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# Hull Area Wholesale Fixed Telecoms Market Review 2021-26

Volume 3: Remedies

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# Contents

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## Section

1. Introduction and approach to remedies	2
2. Remedies: WLA and LL Access markets	8
3. Detail of regulatory financial reporting requirements	40
4. Legal tests	57
5. Fixed voice transitional arrangements	62

# 1. Introduction and approach to remedies

- 1.1 This section sets out our approach to our proposed remedies. These proposed remedies aim to deal with the SMP findings set out in Volume 2 which, in summary, identify KCOM to have SMP in the Hull Area in the wholesale local access (WLA) market and the wholesale leased lines access services (LL Access) market.
- 1.2 In this section, before setting out the detail of the proposed remedies covered in Sections 2 and 3 we summarise:
- the competition concerns that we are seeking to address in this consultation;
  - our strategy and objectives for promoting competition; and
  - the factors we have identified in our provisional market analysis which have led us to propose the remedies set out in this document.
- 1.3 Section 4 sets out the legal tests which apply to our proposed remedies.
- 1.4 Finally, in Section 5 we set out the transitional arrangements we propose to retain on the fixed voice markets for a 12-month period following publication of our Final Statement.

## Competition concerns

- 1.5 Our provisional assessment that KCOM has SMP in the WLA and the LL Access markets gives rise to a number of competition concerns. Absent regulation, KCOM's SMP would give it the ability and incentive to engage in various forms of conduct that could distort competition and/or harm consumers. KCOM would have the ability and incentive to:
- refuse to supply access and thus restrict competition in the provision of products and services in the relevant downstream markets;
  - set excessive wholesale charges or, in combination with downstream prices, engage in price squeeze behaviour (also referred to as margin squeeze);
  - favour its downstream retail businesses to the detriment of its competitors in the relevant retail markets, by price or non-price discrimination; and
  - not maintain an adequate level of service quality in the provision and repair of wholesale services or to discriminate in the quality of provision.

## Strategy and objectives

- 1.6 In the rest of the UK (excluding the Hull Area), our strategy for regulation is focused on securing network competition with Openreach and, where this is not possible, in incentivising the incumbent to invest in very high-speed networks.<sup>1</sup>

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<sup>1</sup> See 2020 WFTMR Consultation, Volume 3, paragraphs 1.4-1.14 where we set out our objectives and strategy for the wholesale fixed telecoms markets, building on our intention set out in the DCR to regulate to encourage large-scale deployment of new fibre to both homes and businesses, support or extension of cable based broadband, and support for 5G networks. We note that this approach is also consistent with both the Government's ambition set out in its Statement

- 1.7 The Hull Area already has full-fibre coverage provided by the incumbent provider KCOM, unlike the rest of the UK.
- 1.8 In the Hull Area, evidence of demand from stakeholders suggests that:
- a) Large scale network competition in the Hull Area is unlikely to materialise in the review period. We have also seen less demand for access to KCOM’s ducts and poles than is the case for BT’s in other areas of the UK.
  - b) There is some evidence of increased potential for entry based on purchasing wholesale-access products (although no such entry has yet materialised) – this is discussed below (paragraphs 1.13-1.17).
- 1.9 Our general approach to remedies is to intervene at the highest level of the value chain at which we consider effective competition is viable. In the DCR we noted that where there is little prospect of investment in new fibre networks,<sup>2</sup> we consider that targeted measures might be needed to establish competition (see Section 2).
- 1.10 We consider that in the Hull Area, where large scale network competition is unlikely, the highest level at which effective competition is likely to be viable is wholesale access-based competition (i.e. WLA and LL Access). We consider that wholesale access-based competition is still likely to offer a good long-term outcome for consumers and businesses in the context of these markets in the Hull Area. When such competition materialises, it is likely to give consumers a wider choice of products and provide an effective constraint on retail prices.
- 1.11 Our strategy for the Hull Area therefore focuses on requiring KCOM to provide wholesale access to its network and services.

## Approach to remedies

- 1.12 When considering which remedies are appropriate to address the competition concerns set out above, we have assessed the extent to which the existing remedies have been effective in promoting competition in the Hull Area. Our analysis has been informed by discussions with 18 telecoms providers and observed market outcomes in the Hull Area.<sup>3</sup>

## The WLA market

- 1.13 Our strategy in the Hull Area has long been to increase take-up of wholesale services based on KCOM’s network. This was the primary aim of our last review of the WLA market in 2018.<sup>4</sup> Our current review shows that the measures we put in place in 2018 have not been

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of Strategic Priorities (SSP) to provide gigabit capable networks and making them widely available across the UK and the 2018 EECC Directive.

<sup>2</sup> DCR.

<sup>3</sup> KCOM Group Limited, [redacted], CityFibre Infrastructure Holdings Limited, [redacted], Freshwave Group Limited, MS3 Networks Limited, Pure Broadband Limited, [redacted], Vodafone Limited, [redacted], [redacted], [redacted], Hutchison 3G UK Limited (Three), [redacted], [redacted], [redacted], BT Group plc, Connexin Limited.

<sup>4</sup> 2018 WLA/WBA Statement, paragraph 1.9.

successful in encouraging providers to enter and provide services in the Hull Area. In particular, large national providers are still not present in the Hull Area. As a result, increased retail competition has not yet materialised.

- 1.14 In our last review, we noted that absent increased retail competition, we would examine whether more direct regulatory measures would be required in the future.<sup>5</sup> In this review we have therefore carefully considered whether we should continue our strategy of focusing on encouraging wholesale-based competition, or whether more direct measures, for example retail price regulation, are required.
- 1.15 Having considered the evidence gathered from our engagement with stakeholders, we believe that despite the lack of entry to date, there is now a better prospect for wholesale-based competition during the review period.
- a) As roll-out of fibre networks progresses in many areas of the UK, some national providers now report an increased willingness to work with alternative fibre wholesale providers.
    - i) A communications provider ([redacted]) is actively engaging with alternative fibre providers, including KCOM, about providing consumer broadband services via wholesale fibre services.<sup>6</sup>
    - ii) Vodafone has indicated that it was likely to seek to work with multiple fibre providers across the UK to provide low price residential broadband services.<sup>7</sup> [redacted].<sup>8</sup>
    - iii) BT has indicated it is open to working with alternative suppliers, but is not currently actively considering the Hull Area.<sup>9</sup>
  - b) Providers have expressed a greater interest in using KCOM's fibre wholesale products.
    - i) In KCOM's 1<sup>st</sup> RFI response, it provided detailed correspondence with two providers about their interest in fibre WLA services ([redacted] and [redacted])<sup>10</sup>. Pure Broadband has also enquired about KCOM's WLA services, indicating it may be interested to pursue this option further if existing barriers to take-up can be addressed.<sup>11</sup> Both MS3<sup>12</sup> and Pure Broadband<sup>13</sup> have noted that the cost of obtaining accommodation services is a barrier to the take-up of KCOM's WLA products.

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<sup>5</sup> 2018 WLA/WBA Statement, paragraph 1.10.

<sup>6</sup> [redacted].

<sup>7</sup> Meeting between Ofcom and Vodafone, 24 February 2020. We also note that in the rest of the UK, Vodafone is working with CityFibre to deliver full-fibre broadband services. CityFibre, 9 November 2017 [Vodafone and CityFibre bring gigabit-speed fibre to the UK](#) [accessed 9 July 2020], and Digital TV Europe, 22 January 2020. [CityFibre announces restructured Vodafone deal](#) [accessed 9 July 2020].

<sup>8</sup> [redacted].

<sup>9</sup> Call between Ofcom and BT, 27 February 2020.

<sup>10</sup> KCOM 1<sup>st</sup> RFI response.

<sup>11</sup> Call between Ofcom and Pure Broadband 18 June 2020.

<sup>12</sup> Call between Ofcom and MS3, 8 June 2020.

<sup>13</sup> Call between Ofcom and Pure Broadband, 18 June 2020.

- ii) A communications provider ([redacted]) has engaged in exploratory discussions with KCOM about providing services via its wholesale services.<sup>14</sup>
  - iii) In KCOM's 1st RFI response, it indicated that a number of providers have enquired into the use of fibre-based WBA.<sup>15</sup>
- c) There are significantly increasing levels of full-fibre roll-out by alternative providers in many areas of the UK - coverage is increasing at its fastest ever rate and has more than tripled, from 3% to 10%, in three years.<sup>16</sup> As full-fibre coverage increases across the UK, an environment is emerging in which telecoms providers are working to overcome barriers to working with multiple wholesale fibre providers. We understand that one of these barriers is the lack of standardisation of the order and provisioning process ([redacted]<sup>17</sup>, Vodafone<sup>18</sup>, and Pure Broadband<sup>19</sup>), and there are indications that some providers are now actively working to overcome this multi-sourcing barrier. KCOM has been gathering requirements from wholesale customers in recent months to inform the direction of its development of a wholesale provisioning and fault management platform,<sup>20</sup> and a communications provider ([redacted]) has indicated that it is taking measures to reduce the incremental cost of entry ([redacted])<sup>21</sup>.
- 1.16 We believe that the above evidence indicates that during this review period, there is better prospect for competitive entry in the Hull Area than has previously been the case. We therefore consider that the correct approach, despite the absence of entry to date, is to continue our strategy of encouraging wholesale-based competition through the regulation of the WLA market.
- 1.17 Our detailed reasoning on our proposed remedies in the WLA market is in Section 2.

