

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Business Connectivity Market Review – Further Consultation

To (Ofcom contact): Andreas Iliopoulos

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing Name/contact details/job title

Whole response Organisation

Part of the response If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation questions

Question 1: Do you have any comments on our proposal to include the Slough sectors in the WECLA?

Question 2: Do you have any comments about the proposed amendments to the Proposed SLG Direction?

Question 3: Do you have any comments about our proposal that BT should be subject to cost accounting obligations and not required to publish DLRIC & DSAC figures?

Question 4: Do you have any comments about the proposed TAN definition or the proposed circuit routing rules?

Question 5: Do you have further evidence on competition in the MISBO market outside the WECLA, including the use and impact of dark fibre?

Annex 5

Draft Legal Instrument

NOTIFICATION OF PROPOSALS UNDER SECTIONS 48A AND 49A OF THE COMMUNICATIONS ACT 2003

Proposals for the setting of SMP services conditions, and of a direction, in relation to BT and for the setting of SMP services conditions in relation to KCOM, under sections 45 and 49 of the Communications Act 2003

Background

1. On 18 June 2012, Ofcom published the June BCMR Consultation in which it set out its proposals to identify markets, make market power determinations and set SMP services conditions in relation to BT and KCOM under section 45 of the Act.
2. In relation to BT, Ofcom proposed that BT has SMP in the following markets:
 - a) Wholesale market for low bandwidth traditional interface symmetric broadband origination in the UK excluding the Hull Area, at bandwidths up to and including 8Mbit/s;
 - b) Wholesale market for medium bandwidth traditional interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA, at bandwidths above 8Mbit/s and up to and including 45Mbit/s;
 - c) Wholesale market for high bandwidth traditional interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA, at bandwidths above 45Mbit/s and up to and including 155Mbit/s;
 - d) Wholesale market for low bandwidth alternative interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA, at bandwidths up to and including 1Gbit/s;
 - e) Wholesale market for low bandwidth alternative interface symmetric broadband origination in the WECLA, at bandwidths up to and including 1Gbit/s;
 - f) Wholesale market for multiple interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA;
 - g) Wholesale market for regional trunk segments in the UK; and
 - h) Retail market for low bandwidth traditional interface leased lines in the UK excluding the Hull Area, at bandwidths up to and including 8Mbit/s.
3. In relation to KCOM, Ofcom proposed that KCOM has SMP in the following markets:
 - a) Wholesale market for low bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths up to and including 8Mbit/s;

- b) Wholesale market for medium bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths above 8bit/s and up to and including 45Mbit/s;
 - c) Wholesale market for high bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths above 45bit/s and up to and including 155Mbit/s;
 - d) Wholesale market for very high bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths of 622Mbit/s;
 - e) Wholesale market for low bandwidth alternative interface symmetric broadband origination in the Hull Area, at bandwidths up to and including 1Gbit/s;
 - f) Retail market for low bandwidth traditional interface leased lines in the Hull Area, at bandwidths up to and including 8Mbit/s; and
 - g) Retail market for low bandwidth alternative interface symmetric broadband origination in the Hull Area, at bandwidths up to and including 1Gbit/s.
4. As a result of the proposed market power determinations in the markets listed above at paragraph 2, Ofcom proposed to set a number of SMP services conditions and directions on BT in each of those markets.
5. In particular, in the markets listed above at d) and e) of paragraph 2, the SMP services conditions and directions proposed by Ofcom included the following:
- a) Proposed SMP services condition 2; and
 - b) The SLG Direction.
6. As a result of the proposed market power determinations in the markets listed above at paragraph 3, Ofcom proposed to set a number of SMP services conditions on KCOM in each of those markets.
7. The period within which representations could be made to Ofcom about its proposals in the June BCMR Consultation ended on 24 August 2012. Ofcom received representations from several respondents to the proposals set out in the June BCMR Consultation. In light of Ofcom's consideration of those representations, Ofcom sets out its further proposals in this Notification.

Summary of additional proposals in this Notification

8. Ofcom proposes to set SMP services conditions in relation to regulatory financial reporting in the markets listed above at paragraphs 2 and 3, to be applied to BT and KCOM respectively.
9. Ofcom proposes in relation to BT only:
- a) proposed change to Proposed SMP services condition 2;
 - b) proposed change to the SLG Direction;
 - c) proposed changes to two defined terms used for the purposes of the proposed SMP services conditions, as set out in the June SMP Notification; and

- d) proposed change to the proposed geographic market which Ofcom defined as the WECLA, as set out in the June SMP Notification.

