation to the requirement to sink investment in a product with expected obsolescence; and
 - accounting approaches do not necessarily reflect the true economic profits associated with the investment; highly depreciated assets will tend to substantially overstate true profits. Therefore the high reported returns for ISDN30 are not conclusive evidence of market power.
- 6.10 dot.econ's submission provided support for Openreach's arguments. In particular, it argued strongly that ROCE provides an accounting snapshot of profitability and does not provide a measure of economic profitability in a market subject to decline. Its response pointed to recent precedents for using Internal Rate of Return ('IRR') as an appropriate measure of profitability.

- 6.11 C&W agreed with our SMP assessment. However, they cautioned about the use of an overly intrusive pricing remedy. This is discussed in Section 8.
- 6.12 The CMA, the FCS and a confidential respondent agreed with our SMP assessment.

Our response

- 6.13 We agree with Openreach that in a declining market, or indeed in any market, high entry barriers, stable prices, and high profits, do not, of themselves, imply that a firm has market power. Any market power assessment has to be examined in the round, examining all the potential constraints on a firm's price, both individually, and collectively. Our market power assessment was not based on these factors alone, but also on Openreach's high and stable market shares, the limited competition from substitute providers of wholesale ISDN30, and the low level of countervailing buyer power.
- 6.14 We also agree with Openreach that the main competitive constraint it faces is the indirect competitive constraints from increased competition from IP solutions at the retail level. However, we considered this competitive constraint in our market definition analysis, and concluded that, while this constraint was increasing in importance, it was not of a sufficient magnitude to prevent a hypothetical monopolist from raising prices above the competitive level. This, combined with the very limited competitive constraints from direct substitutes (for many retailers Openreach is the only feasible provider of wholesale ISDN30), the limited prospects of entry at the wholesale level and lower countervailing buyer power mean that we continue to believe that Openreach has SMP in the supply of wholesale ISDN30.
- 6.15 In terms of the appropriate measure to assess profitability, the forthcoming review of wholesale ISDN30 prices will consider this.
- 6.16 We therefore remain of the view that Openreach has SMP in the supply of wholesale ISDN30 services in the UK excluding the Hull area.

The Hull area

The May 2010 consultation

- 6.17 In the Hull area KCOM has virtually a 100% share of the market for retail ISDN30 services and we are not aware of any CPs likely to enter the market. There would appear to be little appetite to enter the market for ISDN30 services at the retail or wholesale level in the Hull area, probably because the fixed costs that would be incurred to develop a presence in Hull are high in relation to the share of the market that could be achieved given the relatively small market. This acts as a significant barrier to entry. Furthermore, to attract customers away from KCOM and overcome switching costs, a potential entrant would have to offer substantial discounts or a differentiated (and valued) service.
- 6.18 Additionally, although KCOM is required to meet reasonable requests to supply wholesale ISDN30 services in the Hull area, we are not aware of anyone seeking services in the Hull area and nor has anyone actually entered the market via this route (KCOM's regulatory Financial Statements 2008 report no external sales for ISDN30).

Respondents' views

- 6.19 KCOM commented that the impact of services provided by leased lines had not been considered adequately and that alternative provision of ISDN30 is more of a constraint than we concluded.
- 6.20 C&W and FCS agreed with our assessment.

Our response

- 6.21 Our response to the points KCOM made is set out in the retail market power assessment in Section 4. We consider that our response in Section 4 applies equally to our consideration of the wholesale market power assessment.
- 6.22 We remain of the view that KCOM has SMP in the market for the provision of wholesale ISDN30 services in the Hull area.

Section 7

Retail remedies for KCOM

Introduction

7.1 We have now concluded that KCOM does have SMP in the provision of ISDN30 retail services in the Hull area and in this Section we set out remedies to be applied to KCOM in order to address the identified competition concerns.

Conclusions

7.2 We have concluded that KCOM should be subject to two SMP services conditions at the retail level. These requirements are to:

- not discriminate unduly in the provision of retail ISDN30 services; and
- publish retail ISDN30 prices.

7.3 These conclusions reflect the proposals set out in the May 2010 consultation, and are a continuation of existing remedies.

The May 2010 consultation

7.4 In the May 2010 consultation we observed that the current remedies (which are no undue discrimination and price publication) have not led to a significant entry of retail competitors.

7.5 In the retail market we considered 3 options for remedies:

- Option 1 – Remove the existing remedies and rely exclusively on wholesale remedies;
- Option 2 – Maintain the existing remedies; or
- Option 3 – Introduce more direct intervention on pricing (e.g. price controls).

7.6 In rejecting Option 1, we argued that given the lack of competitive entry in the Hull area the case for reliance on wholesale remedies alone was weak. Wholesale remedies have clearly, so far, not enabled or encouraged sufficient competitive entry given the underlying market conditions in the Hull area. Accordingly we considered that the protection against abuse of its SMP position provided by the price publication and no undue discrimination remedies (which ensure that KCOM's actions are transparent and that KCOM does not discriminate) remained essential.

7.7 We then considered Options 2 and 3. We noted that at present KCOM's retail prices are not noticeably out of alignment with BT's prices (as discussed in paragraph 5.38 of the May 2010 consultation)²². In the absence of direct competition, this was

²² KCOM offers two call packages for ISDN30. The local call package includes line rental and inclusive local calls and the UK national call package includes line rental and inclusive UK national geographic calls. Discounts are available depending on contract duration and the number of channels taken, and a discount is also available for paying by direct debit. The different options and discounts available mean that KCOM's ISDN30 list prices range from £163 to £257 per channel per year.

possibly due to the potential threat of price controls, the risk of encouraging market entry by exposing supernormal profits and/or the reaction of its customer base/shareholders (an overlapping group). There was no reason to expect this to change. Equally, it was not clear that price controls would lead to prices substantially below those currently being charged.

- 7.8 Given the lack of clear benefit from increased intervention and the costs of such an intervention, we considered that Option 3 and the imposition of price controls did not appear justified at this time.
- 7.9 Based on the above we therefore proposed that Option 2 was appropriate and that we should re-impose the following specific retail remedies:
- requirement not to discriminate unduly; and
 - requirement to publish prices.
- 7.10 We considered that the proposed remedies effectively restrict KCOM from offering bespoke pricing to a customer without being forced to offer it to all customers. They also ensure that all its packages are visible to potential competitors and customers. The general objectives of these proposed remedies, taken together, were to allow potential competitors to enter the market with confidence in the prices set by the incumbent and to avoid the incumbent selectively undercutting new entrants. While we had not seen any entry at the time of the May 2010 consultation, we believed that removing these remedies would further increase the barriers to entry and deter potential competitors.
- 7.11 We discuss below how each of these remedies addresses our competition concerns in the market and how they satisfy the legal tests set out in the Act.

Respondents' views

- 7.12 In relation to remedies, KCOM welcomed the “pragmatic approach” that we proposed in the May 2010 consultation. No other respondents commented on the substantive remedies proposed.
- 7.13 Although KCOM did not comment on the substantive remedies they did make some comments on the definitions²³ to be applied to them under the draft Notification set out at Annex 5 to the May 2010 consultation. Whilst these relate to both the retail and the wholesale SMP conditions applied to KCOM, we will deal with its comments in this section.
- 7.14 KCOM suggested that some definitions applied were unnecessary as they related to generic descriptions that may apply in the markets for the UK excluding the Hull area, but would not necessarily apply to them.

KCOM's price packages are not directly comparable to BT's due to the different package options available. However, as an indicative comparison BT's list prices range from £182 to £232 per channel per year. While KCOM's prices have a wider range than BT's, they are not noticeably out of alignment.

²³ The definitions are descriptions of terms used in the Notification.

Our response

7.15 We have carefully considered KCOM's comments and agree that some of its comments are correct in that some definitions are not required in order to give effect to the above remedies. We have therefore amended our Notification in order that such definitions are removed to ensure that the Notification remains transparent and clear to both KCOM as the SMP provider and to other stakeholders as potential customers or competitors. The full Notification is set out in Annex 2.

7.16 The definitions that have been removed from the draft Notification are:

- Exchange Line;
- Existing Line Transfer;
- Network Termination and Testing Apparatus;
- Network Termination Point;
- New Line Installation;
- Ordinary maintenance;
- Public Telephone Network;
- Relevant Subscriber;
- Usage Factor;
- Wholesale ISDN30 Line Rental; and
- Wholesale Line Rental.

7.17 In addition we have added a further definition:

“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 Conditions”.

7.18 We have also amended the wording of SMP Condition AAB(IS)4.2(q) to remove a reference to a previously defined term “Wholesale ISDN30 Line Rental”, which is unnecessary to the operation of the condition.

Conclusion

7.19 Having reviewed our market power assessment in Section 4, we remain of the view that the remedies proposed in the May 2010 consultation continue to be appropriate to address the competition concerns present in the market. Further, we consider our analysis of the 3 options remains valid in light of our market analysis and the limited comment received from KCOM in relation to remedies.

7.20 Additionally, we consider our rejection of Option 3 is consistent with Article 17 of the Universal Service Directive²⁴ which permits NRAs to apply retail price controls in

²⁴ Directive 2002/22/EC

order to protect end user interests whilst promoting effective competition. We consider, for the reasons set out in the May 2010 consultation, that there is no material risk to end users in that prices are currently in line with those charged by BT nationally.

7.21 We have therefore decided to impose the following remedies:

- requirement not to discriminate unduly; and
- requirement to publish prices.

7.22 Finally, we need to revoke the previous SMP obligations that were imposed on KCOM under the *Fixed narrowband retail services markets* review in 2003 (the '2003 retail review').

Legal tests

7.23 Before imposing a retail remedy we must be satisfied, in accordance with section 91 of the Act, that we are unable to perform or fully perform our duties under section 4 of the Act by relying solely on conditions set at the wholesale level. We consider that, taking into account the remedies set in this review in the wholesale ISDN30 exchange line services market, specific retail level remedies are still required for the reasons set out at paragraph 7.6.

7.24 We consider that both remedies satisfy the requirements set out in section 47 of the Act.

Legal tests: no undue discrimination

7.25 We have considered our duties under section 3 of the Act. We consider that a no undue discrimination condition will further the interests of citizens and consumers in the relevant market by reducing barriers to entry, and hence promote competition.

7.26 We consider that this remedy meets the criteria set out in section 47(2) of the Act, in particular it:

- is objectively justifiable, as having concluded that KCOM has SMP it could exercise that power to act in a way to discriminate between transactions and customers where such discrimination was not justified. Without such an obligation we consider that barriers to entry would be increased and KCOM's position of SMP would be strengthened;
- does not discriminate unduly as it is only imposed on KCOM who we have concluded holds SMP in the market;
- is proportionate since it does not prevent the application of dissimilar conditions to different transactions where there are objective reasons for doing so. It is therefore the least burdensome means of achieving this aim; and
- is transparent as we have set out the requirements on KCOM and our justifications for those requirements.

Legal tests: price publication

- 7.27 We have considered our duties under section 3 of the Act. We consider that a price publication condition will support the proposed no undue discrimination condition and therefore further the interests of citizens and consumers in the relevant market by increasing transparency within the market which will help to reduce barriers to entry, and hence promote competition.
- 7.28 We consider that the proposed remedy meets the criteria set out in section 47(2) of the Act, in particular it:
- is objectively justifiable as general and reliable visibility of KCOM's prices will enable competitors or potential competitors to assess the suitability for market entry, thus promote retail competition by reducing barriers to entry. The condition would also allow competitors and us to monitor KCOM's prices for possible anti-competitive behaviour;
 - does not discriminate unduly as it is only imposed on KCOM who we have found holds SMP in the market;
 - is proportionate since the obligation only requires publication of prices, not advance notice and we regard this as the least burdensome method of addressing the identified competition concern; and
 - is transparent as we have set out the requirements on KCOM and our justifications for those requirements.