## The LL Access market

- 1.18 In our last review, we imposed access remedies for active leased lines in order to address KCOM's SMP. We said that it was not proportionate to introduce passive remedies as there was insufficient demand. However, we signalled that we would consider this question further in future reviews.<sup>22</sup> The relevant BEREC common position, of which we must take utmost account, states that NRAs should encourage infrastructure competition at the deepest level where it is reasonable.<sup>23</sup>

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<sup>14</sup> [redacted].

<sup>15</sup> Enquiries about WBA were received from [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted].

<sup>16</sup> 2020 WFTMR Consultation, Volume 1, page 3.

<sup>17</sup> [redacted].

<sup>18</sup> Meeting between Ofcom and Vodafone, 24 February 2020.

<sup>19</sup> Call between Ofcom and Pure Broadband, 12 December 2019.

<sup>20</sup> Call between Ofcom and KCOM, 13 March 2020, and KCOM, January 2020. KCOM, [Previous strategic IT development notices](#) [Accessed 9 July 2020].

<sup>21</sup> [redacted].

<sup>22</sup> 2019 BCMR Statement, paragraph 16.18.

<sup>23</sup> BoR (12) 126, BP3.

- 1.19 As part of this review, we have therefore considered whether any passive remedies are required on the LL Access Market.
- 1.20 We have now seen evidence of demand for passive access for both business connectivity and mobile backhaul. In 2019, [3<] and [3<] each made enquiries about the availability of dark fibre. KCOM told each provider that a dark fibre product is not currently offered.<sup>24</sup> This is consistent with our understanding that KCOM does not currently provide a wholesale dark fibre product.<sup>25</sup>
- 1.21 The wider availability of dark fibre in the Hull Area could contribute to our strategic objective of improving wireless and 5G connectivity for consumers.<sup>26</sup> Three considers that passive access is very important for its 5G roll-out plans. It considers that dark fibre is more appropriate in the context of the increasing levels of data throughput needed to support improved mobile and 5G connectivity.<sup>27</sup> We also note:
- a) Dark fibre access allows the access seeker more control over the technical characteristics of the service, and can therefore offer the potential of lower latency transmission of data than can be achieved with active leased lines services. This is important in the provision of backhaul for 5G mobile connectivity.
  - b) Dark fibre access is not priced according to the volume of data that each line will support, unlike active leased lines which tend to get more expensive as demands for data increase.
- 1.22 On the basis of this demand we therefore considered whether it would be appropriate and proportionate to impose a dark fibre remedy on the LL Access market.

## Insufficiency of competition law

- 1.23 Under Article 8(2) of the Access Directive, where we designate an operator as having SMP in a specific market, we are required to impose remedies. However, in considering the imposition of remedies, we take into account the potential application of competition law. To do this we have considered whether competition law, in particular the rules prohibiting the abuse of a dominant position, would be effective in responding to the competition concerns identified above.
- 1.24 First, we have taken account of the fact that the products in the wholesale markets we have identified are inputs into other downstream markets. Appropriate *ex ante* intervention at the upstream level can promote effective competition in downstream markets. It can also facilitate the emergence of effective competition at the upstream level itself. Competition law, insofar as is relevant, prohibits the abuse of a dominant position –

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<sup>24</sup> KCOM's 1<sup>st</sup> RFI response.

<sup>25</sup> From documents submitted under KCOM's 1<sup>st</sup> RFI response, we find that it has responded to enquiries about dark fibre by noting that either no dark fibre access product is available [3<] or dark fibre is not a product that is currently offered [3<].

<sup>26</sup> Ofcom, 30 April 2020. [Ofcom's Plan of Work 2020/21](#), paragraph 3.5.

<sup>27</sup> Call between Ofcom and Three, 3 March 2020.

it does not seek to promote competition. The key aim of our regulatory strategy is to address KCOM's market power by promoting competition.

- 1.25 Second, the requirement to address the competition problems in each of the markets in which we find SMP means imposing an interconnected and complex package of remedies, including provisions to ensure that they remain effective for the duration of the review period.
- 1.26 Third, we consider it is important to provide sufficient certainty about the rules applying to the dominant provider in the wholesale markets. We consider this certainty is best achieved through *ex ante* regulation. *Ex ante* regulation will also allow for timely intervention by us proactively enforcing the conditions and, if necessary, by parties bringing regulatory disputes to us for swift resolution.
- 1.27 We therefore consider that, in the current and expected circumstances of the relevant markets over the review period, competition law alone would be insufficient to address the competition problems we have identified. We explain in our assessment of our individual remedy proposals where we consider there are particular additional relevant points relating to the sufficiency of competition law.

### Consultation question

Question 1.1: Do you agree with our proposed approach to remedies? Please set out your reasons and supporting evidence for your response.

## 2. Remedies: WLA and LL Access markets

### Introduction

- 2.1 In this section, we set out the remedies that we propose to impose on KCOM, designed to address the competition concerns that we have provisionally identified in our market assessment in Volume 2. These remedies would apply to the markets we have provisionally identified KCOM as having SMP – the markets for wholesale local access (WLA) and wholesale leased lines access services (LL Access) in the Hull Area.
- 2.2 The remedies we propose will work together to address our concerns that KCOM could use its market power to deter and prevent other providers from profitably entering the market. They will also improve our ability to detect any possible anti-competitive behaviour.
- 2.3 Our proposed general remedies are summarised in Figure 2.1 below. Our proposed specific remedies are summarised in Figure 2.2 below.

**Figure 2.1: Summary of the proposed general remedies**

<b>Proposed general remedies in the WLA and LL Access markets (including dark fibre access)</b>
Requirement to provide network access on reasonable request, and on fair and reasonable terms, conditions and charges (excludes copper-based services in the WLA market).
Requirements relating to requests for new forms of network access [WLA only]
Requirement not to discriminate unduly (NUD)
Requirement to publish a Reference Offer (RO)
Requirement to notify changes to charges, terms and conditions
Requirement to notify technical information
Requirement to publish quality of service information as directed by Ofcom (QoS)
Regulatory Financial Reporting (general accounting separation and cost accounting)
Requirement to produce a Pricing Transparency Report (PTR) [LL Access only]

**Figure 2.2: Summary of the proposed specific remedies**

<b>Proposed specific remedies in the LL Access market (including dark fibre access)</b>
Requirement to provide Ethernet and dark fibre network access in the following circuit configurations:
<ul style="list-style-type: none"> <li>• connecting end-user premises and KCOM’s ODF Site or Third Party premises; and</li> <li>• connecting an end-user premises and another end-user premises.</li> </ul>

- 2.4 We describe below the form of each remedy which we are proposing to impose in each market, and the extent to which we propose that remedy should apply.

## Requirement to provide network access on reasonable request

### Our proposals

- 2.5 We are proposing that KCOM must offer network access in the WLA and LL Access markets where a third party reasonably requests it. Access must be granted on fair and reasonable terms and conditions, as soon as it is reasonably practicable.
- 2.6 We believe that this obligation should include a requirement for KCOM to provide network access on fair and reasonable charges.
- 2.7 We also propose that this obligation includes the power for Ofcom to make directions in order that we can secure the supply of services and, where appropriate, fairness and reasonableness in the terms, conditions and charges of network access.
- 2.8 Following KCOM's extensive roll-out of FTTP services we propose to exclude all copper-based services from the WLA network access requirement as we anticipate any competition would arise based on access to KCOM's fibre network.

### Our reasoning

- 2.9 We consider that our proposed network access obligations are appropriate and proportionate in relation to KCOM's market power in the WLA and LL Access markets.
- 2.10 The level of investment required by a third party to replicate KCOM's WLA and LL Access networks, and the time it would take to do this are significant barriers to entry. An obligation requiring KCOM to provide network access where a third party reasonably requests it is therefore vital to promoting and protecting competition in downstream markets. Without such a requirement KCOM would have the incentive and ability to refuse access at the level of each relevant fixed telecoms market or provide access on less favourable terms, thereby benefiting its own retail divisions and hindering downstream competition, ultimately against the interests of consumers.
- 2.11 We consider below some specific aspects of our proposed regulation.

### Ancillary services

- 2.12 Our proposed network access obligation includes an obligation on KCOM to provide any ancillary services that are necessary to make that network access effective. We propose that any necessary ancillary services should also be provided on fair and reasonable charges, terms and conditions.
- 2.13 For the purposes of this review, we have explored the reasons why KCOM's fibre WLA product is not currently purchased by any provider. This has included considering the obligations we currently impose in relation to ancillary services. We consider that certain changes to KCOM's Reference Offer may be necessary in order to address KCOM's SMP.

We consider this point further below in relation our proposed condition requiring KCOM to publish a Reference Offer.

