



EUROPEAN COMMISSION

Brussels, 19.7.2018
C(2018) 4927 final

Office of Communications
(OFCOM)

Riverside House - 2a Southwark
Bridge Road
SE1 9HA London
United Kingdom

For the attention of:
Ms. Sharon White (CEO)

Fax: +44 20 7981 3504

Dear Ms.White,

Subject: Commission Decision concerning

Case UK/2018/2094: wholesale local access provided at a fixed location (Hull Area)

Case UK/2018/2095: wholesale central access provided at a fixed location for mass-market products (Hull Area)

Case UK/2018/2096: wholesale central access provided at a fixed location for mass-market products (UK excluding Hull area)

Comments pursuant to Article 7(3) of Directive 2002/21/EC

1. PROCEDURE

On 21 June 2018, the Commission registered three notifications from the UK national regulatory authority, the Office of Communications (Ofcom)¹, concerning the reviews of: (i) the market for wholesale local access (WLA) provided at a fixed location in the Hull area²; (ii) the market for wholesale central access provided at a fixed location for mass-

¹ Under Article 7 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108, 24.4.2002, p. 33, as amended by Directive 2009/140/EC, OJ L 337, 18.12.2009, p. 37, and Regulation (EC) No 544/2009, OJ L 167, 29.6.2009, p. 12.

² Historically, the Hull Area exhibits different characteristics to the rest of the UK. The incumbent operator in the Hull Area is KCOM, which operates the local access network (as opposed to BT in the rest of the UK) and is by far the largest supplier at the retail level. There has been no unbundling of KCOM's exchanges and limited rollout of competing electronic communications networks.

market products in the Hull area; and (iii) the market of wholesale central access provided at a fixed location for mass-market products in the UK excluding the Hull area.³

The national consultations⁴ ran from 31 March to 9 June 2017 and from 22 June to 14 September 2017.

On 2 July 2018, a request for information⁵ was sent to Ofcom and a response was received on 5 July 2018.

Pursuant to Article 7(3) of the Framework Directive, national regulatory authorities (NRAs), the Body of European Regulators for Electronic Communications (BEREC) and the Commission may make comments on notified draft measures to the NRA concerned.

2. DESCRIPTION OF THE DRAFT MEASURE

2.1. Background

2.1.1 The wholesale local access market (Hull area)

The markets for wholesale local access in the UK excluding Hull and in the Hull area were last jointly notified to and assessed by the Commission under case UK/2014/1606⁶.

In line with previous market reviews, Ofcom defined the relevant WLA market as including copper-based, cable-based and fibre-based local access at a fixed location. Ofcom did not distinguish between WLA used to provide business or residential services. Ofcom concluded that other forms of access (such as mobile, satellite and fixed wireless access) were not sufficient indirect constraints at the wholesale level as to justify their inclusion in the relevant market.

Ofcom defined two geographic WLA markets: (i) the UK excluding the Hull area and (ii) the Hull area. Ofcom designated BT as the operator with significant market power (SMP) in the entire territory of the UK, except for the Hull area, where it found that KCOM had SMP.

Ofcom proposed to maintain a set of remedies for both BT and KCOM, notably: (i) network access on reasonable request; (ii) non-discrimination; (iii) transparency; (iv) cost-accounting; and (v) accounting separation.

Ofcom notified to the Commission its most recent full market review for the market of WLA at a fixed location in the UK excluding the Hull Area in case

³ Corresponding to markets 3a and 3b in Commission Recommendation 2007/879/EC of 17 December 2007 on relevant product and service markets within the electronic communications sector susceptible to *ex ante* regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services (Recommendation on Relevant Markets), OJ L 344, 28.12.2007, p. 65.

⁴ In accordance with Article 6 of the Framework Directive.

⁵ In accordance with Article 5(2) of the Framework Directive.

⁶ C(2014) 4296.

UK/2018/2062⁷. In this submission Ofcom explicitly excluded the analysis of the Hull area, which would be notified separately to the Commission. Ofcom continued to define a single product market for WLA comprising copper-based, cable-based and fibre-based local access services. On a geographic level, Ofcom continued not to delineate sub-national markets (other than the traditional definition of a separate Hull market). BT was designated with SMP in the UK excluding the Hull area. Ofcom imposed an additional set of remedies on BT with the objective to promote investment and competition in the relevant market.⁸ The Commission had no comments.

2.1.2 The wholesale broadband access market (UK & Hull area)

The market for wholesale broadband access (WBA) services⁹ in the UK was previously notified to and assessed by the Commission under case UK/2014/1608.¹⁰

In line with previous market reviews, Ofcom defined the market as: asymmetric broadband access and any backhaul which is necessary to allow interconnection with other communications providers, which provides an ‘always-on’ capability, allows both voice and data services to be used simultaneously and provides data at speeds faster than a dial-up connection. Ofcom included in the relevant product market self-supplied cable- and LLU-based access products.