Section 8

Wholesale remedies for Openreach and KCOM

Introduction

8.1 In this Section we set out our conclusions on remedies to address Openreach's SMP in the wholesale market for ISDN30 services in the UK excluding the Hull area and KCOM's SMP in the wholesale market for ISDN30 services in the Hull area. First, we set out a summary of the remedies we proposed in the May 2010 consultation. Then we summarise the responses we received on the proposed remedies. Third, we explain our position on the points raised in responses, and the conclusions we have reached on the basis of all the evidence available to us, including the consultation responses. Finally, we explain the legal tests for these remedies and how they apply to these specific cases including, where appropriate, explanations of how the detailed drafting of the remedies has taken account of stakeholder comments.

Conclusions

8.2 We have concluded that:

- the SMP conditions which we proposed for Openreach in the May 2010 consultation should be set; and
- the SMP conditions which we proposed for KCOM in the May 2010 consultation should be set.

8.3 We are confirming the need for a price control remedy on Openreach in response to our finding that wholesale charges for ISDN30 appear to be above the competitive level. However, in this statement, we do not review the options for the form of price control to be applied or review the efficient level of costs on which any price control should be based. We will consult further on these issues in a forthcoming consultation document.

SMP conditions proposed to be applied to Openreach

The May 2010 consultation

8.4 In the May 2010 consultation we explained that the following remedies currently apply to Openreach following the finding of SMP in 2003 as set out in the Notification to the *Review of the fixed narrowband line, call origination, conveyance and transit markets* ('the 2003 wholesale review'):²⁵

- requirement to provide network access on reasonable request;
- requirement not to unduly discriminate;
- requirement to provide Wholesale Line Rental ISDN30;

²⁵ http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/fixednarrowbandstatement.pdf

- requests for new network access;
- requirement to publish a reference offer;
- requirement to notify charges, terms and conditions;
- requirement to publish technical information;
- transparency as to quality of service; and
- requirement to account separately.

8.5 We explained that these remedies had been successful in enabling an increasingly competitive downstream retail market. We proposed that the re-imposition of these remedies was appropriate.

8.6 We also explained that we thought additional remedies were appropriate to address the identified competition concern that wholesale charges for ISDN30 appeared to be above the competitive level based in part upon the level of return on ISDN30 services reported by BT in its RFS. We considered how best to address this issue and what remedies could be imposed. We considered a variety of options and proposed a charge control supported by a cost accounting obligation. We explained that our proposal was the result of consideration of all the evidence then before us, although we acknowledged that we would need to undertake a full cost analysis for the provision of ISDN30 services and that it would be appropriate to consider this, and the setting of any control, in a separate consultation.

Respondents' views

Existing remedies

8.7 Generally, respondents who commented were not opposed to our proposals for continuation of existing remedies for Openreach. Openreach in its response to our proposal to maintain a requirement to provide WLR ISDN30 stated that the obligation should not apply should ISDN30 become obsolete. Openreach's submission was supported by a report by dot.econ who also commented that ISDN30 is declining in volume and that this trend will continue and likely accelerate.

Functional Specification

8.8 C&W and a confidential respondent submitted that an obligation to comply with a functional specification for ISDN30 should be retained.

New remedies

Price control

8.9 A number of respondents commented specifically on our proposals for charge controls.

8.10 The CMA agreed that a charge control should be set. However, they did not agree that charge controls should be synchronised with other Openreach charge controls and hence set to run from April 2011. The CMA argued that this was too long a timeframe for the setting of a charge control given rising levels of returns.

- 8.11 C&W expressed concern that Openreach's reported returns may be a misleading measure of underlying costs as a result of possible reductions in ISDN30 investment by Openreach in preparation for the deployment of IP services. C&W believed that setting charges based on reported returns could damage competitive service provision and investment. It suggested that we should consider the costs of an efficient operator in setting any charge controls. UKCTA also made these points.
- 8.12 A confidential respondent expressed concern that a charge control could distort the competitive market and hence be detrimental to consumers. This respondent also made the point that BT's RFS may provide a misleading view of profitability. This respondent suggested that existing remedies would be sufficient going forward but that, if further regulation is imposed, a basis of charges condition would be more appropriate than a charge control.
- 8.13 Openreach also said that reported returns were not an appropriate measure of profitability for wholesale ISDN30 services and that they are likely to overstate returns since the asset base for ISDN30 is very heavily depreciated. Furthermore, Openreach stated that a charge control could have damaging effects in artificially stimulating demand for its wholesale ISDN30 services, reducing alternative infrastructure supply, and delaying investment in and development of IP-based alternatives. Openreach said that it considered that we had not carried out a full regulatory impact assessment for our proposals. Openreach also proposed that we should make an explicit commitment to remove charge controls in the event that any charge controls artificially stimulated new demand for ISDN30 services.
- 8.14 In their report supporting Openreach's submission, dot.econ expressed the view that a charge control would be a disproportionate remedy and could be damaging in the market. They postulated that new investment required to meet an artificial stimulus to demand would need to be recovered over a shorter time period than existing investments in a market which is not in steady state. They suggested that a simpler remedy could be a safeguard cap with the option to establish a charge control in the event that expected declines in demand do not materialise.

Interim charge ceiling

- 8.15 Most respondents agreed with our proposal for a charge ceiling to cover the interim period between our statement on this market review and the setting of any price controls. However, the CMA disagreed as they favoured the immediate setting of a charge control. Openreach, whilst disagreeing with the imposition of any form of price control, commented that this may also be an appropriate form of regulation for a longer term price control in the event that we decided that some form of price control would be appropriate.

Cost accounting

- 8.16 Respondents who commented on the proposal for a new cost accounting obligation agreed with the proposal, with the exception of Openreach. Openreach argued that, as it did not accept that a charge control was appropriate, a cost accounting obligation should not be necessary. Openreach further commented that, if we imposed a charge control, it should not have to publish costs floors and ceilings²⁶. Any information that we would need for compliance purposes should be supplied as part of the Additional Financial Information which is not published.

²⁶ Charge controls are generally supported by cost orientation obligations and cost accounting obligations which support the charge control.

Our response

Existing remedies

- 8.17 We have noted Openreach's representations that ISDN30 is a declining service and that new technology substitutes will emerge during the period of the forward look. As explained in Sections 3 and 5 of this statement, the evidence indicates that new technology services do not currently provide a competitive constraint on ISDN30 and we consider that this will continue to be so for the duration of the forward look.
- 8.18 We have also noted the views of other stakeholders in this area – for example, the European Commission has invited us to monitor the market and carry out a new market review in the event that IP alternatives become prevalent in the mass market.
- 8.19 We have carefully considered the representations from Openreach and the European Commission, and we will monitor market developments during the course of the forward look. Should circumstances change to the extent that our analysis and conclusion in this review become significantly outdated, then we would review the market at that stage.

Functional specification

- 8.20 We note the view of C&W and a confidential respondent that the requirement to comply with a functional specification should be retained for Openreach. We understand the need for transparency and non-discrimination in the design and specification of regulated services. However, we do not consider it to be appropriate to continue an ISDN30 functional specification requirement for Openreach. Functional specifications for WLR services were an important feature in the market when WLR was a new and developing service. Now that the service is mature and well understood by purchasers, a regulated functional specification is no longer needed. Transparency of service developments is and will continue to be managed through industry consultation and the Office of the Telecommunications Adjudicator (OTA). Removal of the detailed functional specification will create a consistent framework between ISDN30 and other WLR services for which functional specifications are no longer required by regulation. We have considered all of these points and concluded that compliance with a functional specification for ISDN30 WLR would not be proportionate and therefore we will not impose this requirement.

New remedies

Price control²⁷

- 8.21 We have noted the concerns of a number of stakeholders – Openreach supported by dot.econ, C&W, UKCTA and a confidential respondent, that the reported level of profitability in BT's RFS may be misleading as a result of a heavily depreciated asset base and a switch in investment priority to new technology services. In the May 2010 consultation, we stated the need to ensure that any intervention to regulate wholesale ISDN30 prices was appropriate given the circumstances of the market, and that the RFS may not tell the whole story on profitability in the case of ISDN30. We acknowledged that if a price control was too stringent, then inefficient investment

²⁷ A price control can take a variety of forms as suggested by Recital 20 to Directive 2002/19/EC (Access Directive), including but not limited to the options that were considered in the May 2010 consultation (charge control, cost orientation, safeguard cap).

and purchasing signals could be sent to the market that could artificially alter demand and distort competition.

- 8.22 Having carefully considered all of the responses received from stakeholders, we have decided that we should not, in this statement, reach final conclusions on the form of price control remedy to be imposed. We have reviewed our proposals made in the May 2010 consultation where we specifically identified a charge control as the appropriate remedy over alternate forms of price control such as cost orientation and safeguard caps. Whilst we consider that the potential advantages and disadvantages identified for each form of control we considered remain valid, we accept that, given the need to fully assess costs, it would be premature for us at this stage to propose a specific form of price control.
- 8.23 We have therefore concluded that, on the evidence currently available to us, there is a competition concern in that wholesale charges for ISDN30 appear to be above the competitive level. Having identified this relevant risk of an adverse effect arising from price distortion in our market analysis, we consider that this risk should be addressed by the imposition of an appropriate price control condition. The setting of any control will be considered under a separate review in order to fully review the costs associated with the provision of wholesale ISDN30 services. The precise form and level of any remedy applied will therefore be the subject of further consultation through that process. The consultation will include consideration of relevant points and concerns raised by stakeholders in response to the May 2010 consultation document, including on the necessity to ensure that any remedy does not distort effective competition or result in inefficient incremental investment.

Synchronising regulation of Openreach charges

- 8.24 In confirming the process and timing for further review of ISDN30 costs and price control proposals, we have noted the CMA's view that synchronisation of the ISDN30 price control with other controls would leave prices at their present level for too long. We believe that, as explained in the May 2010 consultation, there are benefits to synchronisation, including the consistent treatment of common costs. Also, the process necessary to initiate a price control requires further cost modelling and consultation. It is therefore not straightforward to speed up the setting of a new price control. Taking account of these considerations, we have concluded that we should keep to the timeframe proposed and aim to synchronise price controls for Openreach access services including ISDN30.

Interim price ceiling

- 8.25 The CMA was the only stakeholder to oppose our proposal for an interim price ceiling to cover the period between our statement on this market review and the setting of any possible price controls. As explained above, we do not think that it would be appropriate to accelerate the setting of a price control remedy which could remove the need for the interim price ceiling. We consider that by imposing a formal ceiling Openreach will not be able to increase prices for relevant controlled services. We consider that this is the most appropriate route to ensure that prices do not increase until we have assessed fully our review of costs.
- 8.26 Some stakeholders questioned the need for any form of price control. We have considered these comments in relation to whether it is appropriate to set any form of interim control whilst the price control review is underway. We consider that our market analysis still reveals a significant concern that wholesale charges for ISDN30 appear to be above the competitive level. As such, we consider that it is appropriate

to impose a condition that prevents Openreach from raising its current prices. We consider that this action would be proportionate pending a full and comprehensive assessment of the costs in providing wholesale ISDN30 services, as it provides protection without interfering with current pricing levels. Therefore it does not risk potential disruption to the market that some stakeholders suggested may occur in the event that we imposed a substantive control.