Proposal to set SMP services conditions in relation to regulatory financial reporting in the markets listed above at paragraphs 2 and 3

10. In relation to BT:

- a) In the markets listed a) to g) above at paragraph 2, Ofcom is proposing to set SMP services conditions OA1 to OA28, OA32 and OA33, as set out in the BT Notification 2004; and
- b) In the market listed h) above at paragraph 2, Ofcom is proposing to set SMP services conditions OA1 to OA25, OA29 to OA31 and OA34, excluding subparagraphs (b), (d) and (e) of OA23, as set out in the BT Notification 2004.

11. Also in relation to BT:

- a) At paragraph 4.(a)(i) of the BT Notification 2004, Ofcom is proposing to remove “and 17a”;
- b) In Part 1 of Schedule 1 of the BT Notification 2004, Ofcom is proposing to make the following changes:
 - o Removing the reference at paragraph 14 to “Provision of traditional interface symmetric broadband origination with a bandwidth capacity up to and including eight megabits per second within the United Kingdom but not including the Hull Area” to be replaced with “Wholesale market for low bandwidth traditional interface symmetric broadband origination in the UK excluding the Hull Area, at bandwidths up to and including 8Mbit/s”;
 - o Removing the reference at paragraph 15 to “Provision of traditional interface symmetric broadband origination with a bandwidth capacity above eight megabits per second and up to and including forty five megabits per second within the UK but not including the Hull Area and the Central East London Area” to be replaced with “Wholesale market for medium bandwidth traditional interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA (as defined in OFCOM’s notification published on [*date of publication of final statement*]), at bandwidths above 8Mbit/s and up to and including 45Mbit/s”;
 - o After paragraph 15, inserting the following paragraph 15a “Wholesale market for high bandwidth traditional interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA (as defined in OFCOM’s notification published on [*date of publication of final statement*]), at bandwidths above 45Mbit/s and up to and including 155Mbit/s”;
 - o Removing the reference at paragraph 16 to “Provision of alternative interface symmetric broadband origination with a bandwidth capacity up to and including one gigabit per second in the United Kingdom but not including the Hull Area” to be replaced with “Wholesale market for low bandwidth alternative interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA (as defined in OFCOM’s notification published on [*date of publication of final statement*]), at bandwidths up to and including 1Gbit/s”;

- After paragraph 16, inserting the following paragraph 16a “Wholesale market for low bandwidth alternative interface symmetric broadband origination in the WECLA (as defined in OFCOM’s notification published on [*date of publication of final statement*]), at bandwidths up to and including 1Gbit/s”;
 - After paragraph 16a, inserting the following paragraph 16b “Wholesale market for multiple interface symmetric broadband origination in the UK excluding the Hull Area and the WECLA (as defined in OFCOM’s notification published on [*date of publication of final statement*])”;
 - Removing reference at paragraph 17 to “Provision of wholesale trunk segments at all bandwidths within the UK” to be replaced with “Wholesale market for regional trunk segments in the UK”;
 - Deleting paragraph 17a.;
 - Updating the dates set out in paragraphs 14 to 17 by replacing the current dates with the date of the final statement.
- c) In Part 2 of Schedule 1 of the BT Notification 2004, Ofcom is proposing to make the following changes:
- Removing reference at paragraph 25 to “Provision of traditional interface retail leased lines up to and including a bandwidth capacity of eight megabits per second within the UK but not including the Hull Area” to be replaced with “Retail market for low bandwidth traditional interface leased lines in the UK excluding the Hull Area, at bandwidths up to and including 8Mbit/s”; and
 - Updating the date set out in paragraph 25 by replacing the current date with the date of the final statement.

12. In relation to KCOM:

- a) In the markets listed a) to e) above at paragraph 3, Ofcom is proposing to set SMP services conditions OB1 to OB27 and OB31 to OB33, excluding subparagraphs (a) to (c) and (f) of OB23, as set out in the KCOM Notification 2004.