Ofcom defined three separate geographic markets: (i) the Hull area; (ii) ‘Market A’¹¹ corresponding to BT exchanges where there were no more than 2 present or forecasted principal operators (POs)¹², including BT; (iii) ‘Market B’¹³ corresponding to exchanges where there were three or more present or forecasted POs, including BT.

Ofcom found that KCOM had SMP in the Hull area, that BT had SMP on Market A and that no operator had SMP in Market B.

⁷ C(2018) 1931.

⁸ Ofcom imposed a set of general remedies, which apply to all forms of network access provided by BT in the WLA market. In addition, Ofcom also proposed a set of specific remedies designed to ensure that BT provides specific forms of access to its network. Ofcom changed its approach regarding BT’s lower bandwidth virtual unbundled local access (VULA) services and planned to introduce a charge control for the rentals of such services. In order to foster further infrastructure competition, Ofcom proposed a number of changes to the existing obligation to provide physical infrastructure access.

⁹ Which broadly corresponds to the market for central access at a fixed location for mass-market products as defined in the 2014 Commission Recommendation on Relevant Markets.

¹⁰ C(2014) 4296.

¹¹ This area accounted for 9.5% of UK premises.

¹² As in previous reviews, Ofcom considers that the key factor determining differences in competitive conditions between exchange areas (the building block for its geographic markets) is the number of POs able to serve premises within the exchange area. A PO is defined as an operator which Ofcom considers large enough to impose a material competitive constraint on the other operators, across the UK, such as BT, Virgin Media, Vodafone, TalkTalk and Sky. Telecoms providers without these characteristics are far less likely to offer a significant competitive constraint, in Ofcom’s view.

¹³ This area accounted for 89.8% of UK premises.

Ofcom imposed the following obligations on the SMP operators: (i) network access on reasonable request; (ii) non-discrimination (for BT on the basis of equivalence of inputs-EoI); (iii) requirement to publish a reference offer; (iv) requirement to notify charges, terms and conditions; (v) transparency as regards quality of service; (vi) requirement to notify technical information; and (vii) accounting separation.

In addition, for BT in Market A, Ofcom imposed a charge control based on the consumer price index (CPI). No price control obligations were imposed on KCOM in the Hull area.

The Commission reiterated its previous comments on the inclusion of self-supply in the market definition based on indirect constraints and invited Ofcom to further substantiate its WLA and WBA market definitions in its final measure.

2.2. Market definition

2.2.1 The wholesale local access market (Hull area)

Ofcom defines the relevant market as including WLA services delivered via cable (where available)¹⁴, copper and fibre networks. The market definition excludes wireless services and leased lines, which in Ofcom's view do not represent a significant constraint to traditional WLA services. The geographic scope of the relevant product market is the Hull area.

2.2.2 The wholesale broadband access market (UK & Hull area)

Ofcom continues to define the relevant market as including the provision of asymmetric broadband access over cable, copper and fibre and any backhaul as necessary to allow interconnection with other telecoms providers, which allows an always-on capability and both voice and data services to be used simultaneously. Ofcom concludes that WBA services provided over mobile, wireless and satellite networks remain outside the scope of the relevant product market.

Ofcom defines three distinct geographic markets: (i) areas of the UK excluding Hull where only one or two POs (including BT) provide WBA services ('Market A'); (ii) areas of the UK excluding Hull where two or more POs in addition to BT provide WBA services to themselves or other telecoms providers ('Market B'); and (iii) the Hull Area.

The two distinct geographic markets for WBA in the UK excluding the Hull Area cover 99.4% of UK premises: Market A (0.9% of premises) includes areas in the UK where there is limited or no network competition; Market B (98.5% of premises) includes areas in the UK where there is sufficient network competition.¹⁵ The premises in the Hull area represent the remaining 0.6% of UK premises.

¹⁴ No cable network is currently present in the Hull area.

¹⁵ For the geographic delineation of Markets A and B in the UK excluding Hull area, Ofcom used BT's local exchange areas as the geographic unit of its analysis. It started by counting POs that have a presence in that exchange area using local loop unbundling (LLU) over the copper line. It then considered the cable network as present in these areas if it is able to supply more than 65% of the premises and considered the other POs (Sky, TalkTalk and Vodafone) as present using regulated access to fibre to the cabinet (FTTC) if it is available to more than 65% of the premises in a copper exchange area. Ofcom also accounted for future entry based on the POs' committed plans.

Ofcom concluded that the number of copper, cable and fibre-based POs is a key determinant of competitive conditions in BT's exchange areas. It found that competitive conditions are likely to vary significantly between areas with BT+2 POs and areas with BT-only or BT+1 PO.