Cost accounting

- 8.27 We have noted Openreach's opposition to the imposition of a cost accounting obligation and its proposal that additional compliance information should not be published. We also note that Openreach does not believe cost floors and ceilings should be required for wholesale ISDN30 services.
- 8.28 We are not persuaded by Openreach's arguments on this. We believe that it is appropriate that any price controls for ISDN30 services would need to be supplemented by an appropriate reporting framework, and that this should be transparent to stakeholders. We have therefore concluded that a new cost accounting obligation is needed, subject to the setting of an appropriate price control.
- 8.29 It is important to understand how the cost accounting requirement would work in practice. In this review we are imposing SMP conditions (OA1 to OA33) that require Openreach to comply with appropriate financial reporting obligations. We have concluded that Openreach should provide appropriate cost accounting information in order to ensure that any price control could be effectively monitored. Any specific obligations would be imposed by a direction made under the SMP conditions ("the financial reporting direction"). We are not setting this direction in this review.
- 8.30 Firstly, we will need to conclude our ISDN30 price control review. This will determine the nature of any control applied to Openreach. The nature of any control may have a bearing on the data that would be required to be produced under the cost accounting obligation.
- 8.31 Secondly, we intend to undertake a review of BT's regulated financial statements next year ("the RFS review"). The RFS review will take account of regulatory changes made that need to be reflected in the reporting requirements imposed on BT by the financial reporting direction. The RFS review will therefore take into account the conclusions of this review and the conclusions of the ISDN30 price control review before proposing any amendments or additions to the financial reporting direction. Stakeholders will therefore, have two further opportunities to respond to consultations related to the price control and the detail of the cost accounting obligations to be associated with that control.

Impact assessment

- 8.32 We do not accept Openreach's comment that a full regulatory impact assessment was not undertaken. As we explained in paragraphs 2.9 and 2.10 of the May 2010 consultation, the analysis presented in that document constituted an impact assessment as defined in section 7 of the Act. In this context, the May 2010 consultation discussed fully all of the relevant considerations and options under consideration by us, including their impact at an appropriate level of detail given that we were not proposing to set the control before a separate review of the underlying cost base was undertaken in the price control review. We will be undertaking a further impact assessment in the course of that review.

Conclusions

8.33 On the basis of our market analysis, set out in Section 6, and having carefully considered all of the comments received from stakeholders, we have concluded that the existing remedies should continue to apply to Openreach. For avoidance of doubt, these remedies are:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Requirement to provide Wholesale Line Rental ISDN30;
- Requests for new network access;
- Requirement to publish a reference offer;
- Requirement to notify charges, terms and conditions;
- Requirement to publish technical information.
- Transparency as to quality of service; and
- Requirement to account separately.

8.34 We have also concluded that a new price control condition should be applied to address the competition concern that wholesale charges for ISDN30 appear to be above the competitive level. The precise form and level of the remedy to be set by the new condition should be determined in a subsequent review which will examine the efficient level of cost of wholesale ISDN30 provision. We are therefore not concluding in this statement that a RPI+/-x charge control will be set for wholesale ISDN30, although we will consider this as an option in the separate review. The review will run concurrently with the reviews of charge controls on LLU and WLR to enable synchronisation of the regulatory framework for Openreach's charges.

8.35 We have also concluded that a new cost accounting condition should be applied to Openreach to support any new price control arrangements.

8.36 Finally, we have also withdrawn the previous obligations imposed under the 2003 wholesale review.

SMP conditions proposed to be applied to KCOM

The May 2010 consultation

8.37 In the May 2010 consultation, we proposed continuation of the remedies that already applied to KCOM as a result of the 2003 wholesale review, which were:

- Requirement to provide network access on reasonable request;
- Requirement not to unduly discriminate;
- Requirement to publish a reference offer;
- Requirement to notify charges, terms and conditions; and

- Requirement to publish technical information

8.38 We explained that we believed that these obligations were still appropriate.

Respondents' views

8.39 There were no specific comments from respondents on remedies proposed for KCOM. KCOM itself welcomed our pragmatic approach to remedies. KCOM made a number of comments on the legal instruments. These are discussed in Section 7. Additionally, KCOM requested that Condition AAB(IS)4.6 should be amended to allow KCOM to make a reasonable charge for providing a copy of the Reference Offer.

Our response

8.40 We have decided not to amend the condition as requested. The requirement to provide a Reference Offer does not require KCOM to publish an RO immediately and will only be triggered in the event that a third party makes a request for network access. Further, the condition has been based upon the requirement under SMP condition AB4, set under the 2003 wholesale review which did not contain such a provision. Therefore, we consider that the condition is appropriate as drafted in the May 2010 consultation.

Conclusions

8.41 We have concluded that existing remedies should continue to apply to KCOM. For avoidance of doubt, these remedies are:

- requirement to provide network access on reasonable request;
- requirement not to unduly discriminate;
- requirement to publish a reference offer;
- requirement to notify charges, terms and conditions; and
- requirement to publish technical information.

8.42 We understand that there is currently no demand for wholesale ISDN30 services from KCOM. In the event that a reasonable request for Network Access were made to KCOM, these obligations would be relevant. In that case, KCOM would need to provide the Network Access requested in compliance with these requirements – i.e. so as not to discriminate unduly. Once the Network Access were provided, it would be necessary for KCOM to publish a reference offer, notify charges, terms and conditions, and publish technical information in order to comply with the regulatory obligations established by this market review.

Legal tests and application to these SMP remedies: Openreach and KCOM

8.43 The remainder of the section explains each of the SMP remedies we are imposing on Openreach and KCOM in further detail. Where we are imposing the same or equivalent remedies on both Openreach and KCOM we consider its application together, given the underlying similarities in the competition issues that apply to the respective markets in these cases.

Requirement to provide network access on reasonable request

- 8.44 We are continuing remedies requiring Openreach and KCOM to meet reasonable requests for network access in the provision of wholesale ISDN30 services.
- 8.45 Section 87(3) of the Act authorises us to set SMP services conditions requiring the dominant CP to provide network access to bottleneck inputs as we 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 the conditions are complied with within the periods and at the times required.
- 8.46 When considering the imposition of such conditions, we must have regard to 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.

Aim of regulation

- 8.47 This remedy is designed to promote competition in downstream markets by requiring CPs with SMP to provide wholesale access to their network facilities. The level of investment required by a third party to replicate the networks of Openreach and KCOM in order to compete at this level is a significant barrier to entry. We consider that in the absence of such a requirement, Openreach and KCOM would have an incentive not to provide access. The ability of competing CPs to gain wholesale access could facilitate the development of competition in retail markets.

Legal tests

- 8.48 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 condition will in particular further the interests of citizens and consumers in relevant markets by the promotion of competition.
- 8.49 We have considered the Community requirements as set out in section 4 of the Act. The obligation will 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 ISDN30 services, and that it has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK outside of the Hull area. We believe that removal of the requirement would harm or reverse this.
- 8.50 We consider that the condition meets the criteria set out in section 47(2) of the Act. The condition:
- is objectively justifiable, as its 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 Openreach or KCOM. We also consider that it is important that any regulatory intervention, if it became necessary, could be made in a timely manner and therefore it would not be appropriate to rely on competition law;

- does not discriminate unduly, as it is only imposed on Openreach and KCOM who have SMP, and both these CPs will be subject to the same obligation;
- is proportionate, since without such an obligation Openreach and KCOM could refuse to provide access and this would mean that other CPs would not be able to compete effectively in markets where Openreach and KCOM hold SMP, but does not require Openreach and KCOM to provide access where it is not technically feasible or reasonable; and
- is transparent as it is clear the intention is to ensure that Openreach and KCOM provide access to their networks in order to facilitate competition.

8.51 The condition applies to the market for provision of wholesale ISDN30 services in the UK except the Hull area, and the market for provision of wholesale ISDN30 services in the Hull area.

Requirement not to discriminate unduly

8.52 We are imposing the condition on Openreach and KCOM not to discriminate unduly in relation to the provision of wholesale ISDN30 services.

8.53 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.

Aim of regulation

8.54 Where dominant CPs are vertically integrated like KCOM, or part of a larger group of companies incorporating downstream activities, like Openreach, they may have an incentive to provide wholesale services on terms and conditions that favour their own or affiliated retail activities in a way that would have a material adverse effect on competition. In particular, they may charge competing CPs different amounts for the same service, thereby increasing the costs of some competing CPs and giving others an unfair competitive advantage. They might also provide services on different terms and conditions, for example with different delivery timescales, which would disadvantage retail competitors and in turn consumers.

8.55 An obligation to provide network access on its own is not adequate to promote downstream competition. In the absence of a requirement not to discriminate unduly, Openreach and KCOM could favour downstream businesses, which would have the effect of restricting or distorting competition in the retail market.

8.56 We have considered whether allegations or evidence of discriminatory behaviour could be adequately addressed through competition law. We consider that in order to meet our objective to promote efficient and sustainable competition at the wholesale level, a no undue discrimination condition is necessary. This condition helps to ensure a level playing field for all parties, thereby creating the right environment for competition to develop.

Legal tests

8.57 Together with an obligation to provide network access, the obligation encourages the provision of network access and service interoperability for the purpose of efficiency and sustainable competition in downstream markets by ensuring that Openreach and

KCOM are not permitted to discriminate unduly. This ensures a competitive playing field and promotes competition and the interests of consumers through the maximisation of choice in downstream markets.

- 8.58 Therefore, we consider that the condition in particular furthers the interests of citizens and 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 wholesale provision of ISDN30 services, and that it has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK outside of the Hull area. We believe that removal of the requirement could harm or reverse this.
- 8.59 We have considered the Community requirements as set out in section 4 of the Act. The condition encourages 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 Openreach and KCOM are not permitted to unfairly favour particular retail businesses and therefore distort competition.
- 8.60 We consider that the condition meets the criteria set out in section 47(2) of the Act. We believe the condition:
- is objectively justifiable, as it provides a safeguard to prevent Openreach and KCOM from favouring their own or affiliated businesses, to the disadvantage of their competitors;
 - does not discriminate unduly, as it is imposed only on Openreach and KCOM who have SMP and we propose that both CPs should be subject to the same obligation;
 - is proportionate, as it is intended to prohibit discrimination that is undue only, that is discrimination that would materially affect the ability of Openreach and KCOM's competitors to compete on equal terms; and
 - is transparent, as it is clear that its intention is to prevent discrimination that is undue.
- 8.61 The condition applies to the market for the provision of wholesale ISDN30 services in the UK except the Hull area, and the market for the provision of wholesale ISDN30 services in the Hull area.

Transparency

- 8.62 We consider that it is appropriate to ensure that there is transparency of charges, terms and conditions in all markets considered in this review in which there is a CP with SMP. In the absence of requirements obliging the publication of prices, terms, conditions and technical information by a CP with SMP, they might provide services on differing terms and conditions to its downstream division and other CPs. Third party CPs would not be able to check that they were being charged the same rate, or that the terms and conditions that they were offered were also the same.
- 8.63 Section 87(6)(b) of the Act authorises the setting of SMP services conditions which require a dominant CP to publish all such information in such manner as we 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 CP to

publish, in such manner as we 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 CP to include specified terms and conditions in the reference offer. Section 87(6)(e) permits the setting of SMP services conditions requiring the dominant CP to make such modifications to the reference offer as we may direct from time to time.