13. Also in relation to KCOM:

- a) At paragraph 4.(a) of the KCOM Notification 2004, Ofcom is proposing to remove subparagraph (ii);
- b) At paragraph 4.(a)(iii) of the KCOM Notification 2004, after “numbered 5 and 8”, Ofcom is proposing to add “and 9 to 12”;
- c) In Part 1 of Schedule 1 of the KCOM Notification 2004, Ofcom is proposing to make the following changes:
- Removing reference at paragraph 9 to “Provision of traditional interface symmetric broadband origination with a bandwidth capacity up to and including eight megabits per second within the Hull Area” to be replaced with “Wholesale market for low bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths up to and including 8Mbit/s”;

- Removing reference at paragraph 10 to “Provision of traditional interface symmetric broadband origination with a bandwidth capacity above eight megabits per second and up to and including forty five megabits per second within the Hull Area” to be replaced with “Wholesale market for medium bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths above 8Mbit/s and up to and including 45Mbit/s”;
 - Removing reference at paragraph 11 to “Provision of traditional interface symmetric broadband origination with a bandwidth capacity above forty five megabits per second and up to and including one hundred and fifty five megabits per second within the Hull Area” to be replaced with “Wholesale market for high bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths above 45Mbit/s and up to and including 155Mbit/s”;
 - After paragraph 11, inserting the following paragraph 11a “Wholesale market for very high bandwidth traditional interface symmetric broadband origination in the Hull Area, at bandwidths of 622Mbit/s”;
 - Removing reference at paragraph 12 to “Provision of alternative interface symmetric broadband origination with a bandwidth capacity of up to and including one gigabit per second within the Hull Area” to be replaced with “Wholesale market for low bandwidth alternative interface symmetric broadband origination in the Hull Area, at bandwidths up to and including 1Gbit/s”; and
 - Updating the dates set out in paragraphs 9 to 12 by replacing the current dates with the date of the final statement.
- d) In Part 2 of Schedule 1 of the KCOM Notification 2004, Ofcom is no longer proposing to make any changes. Consequently the June SMP Notification should be read accordingly.
14. The effect of, and the reasons for making, the proposals set out above at paragraphs 10 to 13 are set out in the consultation document accompanying this Notification.

Proposed change to Proposed SMP services condition 2

15. Ofcom is proposing to change the wording of Proposed SMP services condition 2, and consequently the June SMP Notification should be read accordingly. The change is set out in Schedule 1.
16. The effect of, and the reasons for making, the proposal set out above at paragraph 15 are set out in the consultation document accompanying this Notification.

Proposed change to the SLG Direction

17. Ofcom is proposing to add wording to the SLG Direction, and consequently the June SMP Notification should be read accordingly. The change is set out in Schedule 2 and the proposed added wording is underlined.
18. The effect of, and the reasons for making, the proposal set out above at paragraph 17 are set out in the consultation document accompanying this Notification.

Proposed changes to two defined terms used for the purposes of the proposed SMP services conditions, as set out in the June SMP Notification

19. For the reasons set out in the consultation document accompanying this Notification, Ofcom is proposing to change the wording of the definition of “Backhaul Segment”. Consequently the June SMP Notification should be read accordingly. The change is set out at Schedule 3.
20. For the reasons set out in the consultation document accompanying this Notification, Ofcom is proposing to change the wording of the definition of “Trunk Aggregation Node”. Consequently the June SMP Notification should be read accordingly. The change is set out at Schedule 4.

Proposed change to the proposed geographic market which Ofcom defined as the WECLA, as set out in the June SMP Notification

21. For the reasons set out in the consultation document accompanying this Notification, Ofcom is proposing that the list of postcode sectors making up the WECLA should include certain additional postcode sectors. Consequently the June SMP Notification should be read accordingly. The proposed full list of postcode sectors is set out in Schedule 5.

Ofcom’s duties and legal tests

22. In accordance with section 79 of the Act, Ofcom has taken due account of all applicable guidelines and recommendations which have been issued or made by the European Commission in pursuance of an EU instrument and which relate to market identification and analysis or the determination of what constitutes market power.
23. In making all of the proposals referred to in this Notification, Ofcom has considered and acted in accordance with its general duties set out in section 3, and the six Community requirements set out in section 4, of the Act.

Representations

24. Representations may be made to Ofcom about the proposals set out in this Notification and the accompanying consultation document no later than 5pm on 17 December 2012.
25. Copies of this Notification and the accompanying consultation document have been sent to the Secretary of State, in accordance with sections 48C(1) and 49C(1) of the Act.

Interpretation

26. Schedules 1 to 5 form part of this Notification.
27. For the purposes of interpreting this Notification:
 - a) Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them below in paragraph 28 or the meaning assigned to them in Part 2 of Schedule 2 of the June SMP Notification, and otherwise any word or expression shall have the same meaning as it has in the Act; and
 - b) Headings and titles shall be disregarded.