2.3. Finding of significant market power

2.3.1 The wholesale local access market (Hull area)

Ofcom concludes that KCOM¹⁶ holds SMP in the WLA market in the Hull area. Ofcom analysed the following main criteria: (i) 100% of market shares; (ii) pricing and profitability¹⁷; (iii) high barriers to entry and expansion; (iv) absence of countervailing buyer power; (v) weakness of external constraints.

2.3.2 The wholesale broadband access market (UK & Hull area)

Hull area

Ofcom concludes that KCOM holds SMP also in the WBA market in the Hull area. Ofcom analysed the following main criteria: (i) market growth and market shares¹⁸; (ii) pricing and profitability¹⁹; (iii) high barriers to entry and expansion, combined with the absence of entry so far and the uncertainty over future demand for WLA fibre; (iv) absence of countervailing buyer power; (v) weakness of external constraints.

UK excluding Hull

Ofcom considers that BT has SMP in Market A. Ofcom's analysis takes into consideration (i) BT's substantial market shares (over 90%); (ii) the expected limited further roll-out of LLU and lack of certainty of further fibre roll-out; (iii) the likely limits to countervailing buyer power; and (iv) evidence on pricing and profitability²⁰.

Given the significant amount of entry that has occurred across Market B exchanges and the success of the POs using LLU and VULA, as well as POs using their own

¹⁶ The incumbent telecoms provider in the Hull Area, operates two fixed access networks: a copper network covering the whole of the Hull Area, and a newly deployed Fibre to the Premises (FTTP) network covering around 75% of homes and small businesses in the area.

¹⁷ According to Ofcom's analysis, KCOM's prices are at least as high as (and in many cases higher than) those in the rest of the UK, where BT makes returns which are well above the cost of capital and has been found to have SMP.

¹⁸ KCOM holds almost 100% of market shares.

¹⁹ As in the WLA market, Ofcom found that KCOM's prices are at least as high as (and in many cases higher than) those charged by BT in the rest of the UK.

²⁰ Ofcom finds that the retail pricing evidence is consistent with the different competitive conditions observed between Market A and Market B. For example, BT's brand Plusnet has historically charged higher prices in Market A areas.

local access networks (such as Virgin Media) in securing market share, Ofcom concludes that no provider has SMP in Market B.²¹

2.4. Regulatory remedies

2.4.1 The wholesale local access market (Hull area)

Ofcom proposes to impose the following remedies on KCOM in the Hull WLA market: (i) provision of physical²² unbundled access to KCOM's fibre network on reasonable request and on fair and reasonable terms, conditions and charges²³; (ii) no undue discrimination; (iii) publication of a reference offer; (iv) notification of changes to charges, terms and conditions; (v) notification of changes to technical information; (vi) publication of quality of service information; (vii) regulatory financial reporting requirements (accounting separation and cost accounting).

Ofcom proposes to remove the copper LLU access obligation because of the lack of interest for this type of access by alternative operators in the Hull area.²⁴ Additionally, given KCOM's significant investment in a fibre network with almost full coverage expected over the review period, it is unlikely to be commercially viable for telecoms providers to begin to invest in copper LLU.

2.4.2 The wholesale broadband access market (UK & Hull area)

Hull area

Ofcom proposes to impose the following remedies on KCOM in the Hull WBA market: (i) provision of bitstream access over its copper and fibre networks on reasonable request and on fair and reasonable terms, conditions and charges²⁵; (ii) no undue discrimination; (iii) publication of a reference offer; (iv) notification of changes to charges, terms and conditions; (v) notification of changes to technical

²¹ In Market B, BT has a market share of less than 40%, while Sky, TalkTalk and Virgin Media have between 15% and 25% of market shares. Ofcom also observed different WBA products in the different geographic markets.

²² Ofcom does not impose a specific VULA obligation for fibre-access on KCOM because it considers it preferable that the precise specifications of a fibre access service emerge from local industry demand, which Ofcom is seeking to facilitate by improving the means by which access seekers are able to engage with KCOM through the general access obligation in the WLA market.

²³ Ofcom recognises that KCOM has been investing in an FTTP network since 2012 and should be permitted to benefit from sufficient upside potential from its investment to offset the downside risk of failure. However, Ofcom states that should it be required to conduct an assessment of KCOM's charges for any fibre-based services, this would include analysis of its costs in order to ascertain whether charges are consistent with making a reasonable rate of return and reasonable contribution to common cost recovery. No margin squeeze test is foreseen in this market.

²⁴ No form of LLU has been taken up in the Hull Area by access seekers.