8.64 We are imposing the following obligations to provide transparency in the markets for the provision of wholesale ISDN30 services:

For Openreach and KCOM:

- requirement to publish a reference offer ('RO');
- requirement to notify charges; and
- requirement to notify technical information.

For Openreach only:

- transparency as to quality of service; and
- requirement to account separately.

Requirement to publish a reference offer

8.65 We are requiring Openreach and KCOM to publish a RO for services and products offered in the markets for the provision of wholesale ISDN30 services. In the case of KCOM, the requirement for a RO would only apply in the event that a wholesale service was reasonably requested. No one has requested KCOM to supply wholesale ISDN30 services and therefore the condition does not require any immediate action on the part of KCOM. In the event that a CP reasonably requested KCOM to provide wholesale ISDN 30 services, KCOM would be required to publish a RO. We have amended the wording of the obligation, as applied to KCOM, to reflect this.

Aim of regulation

8.66 The main reasons for requiring the publication of a RO are to assist with transparency in monitoring for potential anti-competitive behaviour and to give visibility to the terms and conditions on which other CPs would be able to purchase wholesale ISDN30 services. The publication of a RO would therefore help to ensure stability in markets and would ensure that incentives to invest would not be undermined.

8.67 The publication of a RO allows for speedier negotiations and might avoid possible disputes. Together with a requirement not to discriminate unduly, the publication of a RO gives confidence to those purchasing wholesale ISDN 30 services that services are provided on terms which do not discriminate unduly. We have taken account of the prior existence of a requirement to publish a RO for wholesale ISDN30 services, and that it has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK outside of the Hull area. We consider that removal of the requirement could harm or reverse this.

The Condition

8.68 We consider that it is appropriate for the published RO to include:

- a clear description of the services on offer;
- terms and conditions including charges, ordering, provisioning, billing and dispute resolution procedures. The RO should provide sufficient information to enable CPs 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 are able to make full and effective use of all the services provided;
- conditions relating to maintenance and quality of service including service level agreements and guarantees. The inclusion of service levels to provide for a minimum acceptable level of service ensures that services are provided in a fair, reasonable, timely and non-discriminatory fashion; and

Legal tests

8.69 For the markets under review, we consider that the requirement to publish a RO, in combination with a requirement not to discriminate unduly, facilitates service interoperability, secures freedom of choice for wholesale customers of Openreach and KCOM and allows CPs to make informed decisions about wholesale investment. Further, the obligation promotes the interests of purchasers of wholesale ISDN30 by enabling them to adjust their downstream offerings in competition with Openreach or KCOM in response to changes in their terms and conditions. Finally, the obligation makes it easier for CPs and us to ensure that wholesale ISDN30 services are provided in a manner which does not discriminate unduly.

8.70 For the reasons set out above, we consider that the condition in particular furthers the interests of citizens and consumers in relevant markets by the promotion of competition in line with section 3 of the Act.

8.71 We consider that the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and encourages the provision of Network Access and service interoperability for the purpose of securing efficient and sustainable competition for the maximum benefit of consumers. The publication of a RO means that CPs can have the necessary information readily available to allow them to make informed decisions about entry into the market.

8.72 We consider that the condition meets the criteria set out in section 47(2) of the Act. We are satisfied that the condition:

- is objectively justifiable, in that it requires that terms and conditions are published allowing competing CPs to ensure that they are receiving offers that do not discriminate unduly in favour of the retail operations of Openreach and KCOM and therefore encourages competition to the benefit of consumers;
- does not discriminate unduly, as it is applied only to Openreach and KCOM who hold SMP and we propose that both are subject to the same obligation;

- is proportionate, in that only information that is necessary to ensure that there is no material adverse effect on competition is required to be provided; further, in relation to KCOM, it would only be required to publish a RO in the event that they received a request to supply wholesale ISDN30 services; and
- is transparent, as it is clear the obligation is designed to ensure that potential competitors have sufficient information to make investment decisions about entry into this market.

8.73 The condition applies to the market for the provision of wholesale ISDN30 services in the UK except the Hull area, and the market for the provision of wholesale ISDN30 services in the Hull area.

Requirement to notify charges, terms and conditions

8.74 We consider that it is appropriate to retain a requirement on Openreach and KCOM to publish any planned changes to charges in advance of those changes taking place. We consider that 28 days' notice is appropriate in both cases and this retains the status quo. In the case of KCOM, the requirement to notify charge changes would only apply in the event that a CP requested reasonably that KCOM supply wholesale ISDN30 services.

Aim of regulation

- 8.75 Notification of changes to services at the wholesale level can further assist competition, as it means other CPs would have the opportunity to consider whether these changes require amendments to their own retail offerings.
- 8.76 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 ISDN30 services. The latter purpose ensures that competing providers have sufficient time to plan for such changes. Notification of changes therefore helps to ensure stability in markets without which incentives to invest might be undermined and market entry made less likely.

The Condition

- 8.77 The notice shall be required to include:
- a description of the service;
 - the location of terms and conditions in the RO;
 - the effective date or period from which the changes will have effect; and
 - other charges for services that would be directly affected by the change.

Legal tests

8.78 For the markets under review, we consider that 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 ISDN30 services by enabling them to adjust their downstream offerings in competition with Openreach and KCOM in response to

changes in Openreach or KCOM's charges. The obligation also makes it easier for us to monitor any instances of discrimination. We have taken account of the prior existence of a requirement to notify charges, terms and conditions for wholesale ISDN30 services, and that it has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK outside of the Hull area. We believe that removal of the requirement could harm or reverse this.

- 8.79 For the reasons set out above, we consider that the condition in particular furthers the interests of citizens and consumers in relevant markets by the promotion of competition in line with section 3 of the Act.
- 8.80 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 for the maximum benefit of consumers by ensuring that CPs have the necessary information to allow them to make informed decisions about competing in the relevant market.
- 8.81 We consider that the condition meets the criteria set out in section 47(2) of the Act. We are satisfied that the condition:
- is 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 the costs of the regulated inputs. It also allows CPs and us to monitor Openreach and KCOM's charges for possible anti-competitive behaviour;
 - does not discriminate unduly, as it is only imposed on Openreach and KCOM both of whom have SMP and we propose that both subject to the same obligation;
 - is proportionate, in that only information that other CPs would need to know in order to adjust for any changes would have to be notified. The period of 28 days is to be the minimum required to allow changes to be reflected in retail offers; and
 - is transparent, as it is clear the intention is to ensure that Openreach and KCOM notify CPs who purchase wholesale access of changes to charges.
- 8.82 The condition would apply to the market for the provision of wholesale ISDN30 services in the UK except the Hull area, and the market for the provision of wholesale ISDN30 services in the Hull area.

Requirement to notify technical information

- 8.83 We consider that it is appropriate to impose a requirement on Openreach and KCOM to notify technical information a minimum of 90 days in advance of providing new wholesale ISDN30 services or amending existing technical terms and conditions. In the case of KCOM, the requirement to notify technical information would only apply in the event that a CP reasonably requested wholesale ISDN30 service.

Aim of regulation

- 8.84 The aim of an obligation to provide advance notification of technical characteristics 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.

- 8.85 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).

The Condition

- 8.86 The present 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.
- 8.87 This condition for 90 days' notice relates to changes to technical information related to SMP services. Separately, all CPs are required to comply with General Condition 2²⁸, which obliges them to apply compulsory standards, or in the absence of these, voluntary standards. Such changes should be agreed through NICC²⁹. Where the NICC process applies to network changes notified under this condition, this should take place before the 90 day notification.
- 8.88 Openreach commented that the wording of the draft condition referred to notification of changes to charges as well as to terms and conditions, and queried whether this was appropriate. We have reviewed the wording of the condition and agree that as the requirement relates only to technical information it does not need to refer to charges. We have amended Condition AAA(IS)6(b).1 accordingly.

Major changes and NGN

- 8.89 For major changes to the existing network and migration to NGNs, we consider that industry consultation (including through 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 consultation process.

Legal tests

- 8.90 We consider that, by ensuring that CPs' systems are interoperable with any changes to technical specifications that might affect their businesses, the condition in particular furthers the interests of citizens and consumers in relevant markets by the promotion of competition in line with section 3 of the Act.
- 8.91 We consider that the condition meets the Community requirements set out in section 4 of the Act. In particular, the condition promotes competition and secure efficient and sustainable competition for the maximum benefits of consumers 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 prior existence of a requirement to notify technical information in relation to wholesale ISDN30 services, and that it has been effective in enabling increasingly competitive conditions in the downstream retail market in the UK outside of the Hull area. We believe that removal of the requirement could harm or reverse this.

²⁸ http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/

²⁹ 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/>.

- 8.92 We consider that the condition meets the criteria set out in section 47(2) of the Act. We are satisfied that the condition:
- is objectively justifiable, as it enables CPs to make full and effective use of network access. The period allows CPs time to react to changes without imposing an unnecessarily long notification period on Openreach and KCOM that may restrict their ability to develop and deploy new features or products;
 - does not discriminate unduly, as the condition is only imposed on Openreach and KCOM both of whom have SMP, and both are subject to the same obligation;
 - is proportionate, in that 90 days' notice is considered the minimum period necessary to allow CPs to modify their networks; and
 - is transparent, in that it is clear in its intention that Openreach and KCOM notify technical information.
- 8.93 The condition applies to the market for the provision of wholesale ISDN30 services in the UK except the Hull area, and the market for the provision of wholesale ISDN30 services in the Hull area.

Transparency as to quality of service

- 8.94 Dominant CPs in wholesale markets have the ability to favour their 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 provided by the dominant CP to external CPs compared to its own retail operations). This has 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 consumers to compete in downstream retail markets. Distortions can also be caused by provision of wholesale services with varying levels of service quality. We consider that it is appropriate to continue to require Openreach to provide transparency as to the quality of service it provides. No requirement for this currently applies to KCOM and, given the size of the market and the current lack of demand for a wholesale service, we do not believe it would be proportionate to extend regulation of KCOM into this area.

Aim of regulation

- 8.95 The intention of the transparency of quality of service remedy is to monitor whether any undue discrimination is occurring by requiring the publication of data regarding the delivery of wholesale services by Openreach to downstream BT businesses and other third party CPs. We believe that it is necessary for quality of service to be measured and transparent.

New Direction

- 8.96 We consider that service provision and fault repair remain critical areas in which to maintain transparency of Openreach's service levels. These areas remain critical as they are where differentiated service levels could be key determinants of a positive customer experience and could cause consumers to switch.
- 8.97 Therefore we are now making a new Direction to formally require Openreach to supply the same KPIs for ISDN30 as currently required for the analogue and ISDN2 exchange line markets.

8.98 Openreach commented that they currently provide KPI information for the analogue and ISDN2 exchange line markets on the basis of the web based KPI online system. They are required by Clause 6 of the direction, to provide specified information to each third party CP on a confidential basis. Openreach were concerned that the wording of the direction was not in line with their online system in practice. Having discussed the nature of the online system in both this review and in the wholesale narrowband review (which set the KPI direction for analogue and ISDN2 markets), we consider that the current configuration of Openreach's online system that provides access to third parties, via a confidential link, to the required information does satisfy the terms of Clause 6 of the direction.