### Fair and reasonable pricing

- 2.14 We provisionally consider that in the WLA and LL Access markets there is risk that KCOM might fix or maintain some or all of its prices for network access at an excessively high level, or impose a margin squeeze in relation to such access so as to have adverse consequences for end-users of public electronic communications services.
- 2.15 We consider therefore that a regulatory constraint on KCOM's wholesale prices is appropriate in order to address this risk, but in designing our remedy we consider that due to the scale of the market it is not proportionate to apply specific charge controls to WLA or LL Access in the Hull Area. We propose instead to impose in the WLA and LL Access markets (including dark fibre access, considered below) an obligation for charges for network access to be fair and reasonable, as the minimum regulation necessary to address this risk.
- 2.16 In general, we consider that KCOM's charges would be fair and reasonable if they are consistent with making a reasonable return over costs including a reasonable contribution to common cost recovery, and if they do not equate to a margin squeeze.
- 2.17 In order to inform our enforcement priorities, we identify appropriate benchmark prices against which to compare KCOM's prices. If KCOM's prices are in excess of these benchmarks, we would be likely to give further scrutiny to those charges.
- 2.18 For WLA services at or around 40 Mbit/s, we propose to set a specific benchmark rate for KCOM's prices, equal to the existing benchmark rate held constant in real terms during the review period. This existing benchmark rate is the published price of Openreach's VULA 40/10 rate applied to BT's GEA-FTTP connections where GEA-FTTC is not available.<sup>28</sup> In our Statement, we would publish the rates concerned.
- 2.19 For WLA services at higher bandwidths, we do not propose to set specific benchmark rates in advance. To evaluate whether the prices are fair and reasonable we would take into account the available evidence, which might include reference to equivalent products offered by Openreach in the rest of the UK (were such products to be offered by Openreach). In all cases we would expect KCOM's retail margin over the wholesale prices to cover retail costs.
- 2.20 This differs from our current approach to benchmarking KCOM's WLA prices because in the rest of the UK we have proposed that Openreach's WLA prices should in future be regulated in a way that reflects the level of competition and market circumstances in a

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<sup>28</sup> We explain our existing approach to benchmarking KCOM's WLA services at or around 40 Mbit/s in the Hull Area in the 2018 WLA/WBA Statement, paragraphs 4.69, 4.78 and 4.82. This price is currently £59.97 p.a. (£5.00/mth) for the transition product variant, and £145.35 p.a. (£12.11/mth) for the data only variant. (Openreach, Superfast and Ultrafast Fibre Access price list (dated 28 April 2020) [Accessed 9 July 2020]).

given area, and these now differ from the Hull Area.<sup>29</sup> Unlike in the Hull Area, there is established retail competition in the rest of the UK; encouraging network build is a strategic priority, and Openreach is at a different stage of the investment cycle to KCOM, which has already completed its full-fibre roll-out. We also consider that keeping the benchmark prices for services at or around 40Mbit/s constant in real terms would not compromise KCOM's ability to recover its costs.<sup>30</sup>

- 2.21 In our consideration of whether KCOM's dark fibre charges are fair and reasonable, we would consider their alignment with the charges proposed for Openreach provision of dark fibre in Area 3. A cost-based benchmark is appropriate for dark fibre given that we do not consider rival network build is likely to materialise at scale during the review period and access to KCOM's fibre will be critical to creating the conditions for growth in access-based competition in the Hull Area and improvement of mobile connectivity through the role it plays in 5G backhaul. This is consistent with the Government's strategic priorities to "help create conditions for a competitive mobile market that supports investment and innovation in 5G" including, to "support the growth of infrastructure models [...] that promote competition and investment in network densification and extension".<sup>31</sup>
- 2.22 As well as the dark fibre product proposed, we consider that ongoing regulation of KCOM's active leased lines products is also required. Our view is that alignment of KCOM's charges for active leased lines with Openreach's equivalent active leased lines products (namely, the LL Access products in Area 2 and Area 3 subject to a charge control) would be fair and reasonable.
- 2.23 In addition, we propose to include the power for Ofcom to make directions in order that we can secure the supply of services and, where appropriate, fairness and reasonableness in the terms, conditions and charges of network access. Our proposed condition for the WLA and LL Access markets (including dark fibre access) includes a requirement for KCOM to comply with any such directions.
- 2.24 These provisions would enable us to intervene more quickly where terms, conditions or charges are not fair and reasonable than if we relied solely on *ex post* competition law.

## Conclusion

- 2.25 We consider that these proposed requirements in the WLA and LL Access markets to provide network access on reasonable request (including dark fibre) are proportionate in that they are targeted at addressing the market power that we have provisionally found KCOM holds. We do not consider that different types of obligations or more limited

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<sup>29</sup> In the 2020 WFTMR Consultation, we have proposed that Openreach's regulated GEA-FTTP prices will be set at the GEA-FTTC charge controlled level plus a fibre premium of £1.50-1.85. 2020 WFTMR Consultation, Volume 4 paragraphs 1.82-1.85.

<sup>30</sup> Evidence from KCOM's RFS 2018/19 suggests that KCOM's current returns are likely to be above the cost of capital in the Hull Area.

<sup>31</sup> SSP, paragraph 33.

network access requirements would be sufficient to address the competition concerns we have identified.<sup>32</sup>

- 2.26 In order to implement these proposals, we propose to set the SMP Condition 1 published in Volume 4.
- 2.27 Section 87(1) of the Communications Act 2003 (the Act) provides that, where we have made a determination that a person (here KCOM) has SMP in an identified services market, we shall set such SMP conditions authorised by that section as we consider appropriate to apply to that dominant provider in respect of the relevant network or relevant facilities and apply those conditions to that person. Specifically, section 87(3) and 87(6)(c) to (e) of the Act authorises Ofcom to set SMP services conditions requiring the dominant provider to give such entitlements as Ofcom may from time to time direct as respects the provision of network access to the relevant network, the use of the relevant network and the availability of relevant facilities.
- 2.28 In determining which conditions are authorised by section 87(3) to set in a particular case, we must take into account, in particular, the factors set out in section 87(4). In this case:
- the economic viability of building alternative access networks in the Hull Area means that in the absence of regulatory intervention, it is unlikely that there will be effective competitive entry during the review period by rival telecoms providers;
  - we consider that it is feasible for KCOM to provide the access remedies we are proposing in the WLA and LL Access markets and we have designed the scope of our proposed remedies with this in mind;
  - we do not consider that our proposal will risk undermining KCOM's investment in its fibre network deployment, as it has already invested and did so in circumstances where it was subject to a fair and reasonable pricing obligation; and
  - we consider that our proposed network access requirement is an important element of securing effective competition in the long term at a level that is appropriate to the market conditions of the Hull Area.
- 2.29 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the tests set out in section 47 and 88 of the Act, including as potentially amended to give effect to Article 74 of the EECC.

## Consistency with the BEREC Common Positions

- 2.30 We have taken utmost account of the BEREC Common Positions on wholesale leased lines<sup>33</sup> and wholesale (physical) network infrastructure access<sup>34</sup> in formulating our proposals discussed above which appear to us to be particularly relevant in this context. We consider

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<sup>32</sup> As set out in Volume 2, paragraphs 5.13 and 5.35, we would expect KCOM to consider requests for a suitable WLA access product to support voice only services under this Condition, should demand arise.

<sup>33</sup> BEREC, 2012. [BEREC Common Position on best practice in remedies imposed as a consequence of a position of significant market power in the relevant markets for wholesale leased lines](#) (BoR (12) 126), [accessed 18 June 2020].

<sup>34</sup> BEREC, 2012. [BEREC Common Position on best practice in remedies on the market for wholesale \(physical\) network infrastructure access \(including shared or fully unbundled access\) at a fixed location imposed as a consequence of a position of significant market power in the relevant market](#) (BoR (12) 127), [accessed 18 June 2020].

that our proposals are consistent with the best practice set out in the BEREC Common Positions.

## Requirement to provide specific forms of network access (LL Access only)

### Our proposals

- 2.31 We propose to require KCOM to provide Ethernet and dark fibre network access in the following circuit configurations:
- a) Connecting end-user premises and KCOM's ODF Site or Third Party premises; and
  - b) Connecting an end-user premises and another end-user premises.