28. In this Notification:

- a) “**Act**” means the Communications Act 2003;
- b) “**BT**” 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 in section 1159 of the Companies Act 2006;
- c) “**BT Notification 2004**” means the notification to BT under sections 48(1) and 86(1) of the Act setting further SMP services conditions on BT in relation to regulatory accounting in respect of various markets, as set out in Annex 2 to the Financial Reporting Statement and Notification 2004, as amended;
- d) “**Financial Reporting Statement and Notification 2004**” means the document entitled “The regulatory financial reporting obligations on BT and Kingston Communications, Final statement and notification, Accounting separation and notification: Final statement and notification”, published by Ofcom on 22 July 2004;
- e) “**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 KCOM;
- f) “**June BCMR Consultation**” means the consultation document entitled “Business Connectivity Market Review, Review of the retail leased lines, wholesale symmetric broadband and wholesale trunk segments”, published by Ofcom on 18 June 2012;
- g) “**June Direction Notification**” means the notification under sections 49 and 49A of the Act in which Ofcom proposed to make directions for the purposes of Proposed SMP services condition 1 as a result of the analysis of the proposed markets set out at paragraphs 1 and 2 of the notification, as set out in Annex 15 to the June BCMR Consultation;
- h) “**June SMP Notification**” means notification under sections 48A and 80A of the Act setting out Ofcom’s proposals for identifying markets, making market power determinations and setting SMP services conditions in relation to BT and to KCOM under section 45 of the Act, as set out in Annex 14 to the June BCMR Consultation;
- i) “**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 in section 1159 of the Companies Act 2006;
- j) “**KCOM Notification 2004**” means the notification to KCOM under sections 48(1) and 86(1) of the Act setting further SMP services conditions on Kingston in relation to regulatory accounting in respect of various markets, as set out in Annex 3 to the Financial Reporting Statement and Notification 2004, as amended;
- k) “**Kingston**” means KCOM;
- l) “**Ofcom**” means the Office of Communications;

Schedule 2

Pursuant to SMP services condition 1, Ofcom makes the following direction:

The Dominant Provider shall provide Ethernet Services and shall do so in accordance with this direction.

Service level guarantees (SLGs)

1. The Dominant Provider shall ensure the terms and conditions which govern the supply of Ethernet Services in the wholesale markets of the provision of low bandwidth alternative interface symmetric broadband origination at bandwidths up to and including 1Gbit/s in: (i) the UK excluding the Hull Area and the WECLA: and (ii) the WECLA, provide the following⁸¹:

Compensation per event and value of compensation

- a) The definition of “Contractual Delivery Date” as set out in the Dominant Provider’s terms and conditions shall be amended to require BT to provide reasons to justify a Contractual Delivery Date which is set beyond the 57th day and that any extension of the Contractual Delivery Date beyond the 57th shall be made subject to the consent of the Third Party concerned whose consent shall not be unreasonably withheld;
- b) BT shall pay the Third Party compensation for each day or part day of delay in delivery of service beyond the Contractual Delivery Date or the “CP Requirement Date” (as set out in the Dominant Provider’s terms and conditions), whichever is later;
- c) BT shall pay the Third Party compensation for each and every fault which has not been restored in the first five hours on a per hour basis thereafter;
- d) The compensation payable in event of the each late provision of the required Backhaul Extension Services, Wholesale Extension Services or Wholesale End-to-End Segments shall be set at 100% of one month’s line rental for every day or part day of delay beyond the Contractual Delivery Date or CP Requirement Date (whichever is later), up to a maximum of 60 days;
- e) The compensation payable in the event of each late fault repair in relation to Backhaul Extension Services, Wholesale Extension Services or Wholesale End-to-End Segments shall be 15% of one month’s line rental for every hour thereafter until service is restored, up to a maximum of 200 hours;

Limitations on compensation- removal of caps

- f) Any limits on compensation payable as a result of a failure to satisfy the service guarantees shall be removed other than those set out in d) and e); and

Additional losses

- g) Any compensation payable under the contract shall be without prejudice to any right of either party to claim for additional loss.

Proactive payments

- h) BT shall monitor its performance against the service guarantees for fault repair and compensate Third Parties proactively should it fail to satisfy the service guarantees.

⁸¹ In particular, the following contracts will require modification to reflect the requirements set out in the direction: (i) the Conditions for Backhaul Extensions Services; and (ii) the Conditions for Wholesale Extension Services.