Legal tests

8.99 We consider that, in ensuring the Network Access that third party CPs receive from Openreach is on the same terms as downstream BT divisions the condition, in particular, furthers the interests of citizens and consumers in relevant markets by the promotion of competition in line with section 3 of the Act.

8.100 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 levels Openreach provides to downstream business divisions and third parties.

8.101 We consider that the SMP condition, AAA(IS)7, meets the requirements in section 47. We are satisfied that the condition:

- is objectively justifiable, as in the absence of a requirement to publish specific quality of service information, it would not be possible to monitor if any discrimination which was undue in the quality of service provided by Openreach was taking place;
- does not discriminate unduly, as it applies to Openreach only. We will not impose this obligation on KCOM as we do not consider that such an obligation would be justifiable as information provided would not be statistically meaningful given the number of CPs active in the Hull area;
- is proportionate, as Openreach is only required to publish data related to the securing of transparency for quality of service as set out in the Direction at Annex 3 and subject to section 49 of the Act; and
- is transparent, as it is clear that its intention is to monitor for discrimination that is undue in the quality of service provided by Openreach.

8.102 We consider that the KPI Direction meets the requirements in section 49. 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 discrimination that is undue in this market;
- does not discriminate unduly, as it only applies to Openreach and it is subject to SMP transparency condition, and that it ensures that Openreach is subject to the same reporting requirements across all of the wholesale exchange line markets in which it holds SMP;

- is proportionate, as Openreach is only required to publish specific KPI data related to key business processes and it aligns the requirements across related exchange line services markets. Further, Openreach is already supplying such data on a voluntary basis, and has systems and procedures in place to supply the required information; and
- is transparent, as it is clear from the Direction as to what information would be required to be published and supplied by Openreach.

8.103 The condition and associated direction applies to the market for the provision of wholesale ISDN30 services in the UK except the Hull area.

Accounting Separation

8.104 We consider that it is appropriate to impose an accounting separation obligation on Openreach in relation to the market for provision of wholesale ISDN30 services in the UK except the Hull area. Given the size of the market in the Hull area and the current lack of demand for a wholesale service there, we do not believe it would be proportionate to impose such an obligation on KCOM.

8.105 The accounting separation obligation requires Openreach to account separately for internal and external 'sales' and allows CPs and us to monitor costs and charges to ensure that Openreach does not discriminate unduly in favour of its own downstream business.

8.106 Under section 87(7) and 87(8) of the Act, appropriate accounting separation obligations may be imposed on the dominant CP 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 CP may be required to maintain a separation for accounting purposes between such different matters relating to network access or the availability of relevant facilities.

8.107 Openreach is required to produce a range of outputs, which support compliance with a no undue discrimination remedy, according to requirements set out in the RFS.

8.108 We consider that it is appropriate to maintain this obligation in the market for the provision of wholesale ISDN30 services in the UK except the Hull area.

8.109 In re-imposing the SMP conditions set under the 2004 Financial Reporting Statement³⁰ (OA1 to OA28 and OA32 and OA33) we confirm that the directions set under those conditions imposing accounting separation reporting obligations on Openreach continue to apply to the ISDN30 wholesale exchange line services market.

Legal tests

8.110 The imposition of an accounting separation obligation is justifiable and proportionate 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. This is because the imposition of an

³⁰ *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/

accounting separation obligation ensures that obligations designed to curb potentially damaging leverage of market power could be effectively monitored and enforced. In addition the imposition of an accounting separation obligation enables us to monitor the profitability of Openreach.

- 8.111 For these reasons, we consider that the condition furthers the interests of citizens and consumers in relevant markets by the promotion of competition in line with section 3 of the Act.
- 8.112 We have considered the Community requirements set out in section 4 of the Act and consider that the condition meets these requirements. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant CPs do not favour their own downstream businesses, thereby disadvantaging third party CPs.
- 8.113 We consider that the condition meets the criteria set out in section 47(2) of the Act. We are satisfied that the conditions:
- are objectively justifiable, as it relates to the need to ensure competition develops fairly, to the benefit of consumers;
 - do not discriminate unduly, as Openreach is the only provider to hold SMP in the relevant market;
 - are proportionate, as it is necessary as a mechanism to allow CPs and us to monitor for discriminatory behaviour by Openreach; and
 - are transparent, as it is clear the intention is to monitor compliance with specific remedies, and the particular accounting separation requirements of Openreach are clearly set out in the Financial Reporting Statement.
- 8.114 The accounting separation obligation applies to the market for the provision of wholesale ISDN30 services in the UK except the Hull area.

Requirement to provide WLR

- 8.115 WLR is a service which allows CPs to provide exchange lines to end-users. CPs take on the full retail relationship with the customer. Openreach is currently required to provide WLR for:
- analogue exchange line services;
 - ISDN2 exchange line services; and
 - ISDN30 exchange line services.
- 8.116 The original obligation to provide WLR derived from the 2003 wholesale review which imposed SMP condition AA10 on Openreach for analogue, ISDN2 and ISDN30 variants of WLR. The September 2009 statements concluded that the regulatory requirements for WLR on analogue exchange lines and ISDN2 exchange lines should continue. However, the September 2009 statements did not conclude on the markets for retail and wholesale ISDN30 services and therefore the present SMP obligations date back to the 2003 wholesale review.

- 8.117 Openreach commented that ISDN30 differs from ISDN2 and analogue variants of WLR in that it is a mature product with a limited lifespan and a change in market conditions may lead towards replacement or withdrawal. Openreach suggested that this condition be reviewed during the course of the market review period.
- 8.118 We do not agree that there needs to be a formal review of this condition within the forward look period as our market analysis and the setting of SMP conditions have been made on a forward looking basis. We have explained above our consideration of how IP based alternatives may impact on ISDN30, and have also indicated (taking account of the comment from the European Commission), that we will keep this market under review.
- 8.119 Openreach suggested that the wording of the SMP condition AAA(IS)10.1 be amended to require Openreach to provide ISDN30 WLR, except in so far as we may otherwise consent in writing. We have considered this suggestion, and, taking into account the specific characteristics of this market, and the need for conditions to be proportionate, we consider that it is appropriate to include this additional text. For the avoidance of doubt, our inclusion of a reference to a consent process within the condition does not indicate that any review of this condition will necessarily occur during the forward look period. Should we receive a request to give such a consent, we will follow the process and other requirements set out in section 49 of the Act, including prior consultation.
- 8.120 We did not set equivalent conditions on KCOM in the September 2009 statements in the markets for analogue and ISDN2 wholesale services and we will not do so for ISDN30. Given the size of the market in the Hull area, and the current lack of demand for a wholesale service there, we do not believe it would be proportionate to impose such an obligation on KCOM.

The Condition

- 8.121 Further to our conclusion that Openreach has SMP in the market for provision of wholesale ISDN30 services in the UK except for Hull, we are now imposing a new WLR condition on Openreach. This new condition is consistent with the September 2009 statements.
- 8.122 There are differences between the new WLR condition and the condition in force prior to this Statement. We have retained the core function of the condition which requires Openreach to provide WLR products to CPs but consider that there is scope to remove other elements, such as detailed cost allocation and recovery methods. We consider WLR to be a mature product with embedded systems and processes, which makes it unnecessary to include this level of detail going forward. This is the same change that was made to the analogue and ISDN2 markets and would bring the regulation of ISDN30 into line with those other exchange line markets.

Legal tests

- 8.123 We consider that the condition is consistent with our duties under section 3 of the Act. We consider that the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.
- 8.124 We 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 for the maximum benefit of consumers by enabling CPs to compete in downstream access markets. We have taken account of the current

existence of a requirement for WLR, and that it has been effective in enabling increasingly competitive conditions in the downstream retail market. We believe that removal of the requirement could harm or reverse this.

8.125 We consider the condition meets the criteria set out in section 47(2) of the Act. We are satisfied that 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 could result in Openreach withdrawing the product or otherwise changing it to the detriment of the competition that has developed;
- does not discriminate unduly. The WLR requirement applies only to Openreach. Whilst KCOM has SMP in the wholesale ISDN30 market in the Hull area, the obligation on KCOM to provide network access on reasonable request is sufficient based on the market conditions of the Hull area, and no additional WLR requirement is appropriate there;
- is proportionate, in that it is necessary to enable competition but is not unduly burdensome on Openreach, specifically by reducing regulation where we consider this is not necessary, for example the functional specification; and
- is transparent, in that it is clear in its intention to ensure that Openreach provides WLR products. Further, we consider that the operation of the condition will be unaffected by the consent mechanism as processes under section 49 will be followed.

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

8.127 The condition applies to the market for the provision of wholesale ISDN30 services in the UK except the Hull area.

WLR Functional Specification

8.128 Openreach is currently required to provide wholesale ISDN30 according to the specifications set out in the WLR functional specification, imposed under the 2003 wholesale review. Analogue WLR was required to be provided in line with a functional specification published in 2003, but this was reviewed and not imposed in the September 2009 statement. We can confirm that we will not impose the ISDN30 functional specification as a result of this market review. We consider that such regulation is not now appropriate for this market where the product is well established. This is also consistent with the WLR requirements imposed following the wholesale statement.

Change to existing regulation

8.129 We consider that a detailed functional specification for ISDN30 is no longer required for a number of reasons. Firstly, and most significantly, the Undertakings³¹ came into effect on 22 September 2005 and they require Openreach to provide wholesale

³¹ *Undertakings given to Ofcom by BT pursuant to The Enterprise Act 2002*, consolidated version published 19 December 2008 <http://www.ofcom.org.uk/telecoms/btundertakings/consolidated.pdf>

service on an 'Equivalence of Inputs' (EOI) basis (i.e. the same service it makes available to its retail businesses should also be available to competitors). Large sections of the functional specification covered requirements regarding the provision of services on an equivalent basis and are therefore no longer necessary.

- 8.130 Secondly, we consider that WLR ISDN30 is a mature wholesale service with accepted standards and processes making the requirement for a detailed functional specification less important. The growth of WLR ISDN30 lines sold to third parties suggests that the products generally meet the requirements of CPs and customers alike.
- 8.131 Finally, improvements to WLR products are agreed and implemented through industry working groups and the Office of the Telecoms Adjudicator ('OTA') framework. We consider that the existing accepted product specifications provide a base from which changes in the future should be based on agreement between Openreach and industry. Collaboration can be seen in a variety of other areas (i.e. improvements to the SoR process, KPI online system), and we are keen to ensure that, while regulation requires the provision of specific products, there is sufficient flexibility in the remedy for the life of the review period, to allow Openreach and industry to discuss, agree and implement improvements as required. In considering this change we have also taken into account responses to the May 2010 consultation.

Requests for new Network Access

- 8.132 We consider that it is appropriate to impose an obligation on Openreach regarding its statement of requirement ('SoR') process. Given the size of the market in the Hull area and the current lack of demand for a wholesale service there, we do not believe it would be proportionate to impose such an obligation on KCOM.

Aim of regulation

- 8.133 Regulation of Openreach was considered appropriate in 2003 due to evidence suggesting that the industry negotiated SoR process was not working sufficiently well. The process for making requests for new network access, and the way these were subsequently dealt with, was not effective in getting new products delivered in a timely fashion, and was not sufficiently transparent to allow CPs certainty in how requests were being treated. Therefore, we concluded there was a need to include timings in the process in order to reduce Openreach's incentive to delay and felt that a transparent process would provide clarity if a dispute arose.