### Our reasoning

#### Specific network access: dark fibre

- 2.32 In Section 1, we set out our provisional conclusion that as a result of KCOM having SMP in the provision of LL Access in the Hull Area, it is likely that KCOM would have the incentive and ability to refuse to supply access, and thus restrict competition in the provision of products and services in the relevant downstream markets.
- 2.33 Although historically we have required KCOM to offer leased lines access circuits, we have only imposed a general access obligation. The specific services provided are determined by KCOM. To date, KCOM has provided active products. We also understand that KCOM has indicated that no dark fibre access product is available, when dark fibre access has been requested.
- 2.34 Active products are less effective than passive products at securing innovation and choice for consumers in retail markets. We consider that the current absence of dark fibre access has the effect of hindering efficiency, innovation, and effective and sustainable competition in the corresponding downstream markets, ultimately against end-users' interests.
- 2.35 Regulated access to dark fibre has the potential to deliver several benefits:
- users would be able to choose their own electronic equipment, enabling them to deliver services that better suit their needs and the needs of their customers;
  - users would be able to make efficient decisions on bandwidth upgrades based on the underlying costs of upgrades; and
  - users would be able to eliminate inefficient active equipment duplication.
- 2.36 As noted above, we have established through our engagement with stakeholders that there is now a demand for passive access to support mobile and 5G connectivity (see

- paragraph 1.20 above).<sup>35</sup> Telecoms providers in the LL Access market would benefit from the greater scalability and technical flexibility than an active product can provide.
- 2.37 We expect telecoms providers would use dark fibre instead of active products where they are able to realise these benefits discussed above (i.e. cost and flexibility advantages). We would expect the dark fibre price to be significantly lower than that of a 10Gbit/s circuit and moderately lower than the price of a 1 Gbit/s, 100 Mbit/s and 10 Mbit/s circuit. We expect telecoms providers to substitute dark fibre for active circuits.
- 2.38 The existence of a dark fibre alternative would also be likely to put downward pressure on the price of KCOM's existing active leased lines products. This would increase the competitiveness of the market and provide benefits to telecoms providers of those services.
- 2.39 Overall these benefits would allow telecoms providers to compete better on price, service quality, and product offering in downstream markets.
- 2.40 One potential adverse impact would be the effect on potential new investment by rival telecoms providers in fibre networks in the Hull Area, which may be considering offering a dark fibre product. However, we consider the combination of KCOM's SMP in this market and the limited plans for further large-scale network expansion by alternative providers (see Volume 2 paragraph 2.19) means that the benefits of dark fibre access outweigh any potential impact on investment incentives.
- 2.41 In light of these overall benefits, we propose to impose a specific requirement on KCOM to provide dark fibre access.
- 2.42 To ensure that purchasers of dark fibre are not at a competitive disadvantage to purchasers of active LL Access, we consider that telecoms providers should be able to obtain dark fibre circuits in similar configurations to KCOM's current range of active LL Access. To achieve this, we propose to impose an obligation requiring KCOM to provide dark fibre terminating segments in the following circuit configurations:
- a) Connecting end-user premises and KCOM's ODF Site or Third Party premises; and
  - b) Connecting an end-user premises and another end-user premises.
- 2.43 To ensure that purchasers of dark fibre can obtain a flexible product suitable for different types of connection, we consider that KCOM should be required to provide one or more fibre circuits.
- 2.44 We anticipate that dark fibre would be predominantly used for leased lines sold to enterprise customers and mobile backhaul connections in the LL Access market. However, we recognise that it is difficult to predict all of the ways in which dark fibre could be used, and we are proposing not to place any usage restrictions on the remedy.

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<sup>35</sup> We consider that there is now more demand for passive remedies than we evidenced in our last review, at which time we said "we do not consider that there is sufficient demand for passive remedies or wholesale services more generally in the Hull Area to warrant such an intervention". 2019 BCMR Statement, paragraph 16.18.

- 2.45 We have considered whether it is necessary to specify in regulation more details of the product required. We do not consider that it is. As a starting point, we would have regard to the technical, operational (provisioning and repair) and commercial aspects of KCOM's current offer of Ethernet Direct Access Service (EDAS) and Ethernet Connect Access Service (ECAS) circuits, in considering the fairness and reasonableness of the arrangements applicable to dark fibre.
- 2.46 As with active leased lines services, a number of ancillary services are necessary to enable and support the provision of dark fibre. This also includes other supporting services used for installation, maintenance, modification, and ceasing of dark fibre. We expect that in most circumstances the same arrangements in respect of ancillary services and network adjustments would apply for dark fibre as for active LL Access, and the requirement in Condition 1 for KCOM to provide access on fair and reasonable terms will suffice for dark fibre as it does for active fibre.
- 2.47 We believe that by basing the dark fibre remedy directly on EDAS and ECAS, telecoms providers would be able to replicate the types of connectivity they currently offer over active products.
- 2.48 We propose that KCOM should be required to launch the dark fibre product, including the publication of the Reference Offer (paragraphs 2.90 to 2.101), within 6 months of the publication of our final statement.

#### **Specific network access: active LL Access products**

- 2.49 On the basis that we now propose to impose a specific remedy for dark fibre on the LL Access market, we have also considered whether this is sufficient on its own to address KCOM's SMP in the LL Access market, and whether, if it provides dark fibre services, it would be appropriate for KCOM to change or withdraw its RO for the active leased lines services it provides.
- 2.50 We consider that without a form of specific access, there is a risk that KCOM could seek to withdraw or change the active products it currently offers under the general network access obligation. Although we envisage that over the longer term, competition based on dark fibre would reduce the need for regulated active fibre products, we expect that this may take some time to establish itself. We therefore consider that it is important that active services continue to be provided over this review period.
- 2.51 Imposing a specific remedy would be a proportionate measure to secure this.
- 2.52 We have considered whether imposing this specific remedy might be disproportionate, taking account of the general access obligation which KCOM is under. However, the obligation we are proposing does no more than secure the continued provision of the general types of product that KCOM provides, so the impact of imposing it on KCOM is, in our view, small. The benefits to competition in terms of certainty and security that the active services will continue to be provided over the review period appear to us to be sufficient to justify imposing a specific remedy at this stage.

2.53 We therefore propose to impose a specific access obligation on KCOM for the provision of active products on the LL Access market. We consider this proportionate and necessary for this review period, while we allow competition based on dark fibre to become fully established. We will consider whether this specific form of access continues to be necessary in future reviews.

## Conclusion

2.54 We consider that these proposed requirements in the LL Access market are proportionate in that they are targeted at addressing the market power that we have provisionally found KCOM holds. We do not consider that different types of obligations or more limited network access requirements would be sufficient to address the competition concerns we have identified.

2.55 In order to implement these proposals, we propose to set the SMP Condition 2 published in Volume 4.

2.56 We are requiring KCOM to give specific entitlements as respects the provision of network access to the relevant network, the use of the relevant network and the availability of relevant facilities. We consider that this obligation is proportionate in that we are only requiring the provision of passive versions of products that KCOM already provides as active products, in compliance with its general obligation to provide network access on fair and reasonable terms.

## Consistency with the BEREC Common Positions

2.57 We have taken utmost account of the BEREC Common Positions on wholesale leased lines<sup>36</sup> in formulating our proposals discussed above which appear to us to be particularly relevant in this context, in particular BP3 and BP3a. We consider that our proposals are consistent with the best practice set out in the BEREC Common Positions.

## Requests for new forms of network access (WLA only)

### Our proposals

2.58 We are proposing to re-impose an SMP obligation in the WLA market requiring KCOM to publish guidelines that would set out a Statement of Requirements (SoR) process by which it will address requests for new forms of network access, and deal with any request in accordance with those guidelines. In addition, we propose that KCOM must comply with any direction Ofcom might make under this condition.

2.59 We propose that this SMP condition should continue to require KCOM to:

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<sup>36</sup> BoR (12) 126.

- publish information on each SoR request it receives, sufficient to enable other telecoms providers to consider whether they are interested in such access (redacted to protect the commercial confidentiality of the access seeker);
- implement a process that enables an access seeker to identify to KCOM the information that is to be treated as confidential;
- publish prominently on its website non-confidential SoR data in the form of Key Performance Indicators (KPIs);
- include in any response rejecting a request for new network access, information about the avenues of redress; and
- be transparent where its SoR process applies to any particular request for new network access.

### Publication of KPIs

2.60 The KPIs we are proposing to require are:

- the number of SoR requests received by KCOM;
- the number of requests that are unanswered by KCOM 25 working days or more after receipt<sup>37</sup>;
- the number of requests that are unanswered by KCOM 75 working days or more after receipt;
- the number of requests accepted;
- the number of requests rejected;
- the number of requests KCOM took longer than 25 working days to reject;
- the number of requests KCOM took longer than 45 working days to reject;
- the number of project plans agreed between KCOM and access seekers;
- the number of project plans agreed between KCOM and access seekers more than 80 days the SoR request was received; and
- the number of project plans agreed between KCOM and access seekers more than 95 days after the SoR request was received.

2.61 We propose to require that KCOM publish this data no later than one month after the preceding six-month period (in respect of August to January, and February to July).

### Options of redress for rejected SoRs

2.62 We propose to continue to require KCOM to inform the provider responsible for submitting the SoR of the avenues of redress available. Such avenues would include any dispute resolution process that KCOM has, in addition to the dispute resolution process under the Act.

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<sup>37</sup> This is a change from “calendar” days in the currently applicable SMP condition, but in our view is appropriate to achieve the objective and less onerous for KCOM.

### Transparency as to when SoRs relate to regulatory obligations

- 2.63 We propose to continue to require KCOM to provide transparency on whether an SoR falls within the scope of the guidelines which apply to new requests for regulated access (see paragraph 2.58 above). This would add clarity as to the status, process and timings that apply to a telecoms provider's request.

