

# A5. Draft legal instrument

## NOTIFICATION OF PROPOSALS UNDER SECTION 48A OF THE COMMUNICATIONS ACT 2003

### Proposals for setting SMP services conditions in relation to BT under section 45 of the Communications Act 2003

#### BACKGROUND

1. On 8 January 2020, Ofcom published a consultation document entitled “*Promoting competition and investment in fibre networks: Wholesale Fixed Telecoms Market Review*” (“**WFTMR Consultation Document**”)<sup>1</sup>. That document set out Ofcom’s proposals on its review of certain fixed telecoms markets including: the supply of wholesale local access at a fixed location in WLA Area 2; and the supply of wholesale local access at a fixed location in WLA Area 3. At Volume 5 of the WFTMR Consultation Document, Ofcom published a draft notification under sections 48A and 80A of the Act, containing its proposed market identifications, market power determinations and the setting of SMP conditions to be applied to the Dominant Provider (“**January 2020 Notification**”).

#### PROPOSED SMP CONDITION

2. Schedule 1 to the January 2020 Notification proposed, among others, an SMP condition that made provision for the publication by the Dominant Provider of: a First Threshold Notice in relation to a Local Serving Exchange where Ultrafast network access is available to 75% of Relevant Premises served by that Local Serving Exchange; and a Second Threshold Notice in relation to a Local Serving Exchange where a First Threshold Notice has been published in relation to that Local Serving Exchange for a minimum period of 2 years and Ultrafast network access is available to 100% of Relevant Premises served by that Local Serving Exchange (SMP Condition 1.7). The effect of the publication of a First Threshold Notice would be to remove the requirement on the Dominant Provider to offer new copper-based network access services and a Second Threshold Notice would be to remove certain charge control obligations, in each case for those premises in the Local Serving Exchange provided that Fibre-based network access is available.
3. The WFTMR Consultation Document explained that Ofcom’s proposals in relation to Relevant Premises would be contained in a separate notification under section 48A of the Act. Ofcom is now proposing to define which premises can be excluded for the purposes of calculating whether Ultrafast network access is available to 100% of premises in a Local Serving Exchange by direction post April 2021. Ofcom is therefore modifying its proposed SMP conditions to implement this proposed change.

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<sup>1</sup> [Promoting investment and competition in fibre networks – Wholesale Fixed Telecoms Market Review 2021-26](#), 8 January 2020.

4. Consequently, Ofcom is proposing to set, in relation to the markets (ii) and (iii) identified in Table A in the January 2020 Notification, the following SMP condition to be applied to BT to the extent specified, which shall take effect from [the date of the notification published under sections 48(1) and 79(4) of the Act] or such other date specified in any notification under sections 48(1) and 79(4) of the Act adopting the proposals set out in this notification:

*“1.7 The Dominant Provider may publish a Threshold Notice in respect of a Local Serving Exchange where:*

*(a) Ultrafast network access is available to 75% of Relevant Premises served by that Local Serving Exchange but excluding any premises that Ofcom may from time to time direct (“First Threshold Notice”); or*

*(b) a First Threshold Notice has been published in relation to that Local Serving Exchange for a minimum period of 2 years and Ultrafast network access is available to 100% of Relevant Premises served by that Local Serving Exchange but excluding any premises that Ofcom may from time to time direct (“Second Threshold Notice”).*

*“Relevant Premises” means all premises in a Local Serving Exchange Area as at the date of the First Threshold Notice given in respect of that Local Serving Exchange.*

*1.8 Relevant premises for the purposes of Condition 1.7 are:”*

5. This proposal is a modification to proposed SMP conditions 1.7 and 1.8 in Schedule 1 to the January 2020 Notification. For the avoidance of doubt, Ofcom is not proposing in this notification to modify any of the other proposed SMP conditions proposed in the January 2020 Notification.
6. The effect of, and Ofcom’s reasons for making, this proposal are set out in the accompanying consultation document.

#### **OFCOM’S DUTIES AND LEGAL TESTS**

7. Ofcom considers that the proposed SMP conditions above comply with the requirements of sections 45 to 47 of the Act, as appropriate and relevant. In particular, for the reasons we set out in section 8, Volume 3 of the WFTMR Consultation Document and in the accompanying consultation document, Ofcom is satisfied that the proposed amendment is objectively justifiable in relation to the networks, services and facilities to which it relates; not such as to discriminate unduly against particular persons or against a particular description of persons; proportionate to what it is intended to achieve; and transparent in relation to what it is intended to achieve.
8. In making the proposal referred to in this notification, Ofcom has considered and acted in accordance with its general duties set out in sections 3 and 4 of the Act. In accordance with section 4A of the Act, Ofcom has also taken due account of all applicable recommendations issued by the European Commission under Article 19(1) of the Framework Directive. Pursuant to Article 3(3) of Regulation (EC) No 1211/2009, Ofcom has also taken the utmost

account of any relevant opinion, recommendation, guidelines, advice or regulatory practice adopted by BEREC.

9. Ofcom has also had regard to the Statement of Strategic Priorities in making the proposals referred to in this notification.

## **MAKING REPRESENTATIONS**

10. Representations may be made to Ofcom about the proposal set out in this notification and the accompanying consultation document by no later than 3 September 2020.
11. Copies of this notification and the accompanying consultation have been sent to the Secretary of State in accordance with section 49C of the Communications Act 2003.

## **INTERPRETATION**

12. For the purpose of interpreting this notification –
  - a. except in so far as the context otherwise requires, words and expressions shall have the meaning assigned to them in paragraph 13 below, and otherwise any word or expression shall have the same meaning as it has in the January 2020 Notification and the Act;
  - b. headings and titles shall be disregarded;
  - c. expressions cognate with those referred to in this notification shall be construed accordingly; and
  - d. the Interpretation Act 1978 (c.30) shall apply as if this notification were an Act of Parliament.

13. In this notification

<b>“Act”</b>	means the Communications Act 2003 (c.21);
<b>“BT”</b>	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;
<b>“Dominant Provider”</b>	means BT;
<b>“January 2020 Notification”</b>	means the notification described in paragraph 1 above;
<b>“Local Serving Exchange”</b>	means the site of an operational building of the Dominant Provider, where interconnection is made available by the Dominant Provider to a Third Party for Network Termination

Points served by that site for the provision of network access provided by the Dominant Provider in accordance with Condition 1 and Condition 2 (as applicable);

- “Network Termination Point”** means the physical point at which a Relevant Subscriber is provided with access to a public electronic communications network;
- “Ofcom”** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;
- “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;
- “Statement of Strategic Priorities”** means the Statement of Strategic Priorities for telecommunications, the management of radio spectrum, and postal services designated by the Secretary of State for Digital, Culture, Media and Sport for the purposes of section 2A of the Communications Act 2003 on 29 October 2019;
- “Third Party”** means a person providing a public electronic communications service or a person providing a public electronic communications network;
- “Ultrafast Broadband Services”** means a retail broadband service which offers at least 300Mbit/s download speed and which is provided over the Dominant Provider’s electronic communications network;
- “Ultrafast Network Access”** means the wholesale provision of network access which can be used to provide Ultrafast Broadband Services and which is provided over the Dominant Provider’s electronic communications network;
- “United Kingdom”** has the meaning given to it in the Interpretation Act 1978 (1978 c30); and
- “WFTMR Consultation Document”** means the document described in paragraph 1 above.

Signed



Brian Potterill

**Competition Policy Director, Ofcom**

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

**25 June 2020**