Prior regulation

- 8.134 The existing SoR condition covers:
- the publication of reasonable guidelines on requesting a new product;
 - the provision of information for the purpose of making a request for a new product; and
 - a process for dealing with requests for new products.

Changes to prior regulation

- 8.135 During the life of the previous remedies, the Undertakings were introduced and as such the SoR process is now applicable to two separate BT divisions: Openreach and BT Wholesale.
- 8.136 Whilst issues have occurred with the handling of SoRs using the SoR process set in place by the previous regulation, there have not been significant or formal complaints to us regarding the process. In addition, there have been some developments to the process agreed by Openreach and industry to improve the process. This means the process in place may not be in line with that set out in the previous condition, but is more likely to meet the needs of industry.
- 8.137 The condition has acted primarily as a safety-net by providing regulated timeframes for the completion of each step of the process. While we are aware of existing deficiencies in the current process, we do not believe that to make the condition more prescriptive would necessarily be beneficial in aiding the long term, ongoing development of the process. We consider that including more detail in the condition will not allow sufficient scope for ongoing improvements to be implemented during the life of the remedy. In addition, we are mindful that ISDN30 is a legacy service, and so requests for new access or variants of the current service are less likely than for other wholesale and access services.
- 8.138 We consider that there are certain key principles that a SoR process should meet. Therefore, the new condition requires Openreach to have in place, and follow for each SoR, an SoR process which:
- is documented end-to-end and this documentation is available to CPs;
 - has reasonable timescales for each stage of the process;
 - clearly identifies the criteria by which a SoR will be judged;
 - sets out the information that should be provided in order for an SoR to be accepted; and
 - should be agreed between Openreach and industry.
- 8.139 This is consistent with the requirement for other wholesale and access services.
- 8.140 We are of the view that the SoR process as documented in the previous condition meets these criteria, but that changes to the existing process that better meet the requirements of industry should be made if agreed by industry and Openreach.

Legal tests

- 8.141 Section 87(3) of the Act authorises the setting of SMP services conditions in relation to the provision of network services. We consider that under section 87(5)(a) of the Act, the condition assists in securing fairness and reasonableness in the way in which requests for network access are responded to. The condition provides a framework for agreeing and implementing improvements to the existing system, while imposing regulated “longstop” timeframes to provide certainty to industry.
- 8.142 We have considered our duties under section 3 of the Act. We consider that, in ensuring requests can be made for new network access at the reasonable request of third parties, the condition furthers the interests of citizens and furthers the interests of consumers in relevant markets by the promotion of competition.

- 8.143 We have considered the Community requirements set out in section 4 of the Act and consider that the condition meets the requirements - specifically, section 4(8), as the condition has the purpose of securing efficient and sustainable competition in the markets reviewed.
- 8.144 We consider that the condition meets the criteria set out in section 47(2) of the Act. We are satisfied that the condition:
- is objectively justifiable, as it recognises that a process for handling new requests is needed but that the condition should be flexible to allow for process improvements;
 - does not discriminate unduly, as it only applies to Openreach. We will not impose this obligation on KCOM as the different market conditions in the Hull area mean that there is not the same level of demand for network access;
 - is proportionate, as it continues to provide a SoR process based on the currently implemented process while allowing scope for industry to be involved in agreeing process improvements; and
 - is transparent, as its intention is to ensure that changes to Openreach's SoR process are reflective of industry feedback.
- 8.145 The condition applies to the market for provision of wholesale ISDN30 services in the UK except the Hull area.

Price control

- 8.146 As we have discussed above, we consider that our market analysis shows a relevant risk of adverse effects arising from price distortion and a price control (in a form yet to be determined) is the appropriate long term remedy that will be required to address the competition concern that wholesale charges for ISDN30 appear to be above the competitive level.
- 8.147 We cannot impose the level and form of control until we have undertaken a full cost analysis. We have established a separate project to undertake this analysis and this project is being carried out alongside the reviews of costs and charges for LLU and analogue WLR.
- 8.148 Nevertheless, we consider that in principle such a control on ISDN30 would meet the criteria set out in section 47 of the Act since that it would be objectively justifiable, non-discriminatory, proportionate and transparent. However, we will consult on the specifics of any control later this year when we will specifically consider how the tests in the Act are met. At this time, we consider that, in principle, a price control:
- would be 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;
 - would not discriminate unduly, as BT is the only operator to have SMP in the market;
 - would be 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

- would be transparent, in that the intent of any condition, would be clear.

8.149 Any price control imposed under section 87(9) of the Act would also need to satisfy the tests set out in section 88. We consider that the basis for setting a price control exists based upon the identified market conditions. Specifically, we have identified a relevant risk of adverse effects arising from price distortion, and therefore the gateway to setting a condition under section 88 is present.

8.150 Our further consultation on price controls will assess the appropriateness of any proposed controls against the statutory tests laid down in sections 47 and 88 of the Act.

Interim price ceiling

8.151 We have concluded that, as Openreach has SMP in the market, Openreach is not under any competitive pressure to reduce prices for wholesale ISDN30 services. Therefore, we need to consider further whether price controls are necessary.

8.152 We consider that a condition requiring Openreach to comply with an interim safeguard cap during the period between completion of the market review and conclusion of the price control review provides a degree of certainty to its customers and will constrain Openreach's ability to raise prices in the wholesale market. We consider this meets the criteria set out in section 47(2) of the Act, to be objectively justifiable, non-discriminatory, proportionate and transparent.

8.153 An interim safeguard cap during the period between completion of this market review and the conclusion of the price control review is objectively justifiable based on the evidence available that Openreach's returns appears to be high based on the underlying cost base shown in the RFS, even taking into account the legacy nature of the product and the depreciated asset base. Without full assessment of the underlying cost base it is not be appropriate to attempt to set a cost based control, and this cap is designed simply to ensure that prices do not increase in the interim period before such an assessment is carried out.

8.154 This condition would not unduly discriminate as it only applies to Openreach whom we have assessed as having SMP and being in a position to charge seemingly excessive prices. While we will not extend regulation to KCOM this is consistent with the way we treat KCOM in relation to other remedies imposed in the corresponding market in the Hull area, and it reflects the different market conditions in that no other CP has yet requested KCOM to provide an ISDN30 wholesale product, and KCOM would still be required to provide any such product on reasonable terms.

8.155 The condition is proportionate as it provides a control on the prices that Openreach can charge, but is limited to being a interim remedy and does not seek to reduce prices to a cost based standard when that analysis has not been finalised.

8.156 The condition is transparent as it is clear the intention is to constrain Openreach's ability to increase ISDN30 charges before a full price control review is completed.

Section 88

8.157 We consider that the condition also meets the requirements of section 88 of the Act under which we may not set price controls unless there is a relevant risk of adverse affects arising from price distortions. As we discuss in Section 7 above we have

identified a risk that Openreach can charge seemingly excessive prices in this market. Further, the setting of any price control condition has to be appropriate to:

- promote efficiency,
- promote sustainable competition, and
- confer the greatest possible benefits on end-users.

8.158 We consider that the tests in section 88 have been met in relation to the interim price ceiling. We consider that the setting of a safeguard cap may promote efficiency by ensuring that charges cannot rise. Although the remedy is only intended to be in place for a relatively short period and is unlikely in itself to create long term incentives, we consider that, as the proposed condition ensures that wholesale charges cannot be increased by Openreach, it provides security and certainty to customers, meaning to the extent that a short term ceiling maintains stability in the market it promotes competition and benefits end users. The background to this assessment is that we are undertaking a full cost analysis and consultation on a price control for this market to ensure that appropriate longer term efficiency and competition incentives are provided during the forward look period of this review.

Cost accounting

8.159 We consider that it is appropriate to impose a new cost accounting obligation on Openreach in relation to services supplied in the market for the provision of wholesale ISDN30 in the UK except the Hull area. Given the size of the market in the Hull area and the current lack of demand for a wholesale service there, we do not believe it would be proportionate to impose such an obligation on KCOM.

8.160 The cost accounting requirement supports the new price control requirement (to be set under the price control review) on Openreach by requiring Openreach to demonstrate how charges and costs could be reconciled.

8.161 Under sections 87(9) to 87(11) and 88 of the Act, appropriate cost accounting obligations may be imposed on dominant CPs 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.

8.162 Where Openreach is subject to a cost accounting obligation they are required to comply with obligations governing cost accounting systems and processes as set out in the Financial Reporting Statement.

8.163 We consider that appropriate requirements should be applied to Openreach in the market for provision of wholesale ISDN30 services in the UK excluding the Hull area and therefore proposes to impose those SMP conditions, as set out in the Financial Reporting Statement, to this market, in order to ensure that the regulatory framework for cost accounting is in place.

8.164 Those SMP conditions set the framework under which specific financial reporting obligations are set by direction. Before this Statement the SMP conditions applied to Openreach but only in relation to an obligation requiring accounting separation. This statement confirms the framework should be extended to allow appropriate cost accounting obligations to be imposed on Openreach. However, the direction that sits under the SMP conditions that sets out exactly what obligations apply in any

particular market will still require amendment in order to impose specific reporting obligations. We review, as a matter of course, the mechanics of the financial reporting obligations on an annual basis. Any changes to the relevant direction, including the addition of cost accounting obligations for the ISDN30 market will be made under that review, which will be conducted prior to the end of the financial year 2010/2011.

- 8.165 It would not be appropriate to set specific reporting requirements under this statement as the nature and form of any price control is yet to be considered. Stakeholders, including Openreach, will therefore get two further opportunities to comment on the imposition of specific cost accounting requirements, firstly in the price control consultation and, secondly, in the review of the financial reporting obligations that will need to amend the existing direction to impose any additional obligations on Openreach.

Legal tests

- 8.166 We have considered our duties under section 3 of the Act. In particular, the imposition of a cost accounting obligation 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 leverage of market power – in particular the setting of charges at seemingly excessive levels – can be effectively monitored and enforced.
- 8.167 We have considered the Community requirements set out in section 4 of the Act and believe that the condition meets the requirements. Specifically, section 4(8), where the obligation has the purpose of securing efficient and sustainable competition in the markets for electronic communications networks and services, by ensuring dominant CPs comply with cost orientation and charge control remedies implemented to promote competition.
- 8.168 We consider that the obligation meets the criteria set out in section 47(2) of the Act. We are satisfied that the condition:
- is objectively justifiable, as it relates to the need to ensure competition develops fairly, to the benefit of consumers;
 - does not discriminate unduly, as Openreach is the only CP to hold SMP in the relevant market;
 - is proportionate, as it is necessary as a mechanism to allow third parties sight of regulatory accounts to ensure compliance with a price control remedy; and
 - is transparent, as it is clear the intention is to monitor compliance with specific remedies and the particular cost accounting requirements of Openreach will be clearly documented in a separate direction.
- 8.169 The cost accounting obligation would apply to the market for the provision of wholesale ISDN30 services in the UK except the Hull area.