### Our reasoning

- 2.64 In the absence of a specific access obligation in the WLA market, the SoR process allows telecoms providers to request the forms of access that they need and addresses the concern that KCOM as a vertically integrated telecoms provider will discriminate in favour of its own downstream business in the handling of requests for new types of network access.
- 2.65 Given the relatively small scale of the potential Hull Area WLA market, the publication of SoRs provides a mechanism to aggregate demand for network access requirements and allow the cost to be spread out between access seekers. If the costs of developing a particular form of access were borne by only one access seeker this would create a significant barrier to competition and so the SoR process helps address this risk.
- 2.66 While this proposal may remove a first-mover advantage from providers seeking access, in our provisional view the benefits of sharing costs among multiple providers to assist the development of effective retail competition outweigh the cost of removing a first-mover advantage.
- 2.67 We consider that the transparency and reporting obligations we have included in the proposed condition are the minimum necessary both to secure that SoRs are dealt with promptly and appropriately by KCOM, and to give potential entrants sufficient confidence that this will be the case.

### Conclusion

- 2.68 This SMP condition would be an appropriate and proportionate *ex ante* measure to support future access-based competition and complements the general network access discussed in the preceding subsection.
- 2.69 The form of requirement we are proposing only goes as far as we consider is necessary to address our concerns. Rather than specifying the exact process that KCOM must follow, the condition we are proposing for the WLA market would allow KCOM to implement its own process within certain parameters.
- 2.70 In order to implement this proposal, we propose to set the SMP Condition 3 published in Volume 4. Section 87(5) of the Act allows access obligations authorised by section 87(3) to include provision for securing fairness and reasonableness in the way in which requests for network access are made and responded to and for securing that the obligations in the conditions are complied with within periods and at times required by or under the conditions.

- 2.71 In making our proposals, we have also taken into account the factors set out in section 87(4) of the Act. In particular, having considered the economic viability of building access networks to achieve ubiquitous coverage that would make the provision of network access unnecessary, we consider that the SMP condition is required in the WLA market to secure effective competition, including economically efficient infrastructure-based competition, in the long term.
- 2.72 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the test set out in section 47 of the Act.

### **Consistency with the BEREC Common Positions**

- 2.73 We have taken utmost account of the BEREC Common Positions on wholesale leased lines and on wholesale (physical) network infrastructure access<sup>38</sup> in formulating our proposals discussed above, including BP6/BP15 (respectively) which appear to us to be particularly relevant in this context. We consider that our proposals are consistent with the best practice set out in the BEREC Common Positions.

## **Requirements for no undue discrimination (NUD) (WLA/LL Access)**

### **Our proposals**

- 2.74 We are proposing to retain the current obligation on KCOM that requires it to not unduly discriminate in relation to the provision of network access in the WLA and LL Access markets (extended to dark fibre access). We consider it is necessary to retain the obligation as KCOM has the ability and incentive to unduly discriminate against other telecoms providers in favour of its own retail divisions.
- 2.75 Regarding the provision of dark fibre, we propose to interpret this no undue discrimination requirement to mean that KCOM should not unduly favour its own active products over the provision of dark fibre to other telecoms providers. For example, the allocation of available dark fibre between KCOM's active product use and provisioning of dark fibre circuits to other telecoms providers should not be unduly discriminatory. Accordingly, if there is a limited amount of dark fibre available in a given route, KCOM should not unduly prioritise the provisioning of its own active services over the provisioning of dark fibre to other telecoms providers.
- 2.76 We consider that these proposed non-discrimination requirements are appropriate and proportionate in relation to KCOM's market power in the WLA and LL Access markets.

### **Our reasoning**

- 2.77 Strong downstream competition is vital to ensure the best outcomes for consumers. To achieve this, it is important that KCOM does not unduly discriminate between different

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<sup>38</sup> BoR (12) 127.

customers when supplying access services. Wherever possible, it should provide access to KCOM downstream, non-KCOM access seekers and internally to KCOM itself on the same terms. Without this level playing field, KCOM could engage in practices that could distort downstream competition: for example, by providing access on less favourable terms compared to those obtained by its own downstream businesses. This may in turn discourage alternative network deployment, negatively affecting consumer outcomes.

- 2.78 Generally speaking, we consider equivalence of inputs (EOI) to be the most effective form of non-discrimination obligation. EOI is a strict form of non-discrimination, i.e. a complete prohibition of discrimination with no discretion. However, we do not consider it appropriate to apply an EOI obligation in relation to the Hull Area in either the WLA or the LL Access markets, given the limited size of the market and the significant re-engineering work KCOM would have to carry out to existing systems and processes in order to comply with it.
- 2.79 We propose a NUD obligation as the minimum necessary to prevent discrimination in favour of KCOM's own downstream divisions. A NUD obligation allows KCOM more flexibility and may result in a more practical and cost-effective implementation of wholesale inputs in cases where it is economically justified, although it does allow for certain discriminatory conduct provided that the discrimination is not undue.
- 2.80 In the WLA and LL Access markets, our proposed condition provides that we will interpret undue discrimination to be when a dominant provider "does not reflect relevant differences between (or does not reflect relevant similarities in) the circumstances of customers in the transaction conditions it offers, and where such behaviour could harm competition."<sup>39</sup>

## Conclusion

- 2.81 We consider the proposed imposition of the NUD conditions as detailed above to be proportionate in that they seek to prevent discrimination that would adversely affect competition and ultimately cause detriment to citizens and consumers.
- 2.82 To implement these provisional decisions, we propose to set the SMP Conditions 4 and 5 in Volume 4. Section 87(6)(a) of the Act authorises the setting of an SMP condition requiring the dominant provider not to discriminate unduly against particular persons, or against a particular description of persons, in relation to matters connected with network access to the relevant network or with the availability of relevant facilities. Section 87(6)(b) of the Act authorises the setting of an SMP condition requiring the dominant provider to publish, in such manner as we may direct, all such information as they may direct for the purpose of securing transparency in relation to such matters.
- 2.83 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the test set out in section 47 of the Act.

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<sup>39</sup> Ofcom, 2005. [Undue discrimination by SMP providers](#), paragraph 3.5.

## Consistency with EC Recommendations and the BEREC Common Positions

- 2.84 We have taken due account of the 2013 EC Recommendation on costing and non-discrimination.<sup>40</sup> There are three recommendations relating to the WLA market which are particularly relevant in respect of our proposal to apply a non-discrimination condition to network access:
- a) that where EOI is disproportionate, National Regulatory Authorities (NRAs) should ensure that the SMP operator provides wholesale inputs on at least an EOO<sup>41</sup> basis;
  - b) that NRAs should ensure that when a non-discrimination obligation is imposed, access seekers can use the relevant systems and processes with the same degree of reliability and performance as the SMP operators' own downstream retail arm; and
  - c) that NRAs should require SMP operators subject to a non-discrimination obligation to provide access seekers with regulated wholesale inputs, which allow the access seeker to effectively replicate technically new retail offers of the downstream retail arm of the SMP operator, in particular where EOI is not fully implemented.
- 2.85 We propose to require KCOM to provide inputs on an NUD basis, as this is a case where EOI is disproportionate. In this we consider our approach is consistent with the EC's recommendation to require SMP operators to provide access on "at least an EOO basis" as we interpret EOO to be comparable with NUD when applied as we propose.
- 2.86 We note that the Costing and Non-discrimination Recommendation also provides for the application of a technical replicability test, whether undertaken by the SMP operator and provided to the NRA or undertaken by the NRA itself, to ensure that access seekers can technically replicate new retail offers of the downstream business of the SMP operator. Having taken utmost account of the Costing and Non-discrimination Recommendation in relation to technical replicability, we consider that the additional imposition of a technical replicability test in the context of this review is not appropriate or proportionate. We are satisfied that, where access seekers demand network access in the relevant fixed telecoms markets, the necessary provisions are in place to enable them to access regulated wholesale inputs that enable them to technically replicate KCOM's downstream retail offers.
- 2.87 Point 19 of that recommendation also provides that when imposing non-discrimination obligations, NRAs should impose KPIs in order to monitor effectively compliance with the non-discrimination obligation. Having taken due account of this Recommendation, we have, as in previous reviews, decided not to impose non-discrimination KPIs on KCOM at

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<sup>40</sup> EC, 2013. [\*Commission recommendation of 11 September 2013 on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment \(C\(2013\) 5761\)\*](#) (Costing and Non-Discrimination Recommendation) [accessed 6 June 2020].

<sup>41</sup> Equivalence of outputs, often referred to as no undue discrimination (NUD) – a less strict form of non-discrimination, i.e. more flexibility, certain discriminatory conduct possible. The dominant provider supplies all wholesale inputs to access seekers in a manner which is sufficiently comparable in terms of functionality and price to what the dominant provider supplies to its downstream divisions, but could be using different systems and processes.

this time. We consider that to do so in the circumstances of the Hull Area markets would increase the regulatory burden without any significant prospect that it would result in benefits to competition.