²⁵ Ofcom explains that cost-orientated access to KCOM's WBA services would not be proportionate. As for the Hull WLA market, should Ofcom be required to conduct an assessment of KCOM's charges for any services provided under the corresponding fair and reasonable pricing obligation, this would include an analysis of KCOM's costs in order to ascertain whether charges are consistent with making a reasonable rate of return and reasonable contribution to common cost recovery. No margin squeeze test is foreseen in this market.

information; (vi) publication of quality of service information; (vii) regulatory financial reporting requirements (accounting separation and cost accounting).

UK excluding Hull

Ofcom proposes to impose the following remedies on BT in Market A: (i) provision of bitstream access over its copper and fibre networks on reasonable request, on fair and reasonable terms, conditions and charges;²⁶ (ii) no undue discrimination; (iii) publication of a reference offer; (iv) notification of changes to charges, terms and conditions; (v) notification of changes to technical information; (vi) publication of quality of service information; (vii) regulatory financial reporting requirements (accounting separation and cost accounting).

As regards the price control remedy, Ofcom does not consider that a charge control on WBA products would stimulate further retail level entry into Market A areas in such a way as to drive down prices for consumers. Additionally, it considers that BT is unlikely to increase its retail prices in Market A areas, notably due to the fact that BT has maintained a retail national pricing for the main brand product and there would be a significant risk to its reputation if it decided to increase prices in uncompetitive areas.

Since no operator is found to have SMP in Market B, no regulatory obligations are imposed on this market.

3. COMMENTS

The Commission has examined the notification and the additional information provided by Ofcom and has the following comment:²⁷

Proportionality of regulation in the WBA market in the UK excluding Hull area

In its measure, Ofcom provides a detailed assessment of the competitive conditions in the areas included in Market A and concludes that BT still holds SMP in these areas. The Commission notes that the methodology used by Ofcom to define Markets A and B, based on the concepts of ‘Principal Operators’ and using BT’s exchange areas as the relevant geographic unit, is consistent with the approach used in previous rounds of review.

The Commission notes, however, that the size of the regulated Market A has been decreasing significantly in each recent WBA market review: it included 22% of UK premises in 2010, 9.5% in 2014 and only 0.9% in the current review. Ofcom explains that the size of the uncompetitive areas has declined mainly due to increased use of BT’s regulated WLA products by alternative operators and to fibre network investments by BT and its competitors. The nationwide presence of cable operator Virgin Media also boosts competition significantly.

²⁶ Ofcom’s starting point in any assessment of whether BT’s prices are fair and reasonable would be the evaluation of costs and margins consistent with that which would be adopted in a margin squeeze assessment under ex post competition law, namely by reference to an equivalently efficient operator (EEO) standard.

²⁷ In accordance with Article 7(3) of the Framework Directive.

The Commission understands the reasons explained by Ofcom for continuing to regulate BT in such a small area of the country, corresponding to approximately 260.000 premises throughout the UK, for another regulatory period.

However, the Commission invites Ofcom to evaluate whether regulation will still be appropriate and proportionate if the size of Market A decreases further in the future, in particular against the background that BT, according to Ofcom, is unlikely to increase its retail prices in Market A areas. A detailed evaluation of pricing strategies by BT in the different areas of the country will, thus, be useful to determine whether BT continues to have the incentive to exploit its market power in these uncompetitive areas. Additionally, Ofcom could also consider the impact on competition generated by local telecoms operators which are not considered to be 'Principal Operators', but that are also able to restrict BT's market power at a local level.

Against this background, the Commission invites Ofcom to evaluate the continued need for regulation in the WBA market in the UK excluding Hull area in the coming years and to consider removing the remaining regulation, in particular if the threats to competition become weaker as the size of the uncompetitive areas decreases further, also given the success of the regulation imposed on BT on the upstream WLA market.

Pursuant to Article 7(7) of the Framework Directive, Ofcom shall take the utmost account of the comments of other NRAs, BEREC and the Commission and may adopt the resulting draft measure; where it does so, shall communicate it to the Commission.

The Commission's position on this particular notification is without prejudice to any position it may take *vis-à-vis* other notified draft measures.

Pursuant to Point 15 of Recommendation 2008/850/EC²⁸ the Commission will publish this document on its website. The Commission does not consider the information contained herein to be confidential. You are invited to inform the Commission²⁹ within three working days following receipt whether you consider that, in accordance with EU and national rules on business confidentiality, this document contains confidential information which you wish to have deleted prior to such publication.³⁰ You should give reasons for any such request.

Yours sincerely,

For the Commission,
Roberto Viola
Director-General



²⁸ Commission Recommendation 2008/850/EC of 15 October 2008 on notifications, time limits and consultations provided for in Article 7 of Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communications networks and services, OJ L 301, 12.11.2008, p. 23.

²⁹ Your request should be sent either by email: CNECT-ARTICLE7@ec.europa.eu or by fax: +32 2 298 87 82.

³⁰ The Commission may inform the public of the result of its assessment before the end of this three-day period.