Annex 1

Respondents to the May 2010 consultation

List of respondents (alphabetical order)

- BT;
- Cable & Wireless Worldwide;
- Communications Management Association;
- European Commission;
- Federation of Communications Services;
- KCOM;
- Openreach;
- UKCTA; and
- One confidential response

Annex 2

Legal Instrument (Notification with 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 28 November 2003, the Director General of Telecommunications ('the Director') published a document entitled *Review of the fixed narrowband line, call origination, conveyance and transit markets*³² ('the 2003 Wholesale Statement').
2. On 28 November 2003, the Director published a document entitled *Fixed Narrowband Retail Services Markets*³³ ('the 2003 Retail Statement').
3. In the 2003 Wholesale Statement and the 2003 Retail Statement, the Director set out his decisions on market definitions, market analyses and the setting, where appropriate, of Significant Market Power ('SMP') conditions for the markets under review including the markets for wholesale ISDN30 exchange line services (wholesale market) and Business ISDN30 exchange line services (retail market).
4. On 29 December 2003, Ofcom took over the functions and responsibilities under the Communications Act 2003 ('the Act') relating to the EC Communications Directives from the Director.
5. On 22 July 2004, Ofcom published its statement entitled *The regulatory financial reporting obligations on BT and Kingston Communications, Final Statement and notification: Accounting separation and cost accounting*³⁴ ('the financial reporting statement') which imposed SMP conditions on BT and KCOM in relation to financial reporting obligations in, amongst others, the wholesale ISDN30 markets.
6. On 19 March 2009, Ofcom published its consultation entitled a *Review of the fixed narrowband services wholesale markets : Consultation on the proposed markets, market power determinations and remedies*³⁵ ('the 2009 Wholesale Consultation') on proposals reviewing market definitions, market analyses, and where appropriate, the setting of SMP conditions. The 2009 Wholesale Consultation proposed markets for wholesale ISDN30 exchange line services for the UK excluding the Hull Area and the Hull Area, that BT and

³² *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*, 28 Nov 2003 (http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/nwe/)

³³ *Fixed Narrowband Retail Services Markets explanatory statement and notification*, 28 Nov 2003 (http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/fixednarrowbandrsm.pdf)

³⁵ *Review of the fixed narrowband services wholesale markets*, 19 March 2009 (http://www.ofcom.org.uk/consult/condocs/review_wholesale/)

KCOM had SMP in those respective markets, and that appropriate SMP conditions should be imposed on those providers.

7. On 19 March 2009, Ofcom also published its consultation entitled a *Fixed Narrowband Retail Services Markets* ('the 2009 Retail Consultation') on proposals reviewing market definitions, market analyses, and where appropriate, the setting of SMP conditions. The 2009 Retail Consultation proposed markets for ISDN30 access line services for the UK excluding the Hull Area and the Hull Area, that BT and KCOM had SMP in those respective markets, and that appropriate SMP conditions should be imposed on KCOM only.

8. On 15 September 2009, Ofcom published a statement and further consultation entitled *Review of the fixed narrowband services wholesale markets: Statement on the markets, market power determinations and remedies including further consultation*³⁶ ('the 2009 Wholesale Statement').

9. On 15 September 2009, Ofcom published a statement entitled *Fixed Narrowband Retail Services Markets*³⁷ ('the 2009 Retail Statement').

10. Having given careful consideration to every representation about the proposals made in relation to ISDN30 markets in relation to the 2009 Wholesale Consultation and 2009 Retail Consultation, Ofcom considered it appropriate to review its proposals in relation to those markets and confirmed in both the 2009 Wholesale Statement and 2009 Retail Statement that no decisions would be taken in relation to those proposed markets and a further review would be conducted.

11. On 4 May 2010, Ofcom published a consultation entitled *Review of retail and wholesale ISDN30 markets*³⁸ ('the May 2010 consultation'), consulting on proposals made in relation to ISDN30 markets identified at the retail and wholesale levels.

12. On 15 June 2010 the consultation period for the May 2010 consultation closed. Ofcom received eight responses to the consultation from communications providers and comments from the European Commission. Ofcom has carefully considered all responses received.

Decisions

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

Decisions relating to market definition and market power analysis

14. Ofcom identifies the following markets for the purpose of making market power determinations:

- (a) for the United Kingdom, except the Hull Area:
 - (i) wholesale ISDN30 exchange line services; and
 - (ii) retail ISDN30 exchange line services.

³⁶ *Review of the fixed narrowband services wholesale markets*, 15 September 2009 (http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/main.pdf)

³⁷ *Fixed Narrowband Retail Services Markets*, 15 September 2009 (http://www.ofcom.org.uk/consult/condocs/retail_markets/statement/statement.pdf)

³⁸ *Review of retail and wholesale ISDN30 markets* (<http://stakeholders.ofcom.org.uk/binaries/consultations/isdn30/summary/isbn30.pdf>)

(b) for the Hull Area:

- (i) wholesale ISDN30 exchange line services; and
- (ii) retail ISDN30 exchange line services.

15. Ofcom makes market power determinations that the following persons have significant market power:

- (a) in relation to the market set out in paragraph 14(a)(i) above, BT;
- (b) in relation to the markets set out in paragraph 14(b)(i) and (ii) above, KCOM.

16. Ofcom finds that the market set out at paragraph 14(a)(ii) above is effectively competitive and, therefore, is not proposing to determine any person as a person having significant market power in that market.

Decisions to set SMP service conditions

17. Ofcom sets SMP conditions on the person referred to in paragraph 15(a) above:

- (a) SMP conditions as set out in Schedule 1 to this Notification; and
- (b) SMP conditions OA1 – OA28 (excluding (a) to (c) and (f) of condition OA23) and OA32 to OA33, as set out in Schedule 2 to Annex 2 of the financial reporting statement.

18. Ofcom sets SMP conditions on the person referred to in paragraph 15(b) above:

- (a) SMP conditions as set out in Schedule 2 to this Notification; and
- (b) SMP conditions OB1 – OB27 (excluding (a) to (c) and (f) of condition OB23) and OB31 to OB32, as set out in Schedule 2 to Annex 3 of the financial reporting statement.

19. The effect of, and Ofcom's reasons for making, the decisions identifying the markets set out in paragraph 14 above and to make the market power determinations set out in paragraphs 15 and 16 above are contained in Sections 3 to 6 of the document accompanying this Notification.

20. The effect of, and the Ofcom's reasons for making, the decisions 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 7 to 8 of the document accompanying this Notification.

Decisions to revoke SMP service conditions

21. The conditions (as modified)³⁹ set out at Annex A of the 2003 Wholesale Statement applied to the market for wholesale ISDN30 exchange line services shall be revoked with immediate effect.

22. The conditions (as modified)⁷² set out at Annex D of the 2003 Retail Statement applied to the market for Business ISDN30 exchange line services shall be revoked with immediate effect.

³⁹ The SMP conditions set in the 2003 Wholesale Statement and the 2003 Retail Statement (see footnotes 1 and 2 above), have been amended from time to time. The revocation of the substantive conditions includes any amendment that has subsequently been made to those conditions.

23. The effect of, and the Ofcom's reasons for revoking the SMP conditions set out in paragraphs 21 and 22 above are contained in Sections 4, 7 and 8 of the document accompanying this Notification.

Ofcom's duties and legal tests

24. In identifying and analysing the markets referred to in paragraph 14 above, and in considering whether to make the decisions set out in this Notification, 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.

25. Ofcom considers that the SMP conditions referred to in paragraphs 17 and 18 above comply with the requirements of sections 45 to 47, 87, 88 90 and 91 of the Act, as appropriate and relevant to each such SMP condition and further that the revocations of the SMP conditions referred to in paragraphs 21 and 22 above comply with the requirements of sections 45 to 47, 87 and 88 of the Act as appropriate and relevant to them.

26. In making all of the decisions referred to in paragraphs 13 to 22 of this Notification, Ofcom has considered and acted in accordance with section 3 of the Act and the six Community requirements in section 4 of the Act.

27. Copies of this Notification and the accompanying document have been sent to the Secretary of State for Business, Innovation and Skills in accordance with sections 50(1)(a) and 81(1) of the Act, as well as 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

28. Save as to referring to markets identified in paragraph 14 of this Notification and except as otherwise defined in paragraph 29 of this Notification, words or expressions used shall have the same meaning as they have been ascribed in the Act.

29. In this Notification:

(a) "**Act**" means the Communications Act 2003 (c.21)

(b) "**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;

(c) "**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.

(d) "**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.

30. The Schedules to this Notification shall form part of this Notification.

31. Unless otherwise stated in the Schedules, the decisions set out in this Notification shall take effect on the publication of this Notification.

M. Gibbs

MARINA GIBBS

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

20 AUGUST 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 market set out in paragraph 14(a)(i) of the Notification in which it has been decided that BT has significant market power 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 the market set out in paragraph 14(a)(i) of this 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 AAA(IS)6(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) “**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;

(e) “**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;

(f) “**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);

(g) “**ISDN**” means the integrated services digital network which is an Electronic Communications Network that provides for digital end-to-end connectivity to support a wide range of Public Electronic Communications Services, including voice and non-voice services, to which End-users have access by a limited set of standard multipurpose customer interfaces;

(h) “**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:

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

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

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

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

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

(c) 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);

(i) “**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;

(j) “**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;

(k) “**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;

(l) “**Ofcom**” means the Office of Communications

(m) “**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;

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

(o) “**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;

(p) “**Services Market**” means each of the markets sets out in paragraph 14(a)(i) of the Notification;

(q) “**Third Party**” means either:

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

(r) “**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;

(s) “**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;

(t) “**Wholesale ISDN30 Line Rental**” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an ISDN30 Exchange Line;

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

- (i) Wholesale Analogue Line Rental;
- (ii) Wholesale ISDN2 Line Rental; and
- (iii) Wholesale ISDN30 Line Rental;

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 AAA(IS)1(a) - Requirement to provide Network Access on reasonable request

AAA(IS)1(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.

AAA(IS)1(a).2 The provision of Network Access in accordance with paragraph AAA(IS)1(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.

AAA(IS)1(a).3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA(IS)1(a).

Condition AAA(IS)1(b) - Requests for new Network Access

AAA(IS)1(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.

AAA(IS)1(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
- (e) any changes to the guidelines be agreed between BT and industry.

AAA(IS)1(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.

AAA(IS)1(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 AAA(IS)1(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.

AAA(IS)1(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 AAA(IS)1(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 AAA(IS)2 - Requirement not to unduly discriminate

AAA(IS)2.1 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.

AAA(IS)2.2 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 AAA(IS)4 – Charge Control

AAA(IS)4.1 The Dominant Provider shall not charge more than:

- (a) for the annual rental for Wholesale ISDN30 Line Rental, £141.00 per channel (the charge for which shall be pro rated and levied on no less than a quarterly basis);
- (b) for New Line Installation (Wholesale ISDN30), £550.00; and
- (c) for Existing Line Transfer (Connection Charge per 30 Channel Access Bearer Per Bearer), £75.00;

Condition AAA(IS)5 - Requirement to publish a Reference Offer

AAA(IS)5.1 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.

AAA(IS)5.2 Subject to paragraph AAA(IS)5.8 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 the services specified in paragraph AAA(IS) 4.1 the Transfer Charge for each service

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

AAA(IS)5.3 In relation to those products and services subject to Condition AAA(IS)4, 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 AAA(IS)5.2(a) to (q) above.

AAA(IS)5.4 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 AAA(IS)5 enters into force.

AAA(IS)5.5 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.

AAA(IS)5.6 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).

AAA(IS)5.7 The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

AAA(IS)5.8 The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart there from either directly or indirectly.

AAA(IS)5.9 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA(IS)5.