- 2.88 We have taken utmost account of the BEREC Common Position on wholesale (physical) network infrastructure access<sup>42</sup> in formulating our proposals for WLA, including in particular BP17 and BP 18. We have taken utmost account of the BEREC Common Position on wholesale leased lines<sup>43</sup> in formulating our proposals for LL Access, including in particular BP8 and BP9. Having had regard to BP19 and 19a as to WLA, and BP10 and BP10a as to LL Access, for the reasons given above we did not consider it appropriate to propose an EOI obligation in the light of the competition problems we have identified.

## Ensuring transparency

- 2.89 Requirements for transparency of charges, terms and conditions in markets in which one operator has SMP are complementary remedies to ensure that third-party telecoms providers can make effective use of the dominant operator's network access. We explain below our proposals to impose on KCOM requirements to:
- a) publish a Reference Offer;
  - b) notify changes to charges, terms and conditions; and
  - c) notify changes to technical information.

## Requirement to publish a Reference Offer

### Our proposals

- 2.90 We propose that KCOM must continue to publish a Reference Offer (RO) in relation to the provision of network access in the WLA and LL Access (including dark fibre) markets. We propose that the RO must continue to set out several matters at a minimum, including the terms and conditions for provisioning, technical information, and service level agreements and service level guarantees.
- 2.91 We consider that this proposed requirement is appropriate and proportionate in relation to KCOM's market power in the WLA and LL Access markets.
- 2.92 We also propose that the RO for dark fibre must set out an explanation of any differences between KCOM's provision of dark fibre services and its provision of corresponding active leased lines access services. This is intended to offer transparency within the RO and help achieve appropriate parity between dark fibre access and active wholesale leased lines services. Such transparency in the RO will also assist in detecting any anti-competitive

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<sup>42</sup> BoR (12) 127.

<sup>43</sup> BoR (12) 126.

behaviour and provide visibility of the terms and conditions on which other telecoms providers will purchase dark fibre services.

- 2.93 Our proposed condition, like the existing one, provides for Ofcom to give directions requiring KCOM to modify its RO.

## Our reasoning

- 2.94 A requirement to publish a RO has two main purposes:

- a) to assist transparency for the detection of potential anti-competitive behaviour; and
- b) to give visibility of the terms and conditions on which other telecoms providers will purchase wholesale services.

- 2.95 The RO helps ensure stability (in regard to investment and promoting market entry) in the relevant fixed telecoms markets, allowing for speedier negotiations, avoiding possible disputes and giving confidence to those purchasing wholesale services that they are being provided on non-discriminatory terms. Without this, market entry might be deterred to the detriment of long-term competition and hence consumers.

- 2.96 The proposed RO obligation specifies the information to be included in the RO and how the RO should be published. We are proposing to require the RO to set out (as a minimum):

- a description of the services on offer, including technical characteristics and operational processes for service establishment, ordering and repair;
- terms and conditions for the provision of network access, including charges, terms of payment and billing procedures, ordering and provisioning procedures, dispute resolution procedures, details of relevant intellectual property rights, details of duration and renegotiation of agreements and confidentiality provisions;
- information relating to technical standards for network access, interfaces and points of interconnection;
- conditions relating to maintenance and quality, i.e. service level agreements (SLAs) and guarantees (SLGs); timescales for acceptance or refusal of a request for supply and delivery of services and support services, compensation payable and provisions on limitation of liability and indemnity and procedures for service alterations;
- conditions for access to ancillary, supplementary and advanced services;
- details of traffic/network management [WLA]; and
- details of measures to ensure compliance with respect to network integrity [WLA].

- 2.97 To the extent that KCOM uses the service(s) in a different manner from other telecoms providers or uses similar services, we propose that KCOM be required to publish an Internal RO in relation to those services. This Internal RO would allow Ofcom and telecoms providers to identify any differences in the processes for internal use of network access compared to such use by third parties. The Internal RO should at a minimum set out the same matters as set out in the paragraph immediately above.

## Conclusion

- 2.98 We consider that the proposed requirement in the WLA and LL Access markets for KCOM to publish a Reference Offer is appropriate and proportionate in that it is targeted at addressing the market power that we have provisionally found KCOM holds.
- 2.99 We consider that the information that we are requiring to be published in the Reference Offer is the minimum that is necessary for providing transparency for monitoring potential anti-competitive behaviour and to give visibility on the terms and conditions of network access.
- 2.100 To give effect to the Reference Offer proposals we propose to set the draft SMP Condition 5 in Volume 4. Section 87(6)(c) of the Communications Act 2003 authorises the setting of SMP services conditions requiring the dominant provider to publish, in such a manner as Ofcom may direct, the terms and conditions on which it is willing to enter into an access contract. Section 87(6)(d) also permits the setting of SMP conditions requiring the dominant provider to include specified terms and conditions in the Reference Offer. Finally, section 87(6)(e) permits the setting of SMP conditions requiring the dominant provider to make such modifications to the Reference Offer as may be directed from time to time.
- 2.101 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the test set out in section 47 of the Act.

## Consistency with EC Recommendation and the BEREC Common Positions

- 2.102 The Costing and Non-Discrimination Recommendation provides that NRAs should require SMP operators to implement SLAs alongside KPIs, which should include SLGs in the case of a breach of the SLA. The Recommendation also indicates that payment of financial penalties should, in principle, be made automatic and be sufficiently dissuasive. These recommendations apply to the WLA market only. We have taken into account the Costing and Non-Discrimination Recommendation in relation to SLAs and SLGs in our proposed SMP Condition.
- 2.103 In formulating these proposals, we have also taken utmost account of the BEREC Common Positions on wholesale leased lines<sup>44</sup> (including BP16, BP22 and BP23) and wholesale (physical) network infrastructure access<sup>45</sup> (including BP26, BP32 and BP33) which appear to us to be particularly relevant in this context.
- 2.104 In relation to the objective to assist transparency for the monitoring of potential anticompetitive behaviour; and giving visibility to the terms and conditions on which other telecoms providers will purchase wholesale services, the BEREC Common Positions identify, among other things, as best practice that:

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<sup>44</sup> BoR (12) 126.

<sup>45</sup> BoR (12) 127.

- a) “**BP16/BP26** NRAs should require SMP operators to provide clarity of terms and conditions of access (including those relating to relevant ancillary services) by publishing a Reference Offer (RO), the key elements of which should be specified or approved by the NRA. All material contractual terms and conditions which are known or knowable at the time of publication should be covered clearly.
- b) **BP16/BP26a** NRAs should require SMP operators to take into account any reasonable views of wholesale customers in their RO, in particular regarding the evolution of the service offered.
- c) **BP16/BP26b** NRAs should require SMP operators to publish the RO (i.e. make it operational) within a reasonable time after NRAs have imposed the obligation to grant access. NRAs should give guidance on the reasonable timeframe on a case by case basis.
- d) **BP16/BP26c** NRAs should require SMP operators to update the RO as necessary, and in a timely manner, to reflect relevant changes such as developments in line with market and technology evolution and/or changes to prices, terms and conditions for existing services or technical and operational characteristics. Where NRAs follow a preapproval process, NRAs should further require SMP operators to inform them before publishing the necessary amendments to the RO.
- e) **BP16/BP26d** Where applicable, NRAs should impose an obligation on SMP operators in relation to the minimum amount of information to be made available in the RO.”

2.105 In relation to the objective of achieving reasonable quality of access products (operational aspects), the BEREC Common Positions identify, among other things, as best practice that:

- a) “**BP22/BP32** NRAs should require SMP operators to provide a reasonable defined level of service.
- b) **BP22/BP32a** Service Level Agreements (SLAs) should cover specific service areas. Services areas when SLAs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).
- c) **BP22/BP32b** SLAs should be made available to wholesale operators. To ensure maximum transparency and comparability of the terms provided by SMP operators to alternative operators and their downstream arm, all SLAs could be made available to all relevant wholesale customers (including those from outside a specific Member State). For example, SMP operators could make them available on demand or automatically publish these on their website (as part of their RO).
- d) **BP22/BP32c** NRAs should take oversight for the process of setting SLAs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.
- e) **BP23/BP33** NRAs should impose a generic requirement on SMP operators to provide Service Level Guarantees (SLGs).

- f) **BP23/BP33a** SLGs should cover all necessary specific service areas. Service areas where SLGs are most likely to be necessary are ordering, delivery, service (availability) and maintenance (repair).
- g) **BP23/BP33b** SLG payments should be made without undue delay and should be proactive in nature. That is, with a pre-established process for the payment and billing of the SLGs among operators and without the need for alternative operators to request the intervention of any third party i.e. NRAs or courts.
- h) **BP23/BP33c** NRAs should take oversight for the process of setting SLGs. NRAs should determine the level of their involvement in this process by taking into account specific market circumstances and particular concerns for discriminatory behaviour.”

2.106 We consider that our proposals are broadly consistent with the best practice set out in the BEREC Common Position. We note the general obligation in our proposed SMP Condition 1 that access should be provided on fair and reasonable terms and conditions including as to charges. This has the effect of requiring KCOM to consider the impact on access seekers of the terms and conditions it includes in its RO, and to require it to update the RO where appropriate to reflect changes in technology and the market.