Condition AAA(IS)6(a) - Requirement to notify charges

AAA(IS)6(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.

AAA(IS)6(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 AAA(IS)1(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") not less than 28 days before any such amendment comes into effect.

AAA(IS)6(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) the current and proposed new charge; and
- (e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies.

AAA(IS)6(a).4 The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

AAA(IS)6(a).5 In relation to those products and services subject to Condition AAA(IS)4, 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 AAA(IS)6(a).3(a) to (e).

Condition AAA(IS)6(b) - Requirement to notify technical information

AAA(IS)6(b).1 Save where Ofcom consents otherwise, where the Dominant Provider:

- (a) proposes to provide Network Access covered by Condition AAA(IS)1(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 AAA(IS)1(a) by modifying the terms and conditions listed in paragraph AAA(IS)6(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 Ofcom or are required by a notification or an enforcement notification given by Ofcom under sections 94 or 95 of the Act.

AAA(IS)6(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”).

AAA(IS)6(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.

AAA(IS)6(b).4 Publication referred to in paragraph AAA(IS)6(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 AAA(IS)1(a). The provision of such a copy of Notice may be subject to a reasonable charge.

Condition AAA(IS)7

Transparency as to quality of service

AAA(IS)7.1 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.

AAA(IS)7.2 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA(IS)7

Condition AAA(IS)10 - Requirement to provide ISDN30 Wholesale Line Rental.

AAA(IS)10.1 Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall provide 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 ISDN30 exchange line services.

AAA(IS)10.3 The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAA(IS)10.

AAA(IS)10.4 This Condition AAA(IS)10 is without prejudice to the generality of the provisions in Conditions AAA(IS)1(a) to AAA(IS)7 above.

SCHEDULE 2

The SMP services conditions imposed on KCOM under sections 45, 87, 88, 90 and 91 of the Communications Act 2003 as a result of the analyses of the markets set out in paragraph 14(b) of the Notification in which it has been decided that KCOM has significant market power

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

Wholesale level SMP Conditions

1. The SMP conditions in Part 2 of this Schedule 2 shall, except insofar as it is otherwise stated therein, apply to the market set out in paragraph 14(b)(i) of this Notification.

Retail level SMP Conditions

2. The SMP conditions in Part 3 of this Schedule 2 shall, except insofar as it is otherwise stated therein, apply to the market set out in paragraph 14(b)(ii) of this Notification.

Definitions

3. 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 AAB(IS)6(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) “**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;

(e) “**ISDN**” means the integrated services digital network which is an Electronic Communications Network evolved from the telephony integrated digital network that provides for digital end-to-end connectivity to support a wide range of Public Electronic Communications Services, including voice and non-voice services, to which End-users have access by a limited set of standard multipurpose customer interfaces;

(f) “**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 purposes of these Conditions.

(g) “**Ofcom**” means the Office of Communications

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

(i) “**Services Market**” means each of the markets sets out in paragraph 12(a) of the Notification;

(j) “**Third Party**” means either:

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

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

(k) “**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;

4. 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 paragraphs 2 and 3 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 (Wholesale level)

Condition AAB(IS)1 - Requirement to provide Network Access on reasonable request

AAB(IS)1.1 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.

AAB(IS)1.2 The provision of Network Access in accordance with paragraph AAB(IS)1.1 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.

AAB(IS)1.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAB(IS)1.

Condition AAB(IS)2 - Requirement not to unduly discriminate

AAB(IS)2.1 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.

AAB(IS)2.2 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 AAB(IS)4 - Requirement to publish a Reference Offer

AAB(IS)4.1 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.

AAB(IS)4.2 Subject to paragraph AAB(IS)4.8 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) the Transfer Charge for each service

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

AAB(IS) 4.3 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 AAB(IS)4.2(a) to (q) above.

AAB(IS)4.4 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 AAB(IS)4 enters into force.

AAB(IS)4.5 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.

AAB(IS)4.6 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).

AAB(IS)4.7 The Dominant Provider shall make such modifications to the Reference Offer as Ofcom may direct from time to time.

AAB(IS)4.8 The Dominant Provider shall provide Network Access at the charges, terms and conditions in the relevant Reference Offer and shall not depart there from either directly or indirectly.

AAB(IS)4.9 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAB(IS)4.

Condition AAB(IS)5(a) - Requirement to notify charges

AAB(IS)5(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.

AAB(IS)5(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 AAB(IS)1 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") not less than 28 days before any such amendment comes into effect.

AAB(IS)5(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) the current and proposed new charge; and
- (e) the information specified in sub-paragraph (d) above with respect to that Network Access to which that paragraph applies.

AAB(IS)5(a).4 The Dominant Provider shall not apply any new charge identified in an Access Charge Change Notice before the effective date.

Condition AAB(IS)5(b) - Requirement to notify technical information

AAB(IS)5(b).1 Save where Ofcom consents otherwise, where the Dominant Provider:

(a) proposes to provide Network Access covered by Condition AAB(IS)1, 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 AAB(IS)1 by modifying the terms and conditions listed in paragraph AAB(IS)5(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 charges or 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.

AAB(IS)5(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").

AAB(IS)5(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.

AAB(IS)5(b).4 Publication referred to in paragraph AAB(IS)5(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 AAB(IS)1. The provision of such a copy of Notice may be subject to a reasonable charge.

Part 3 : The SMP conditions (Retail level)

Condition DA(IS)1 – Requirement not to unduly discriminate

DA(IS)1.1 The Dominant Provider shall not unduly discriminate against particular persons or a particular description of persons in relation to services offered.

DA(IS)1.2 Nothing done in any manner by the Dominant Provider shall be regarded as undue discrimination under this Condition if and to the extent that the Dominant Provider is required or expressly permitted to do such thing in that manner by or under any condition set under section 45 of the Act which applies to the Dominant Provider.

Condition DA(IS)2 – Requirement to publish charges

DA(IS)2.1 Except in so far as Ofcom may otherwise consent in writing, the Dominant Provider shall publish charges, terms and conditions and act in the manner set out below.

DA(IS)2.2 The Dominant Provider shall publish charges, terms and conditions, including bundled charges, terms and conditions (whether or not those bundles include charges, terms and conditions for services supplied in markets to which this Condition does not apply).

DA(IS)2.3 The Dominant Provider shall publish any amendments to the charges, terms and conditions published under paragraph DA(IS)2.2, including charges, terms and conditions for any new services, within 24 hours of the time that the amendment comes into effect.

DA(IS)2.4 Publication referred to in paragraphs DA(IS)2.2 and DA(IS)2.3 shall be effected by placing a copy of the information on any relevant website operated or controlled by the Dominant Provider.

DA(IS)2.5 The Dominant Provider shall send to Ofcom a written notice of any amendment to the charges, terms and conditions published under paragraph DA(IS)2.2 (including charges, terms and conditions for any new services) within 24 hours of the time that the amendment comes into effect and shall send a copy of the notice to any person who may reasonably request such a copy.

DA(IS)2.6 Where it would be impractical for the Dominant Provider to publish under paragraphs DA(IS)2.2, DA(IS)2.3 or DA(IS)2.5 any charge or amended charge, the Dominant Provider shall instead publish the method to be adopted for determining that charge or amended charge.

DA(IS)2.7 The Dominant Provider shall provide services at the charges, terms and conditions published under this Condition, and shall not depart there from either directly or indirectly.

Annex 3

Legal Instrument (Direction)

Direction made under section 49 of the Communications Act 2003 and Condition AAA(IS)7 as a result of the analysis of the wholesale ISDN30 exchange line services market in the United Kingdom, excluding the Hull Area) in the *Review of the retail and wholesale ISDN30 markets* dated 20 August 2010

Background

1. On 15 September 2009, Ofcom concluded its *Review of the fixed narrowband services wholesale markets* in which it identified markets, made market power determinations and set appropriate SMP conditions as set out in the Notification at Annex 7 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, amongst others, the following markets in the United Kingdom, excluding the Hull Area:
 - i. wholesale analogue exchange line services; and
 - ii. wholesale ISDN2 exchange line services.
3. At Annex 8 to the review referred to in paragraph 1 above, Ofcom made a direction under section 49 of the Communications Act 2003 and SMP Condition AAA7 requiring BT to publish and provide specified information relating to wholesale line rental key performance indicators ('KPIs') in respect of the markets referred to in paragraph 2(i) and (ii), above.
4. BT (through Openreach) further undertook to voluntarily produce the same information in relation to their ISDN30 product.
5. On 20 August 2010, Ofcom concluded its *Review of the retail and wholesale ISDN30 markets* in which it identified markets, made market power determinations and set appropriate SMP conditions as set out in the Notification at Annex 2 to the review, and explained in the accompanying explanatory statement.
6. Ofcom determined in the review referred to in paragraph 5, above, that BT, as a Dominant Provider, has significant market power in the markets in wholesale ISDN30 exchange line services market the United Kingdom, excluding the Hull Area.
7. SMP service Condition AAA(IS)7 (Transparency as to quality of service) was set in relation to, amongst others, the market referred to in paragraph 6.
8. This direction concerns matter to which Condition AAA(IS)7 relates by imposing the same reporting requirements on the ISDN30 market as were imposed, by the direction referred to in paragraph 3 above, on the wholesale analogue and ISDN2 exchange line services markets.
9. For the reasons set out in Section 8 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.
10. For the reasons set out in Section 8 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.
11. 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

12. Ofcom hereby, pursuant to section 49 of the Act and Condition AAA(IS)7, directs the Dominant Provider to act as prescribed in paragraphs 13 to 18 below:
13. 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 ISDN30 Line Rental, as required in paragraph 16 below.
14. 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 ISDN30 Line Rental, as required in paragraph 16 below.
15. 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 ISDN30 Line Rental, as required in paragraph 16 below.
16. The information required by paragraphs 13, 14 and 15 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.
17. Annex A to this Direction forms part of the Direction.
18. Nothing in this Direction shall require the Dominant Provider to publish confidential information relating to its business or that of a Third Party.
19. 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 British Telecommunications plc subsidiary or holding company, or any subsidiary of that holding company, 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 ISDN30 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 license granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

“Installed Base” means the average number of Wholesale ISDN30 Line Rental lines that are in use during the Reporting Period;

“ISDN” means the integrated services digital network which is an Electronic Communications Network evolved from the telephony integrated digital network that provides for digital end-to-end connectivity to support a wide range of Public Electronic Communications Services, including voice and non-voice service to which End Users have access by a limited set of standard multi-purpose customer interfaces;

“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 ISDN30 Line Rental product/Exchange Line Service is not being provided by the Dominant Provider to the Third Party at the time of order;

“Order” means a request for ISDN30 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 Providers required to publish or provide to Ofcom as required the Wholesale ISDN30 Line Rental KPIs;

“Restored Service” means the point at which the Wholesale ISDN30 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 ISDN30 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 ISDN30 Line Rental” means an Electronic Communications Service provided by the Dominant Provider to a Third Party for the use and Ordinary Maintenance of an ISDN30 Exchange Line;

“WLR line rental package” includes a package containing a line rental charge and any included levels of service sold as part of a single marketed product.

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

20. 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.
21. 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.
22. This Direction shall take effect on the day it is published.

M. Gibbs

MARINA GIBBS

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

20 AUGUST 2010

Annex A

Wholesale ISDN30 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 ISDN30 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 ISDN30 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 ISDN30 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, 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 ISDN30 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;

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 ISDN30 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.