## Direction requiring KCOM to amend its RO (WLA only)

### Our proposals

2.107 We propose to give a direction using the power in the proposed SMP condition, requiring KCOM to modify its WLA Reference Offer so as to remove provisions which require access seekers to be located at exchanges; and to provide appropriate interconnection arrangements anywhere in the Hull Area.

### Our reasoning

2.108 We have interviewed stakeholders in order to determine why KCOM’s fibre WLA product is not currently purchased by any provider. The evidence paints a mixed picture. There is a perceived lack of space in KCOM’s NGA exchanges.<sup>46</sup> Stakeholders suggest that a combination of cost (in particular, the one-off costs associated with building space in

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<sup>46</sup> In a meeting between [redacted] and KCOM on 2 October 2019, KCOM noted that WFLA provides a mechanism for unbundling KCOM exchanges but “*accommodation areas for such co-location facility, while scoped, do not currently exist as no provider chose to use KCOM’s LLU offering*”, KCOM’s 1st RFI response [redacted]. Vodafone has indicated that one of the reasons it does not currently have a point of presence in the Hull Area may be due to the difficulties associated with being able to access colocation space. Meeting between Ofcom and Vodafone, 24 February 2020.

- exchanges)<sup>47</sup>, and a perception among access seekers that KCOM may be unwilling to work with them<sup>48</sup> all play a role.
- 2.109 Evidence from some [redacted] providers suggests that the cost associated with the build of accommodation services may be prohibitive to certain entrants.<sup>49</sup> Some access seekers have looked at ways of accessing KCOM's WLA services that do not involve locating their equipment in exchanges.<sup>50</sup>
- 2.110 The model of requiring operators with SMP to offer accommodation services in their exchanges was originally developed for the provision of WLA services over copper networks. Copper 'local loop unbundling' (LLU) was originally exchange-based because the copper lines terminated in the exchange, therefore this was the logical and easiest place to hand them over (i.e. unbundle) to an LLU operator. Furthermore, the early LLU technologies, e.g. ADSL/ADSL2+ performed well over the typical line lengths between exchanges and end-customer premises. In addition, the equipment for these early technologies required the space and power afforded by exchange buildings. Therefore, entrants to the WLA market had to purchase accommodation services in order to unbundle copper exchanges.
- 2.111 However, with an all-fibre access network, the need for an access-seeker to locate equipment in the local exchange, and therefore purchase associated accommodation services, no longer applies. This is principally because fibre-based transmission networks do not suffer the same degree of signal attenuation as copper-based networks. Operators building new full-fibre networks have more flexibility as to where they locate their network equipment. This includes the option of longer fibre cable lengths, freeing operators from needing to locate their equipment in an exchange. As noted above, KCOM has completed its roll-out of full-fibre, and we are only proposing to regulate the provision of WLA services over KCOM's fibre network. It therefore no longer appears to be the case that access seekers should require accommodation services in order to enter the WLA market.
- 2.112 We have considered the impact of the above analysis on the appropriate regulation for KCOM.
- 2.113 Currently, KCOM is required to provide network access on reasonable request, and to produce a Reference Offer which includes information as to the locations at which network access will be provided and the conditions for access to ancillary services.<sup>51</sup> In order to access KCOM's WLA services the access seeker is required to interconnect their network

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<sup>47</sup> MS3 considers that the cost of unbundling several of KCOM's exchanges too high. Call between Ofcom and MS3, 8 June 2020. Connexin considers that the number of exchanges relative to the number of properties and the unknown costs of unbundling have deterred it from pursuing the option – Connexin considers this option too risky. Call between Ofcom and Connexin, 7 November 2019 and email from Connexin, 1 July 2020. [redacted].

<sup>48</sup> [redacted]. [redacted].

<sup>49</sup> [redacted] and [redacted], KCOM 1<sup>st</sup> RFI response.

<sup>50</sup> [redacted]. MS3 has enquired about the possibility of arranging its own accommodation services, and obtaining direct fibre connection from KCOM's WLA equipment to this point outside the exchange. Call between Ofcom and MS3, 8 June 2020. [redacted].

<sup>51</sup> 2018 WLA/WBA Statement, Conditions 1 and 4, see in particular Condition 4.2A b) and d).

(usually via a Layer 2 Ethernet switch) to KCOM's OLT. KCOM's current product which does this is called WFLLA CableConnect. KCOM's RO for this product specifies that "*WFLLA CableConnect provides a dedicated fibre connection between the designated ethernet port on a KCOM OLT used to serve End Users in the Hull Area and an ethernet port on the CP's transport switch that is located in the CP Equipment Room at the same WFLLA Site as KCOM's OLT*". It further specifies that WFLLA CableConnect is available at those WFLLA Site locations "*as notified by KCOM to the CP from time to time*".<sup>52</sup> WFLLA Site is defined by KCOM as "*the site of an operational building of KCOM where the CP is able to connect to the WFLLA Service*."<sup>53</sup>

- 2.114 These provisions have the effect of forcing entrants to locate in KCOM's exchanges, regardless of the preferences of the access seeker. Where there is a lack of space in exchanges, it may force the access seeker to incur the costs of carrying out building work. An entrant that wants a different sort of access must go through a more uncertain process of requesting a new form of access by submitting a Statement of Requirements to KCOM under existing SMP Condition 2.
- 2.115 Our provisional position is that since it is now not technologically necessary for an access seeker to locate in an exchange, there is no regulatory reason why the Reference Offer should list in advance all the locations where KCOM will provide access, and no economic reason why the access seeker should be forced to locate in KCOM's exchanges rather than in space it owns itself or space it rents from a third party. SMP regulation should therefore secure that KCOM provides suitable interconnect products that allow traffic to be handed over from KCOM's network to the access seeker's network anywhere in the Hull Area.
- 2.116 An access seeker would need to establish its own point of presence outside of KCOM's NGA exchange. This is common practice. For example, an access seeker could purchase rack space in a data centre.
- 2.117 KCOM is required by the existing SMP Condition to set out 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 network access); to set out the locations at which access will be provided; and also to set out the technical standards for network access, including as to security. We propose to keep these requirements.
- 2.118 We have considered whether we should specify suitable interconnect products. We do not propose to do so, as we understand that the precise needs of each access seeker are likely to vary according to their size and network configuration, and so may require different interconnect products.
- 2.119 However, the existing SMP Condition on the Reference Offer provides for Ofcom to give direction requiring KCOM to modify the Reference Offer, and requires KCOM generally to comply with such directions as Ofcom may give from time to time. As set out above, we

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<sup>52</sup> KCOM, 2019. Reference Offer Wholesale FibreLine Local Access, [Schedule 2: WFLLA CableConnect Service](#). [Accessed 3 July 2020].

<sup>53</sup> KCOM. Reference Offer for the Provision of Accommodation Services, [Schedule 1: Definitions](#). [Access 3 July 2020].

are proposing to keep that direction making power unchanged. For all the reasons set out above, and in order to secure the provision of network access on fair and reasonable terms and to promote competition, we propose to give a direction under that power to KCOM, requiring it to modify its Reference Offer so as to remove provisions which require or have the effect of requiring access seekers to be located at exchanges; and to provide appropriate interconnection arrangements anywhere in the Hull Area.

- 2.120 Consistent with its obligation in proposed Condition 1 to provide access on fair and reasonable terms, we would expect KCOM to engage with access seekers to understand their requirements, and to provide a technically suitable interconnection that allows traffic to be handed over from KCOM's network to the access seeker's network. We would expect a limited range of interconnection products, described in the RO, to be appropriate for this.
- 2.121 We propose that KCOM's charges would be fair and reasonable if they are consistent with making a reasonable return and a reasonable contribution to common cost recovery, and do not equate to a margin squeeze. In order to inform our enforcement priorities, we typically identify appropriate benchmark prices against which to compare KCOM's prices. We propose to benchmark KCOM's prices for interconnect products against Openreach's prices for equivalent products or combinations of products.
- 2.122 We do not consider that developing appropriate interconnection products is likely to be disproportionately onerous for KCOM. The current regulatory condition requires KCOM to carry out a survey and potentially building work in each of the NGA exchanges at the request of the access seeker. By contrast, we consider that KCOM already provides products which contain the elements that would be needed for an appropriate set of interconnection products. For example, the Broadband Service Interconnect Link (BSIL) Backhaul Service can be provided to either a telecoms provider's point of presence or a designated point-of-interconnect (PoI). The PoI use case is equivalent to an in-span interconnect (ISI) interconnect variant, similar to type of interconnection we would envisage being possible as part of this remedy. While the BSIL contains additional functionality in respect of WFLA management which is not required for a WLA interconnection and so is likely to be relatively more expensive and inappropriate for use in this regard, the example suggests that there are already workable solutions for linking KCOM's network to an access seeker's network.
- 2.123 We propose that KCOM should publish its amended RO within 3 months of the publication of our final statement.

## Conclusion

- 2.124 We consider that this requirement is the minimum necessary to secure that KCOM provides an appropriate RO, which does not tie access seekers unnecessarily to the purchase of space in its NGA exchanges. In conjunction with our non-discrimination remedy (paragraphs 2.74 to 2.88), it would promote entry to the WLA market in a proportionate manner.

- 2.125 We propose to implement this by giving a direction under section 49 of the Act and proposed Condition 5.11, a draft of which is set out in Volume 4.
- 2.126 In Section 4 below, we explain why the giving of this direction would satisfy the test set out in section 49 of the Act.

## Consistency with BEREC Common Position

- 2.127 In formulating these proposals, we have also taken utmost account of the BEREC Common Position on wholesale (physical) network infrastructure access<sup>54</sup>

## Requirement to notify changes to charges, terms and conditions

### Our proposals

- 2.128 We propose to continue to require KCOM to give advance notice before making changes to its charges or terms and conditions for the provision of existing or new network access in the WLA and LL Access markets (which will now include dark fibre access).

### Our reasoning

- 2.129 This condition would require KCOM to publish an access charge change notice (ACCN) relating to any changes to charges for wholesale network access services. We consider that this requirement would be appropriate and proportionate for the WLA and LL Access markets.
- 2.130 Notification of changes to charges at the wholesale level has the joint purpose of improving transparency so as to detect possible anti-competitive behaviour and giving advance warning of price changes to competing providers who purchase wholesale access services. The latter purpose ensures that competing providers have sufficient time to plan for such changes, as they may want to restructure the prices of their downstream offerings in response to charge changes at the wholesale level. Notifying changes therefore helps to ensure stability in markets.
- 2.131 There may be some disadvantages to advance notification, particularly in markets where there is some competition. It can lead to a ‘chilling’ effect where other telecoms providers follow KCOM’s charges rather than act dynamically to set competitive charges. We do not consider, on balance, that this consideration undermines the rationale for imposing a notification of charges condition in these markets.
- 2.132 We propose to align the requirements in the WLA and LL Access markets to so as to ensure that ACCNs include the following:
- a) a description of the network access in question;

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<sup>54</sup> BoR (12) 127.

- b) a reference as to where the terms and conditions associated with the network access in question can be found in KCOM's RO;
  - c) the date on which the new charges take effect (or the period over which the new charges will apply); and
  - d) the current and proposed charge.
- 2.133 We propose to continue to require KCOM to publish advance notification of changes according to the following notice periods:
- Changes involving new network access – 28 days;
  - Price reductions for existing network access – 28 days;
  - Price rises for existing network access which return the charge to the original level after the end of a temporary price reduction – 28 days;
  - Any other changes for existing network access – 56 days.
- 2.134 We note that we have proposed a notification period of 90 working days for most price increases for the rest of the UK. However, we consider that conditions in the Hull Area, and the differences between KCOM and BT's networks, are such that 56 days is sufficient.

## Conclusion

- 2.135 We consider that the proposed requirement to notify charges, terms and conditions is proportionate in that it only requires that information that other telecoms providers would need to know (in order to adjust for any changes) would be notified. The proposed notification periods are the minimum required to allow changes to be reflected in downstream offers.
- 2.136 To implement these proposals, we propose to set the draft SMP Condition 6 in Volume 4. Section 87(6)(b) of the Act authorises the setting of SMP conditions requiring the dominant provider to publish, in such manner as OFCOM may from time to time direct, all such information as they may direct for the purpose of securing transparency in relation to matters connected with network access. Section 86(6)(c) of the Act authorises the setting of SMP services conditions which require a dominant provider to publish, in such manner as Ofcom may direct, the terms and conditions on which it is willing to enter into an access contract.
- 2.137 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the test set out in section 47 of the Act.

## Consistency with EC Recommendation and the BEREC Common Position

- 2.138 We consider that the proposed condition is consistent with the BEREC Common Positions on wholesale leased lines<sup>55</sup> (including BP16) and wholesale (physical) network infrastructure access<sup>56</sup> (including BP26).

## Requirement to notify changes to technical information

### Our proposals

- 2.139 We propose to continue to require KCOM to publish in the WLA and LL Access markets (now including dark fibre access) any new or modified technical characteristics, points of network access and technical standards within a reasonable time period and at least 90 days in advance of KCOM entering into a contract to provide new network access or making changes to existing network access, unless Ofcom consents otherwise.

### Our reasoning

- 2.140 We consider that the requirement to notify technical information which we are proposing in each market is appropriate and proportionate; and complements the requirement to publish a Reference Offer.
- 2.141 The aim of this regulation in providing advance notification of changes to technical characteristics is to ensure that competing providers have sufficient time to respond to changes that may affect them. For example, a competing provider may need to introduce new equipment or modify existing equipment or systems to support a new or changed technical interface. Similarly, a competing provider may need to make changes to its network in order to support changes in the points of network access or configuration.
- 2.142 This remedy is important in the fixed telecoms markets to ensure that providers who compete in downstream markets are able to make effective use of existing or, where applicable, new wholesale services provided by KCOM. The technical information required by competing providers includes (but is not limited to):
- information on network configuration;
  - locations of the points of network access; and
  - technical standards (including any usage restrictions and other security issues).
- 2.143 We believe that the requirement to publish changes 90 days in advance is an appropriate safeguard to allow sufficient time for competing providers to make modifications to their network to enable them to support such changes.
- 2.144 For the LL Access market, we propose to continue to allow the exception to the minimum notice period for amendments to technical specifications that are developed and agreed through the NICC Standards Limited forum. Telecoms providers are likely to be aware of

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<sup>55</sup> BoR (12) 126.

<sup>56</sup> BoR (12) 127.

NICC specifications due to their participation in the forum and in these circumstances should KCOM provide notification of changes based on the NICC standard we would not consider it necessary to impose a 90-day notice period.

## Conclusion

- 2.145 We consider that the proposed requirement to notify technical information is proportionate in that it only requires information that other telecoms providers would need to know and that the proposed notification periods are the minimum required to allow changes to be reflected in downstream offers.
- 2.146 To give effect to these proposals we propose to set the draft SMP Condition 7 at Volume 4. As set out above section 87(6)(b) of the Act authorises the setting of SMP conditions which require a dominant provider to publish, in such manner as Ofcom may direct, all such information for the purpose of securing transparency in relation to network access as Ofcom may direct.
- 2.147 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the test set out in section 47 of the Act.

## Consistency with the BEREC Common Positions

- 2.148 We consider that the proposed condition is consistent with the BEREC Common Positions on wholesale leased lines<sup>57</sup> (including BP18) and wholesale (physical) network infrastructure access<sup>58</sup> (including BP29 and BP30).

## Requirement for quality of service (WLA/LL Access including dark fibre)

### Our proposals

- 2.149 We are proposing to continue to apply an SMP condition in the WLA market which requires KCOM to comply with any Quality of Service (QoS) reporting requirements Ofcom may direct. We note that we have not to date imposed any such direction on the WLA market.
- 2.150 We also now propose to impose this obligation in relation to the LL Access market (including dark fibre).
- 2.151 This SMP condition provides a mechanism whereby we can direct KCOM to publish QoS information. Particularly as dark fibre access is a new service not previously provided by KCOM, there is a risk that KCOM will favour its downstream retail business in the provision of this service, and it has the ability and incentive to reduce QoS where such action would reduce its costs (thus increasing its profits). Such action by KCOM would undermine other telecoms providers' ability to compete with KCOM's downstream business.

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<sup>57</sup> BoR (12) 126.

<sup>58</sup> BoR (12) 127.

- 2.152 This obligation will allow us to make directions as to the publication of QoS information by KCOM if it becomes necessary and proportionate to do so, to ensure transparency.

## Our reasoning

- 2.153 As a vertically integrated operator, KCOM has the ability to favour its own downstream business over third-party telecoms providers by discriminating on price or non-price factors such as the terms and conditions of access. The latter could involve variations in quality of service (either in service provision and maintenance or in the quality of network service provided by KCOM to external providers compared to its own retail operations). This has the potential to distort competition at the retail level by placing third-party telecoms providers at a disadvantage in terms of the services they can offer to compete with the downstream retail business of the vertically integrated operator. Where it includes a distinction between internal and external supply, the publication of QoS information by KCOM can allow other telecoms providers in the Hull Area to ensure that the service they receive is equivalent to that provided by KCOM to its own retail divisions.
- 2.154 Additionally, KCOM has the ability and incentive to reduce QoS where such action would reduce its costs (thus increasing its profits). This consumer harm is a direct result of KCOM's market power as, in a competitive market, providers are driven to maximise QoS to acquire and retain customers. The publication of QoS information by KCOM would enable us to monitor QoS and ensure that the QoS received by consumers in the Hull Area is comparable to that received by consumers in the rest of the UK.
- 2.155 This obligation requires KCOM to publish information as directed by us, rather than requiring KCOM to publish specific information from the date of the imposition of the obligation. This is the same condition imposed previously in the WLA market and is designed to support transparency as to QoS in the Hull Area. However, we may consider specifying publication in the future if we consider that it becomes necessary and proportionate to do so.

## Conclusion

- 2.156 We consider that the proposed requirements set out above are proportionate in that they are addressing the market power that we have provisionally found KCOM holds. Our proposals go no further than is necessary to address KCOM's ability and incentive to provide poor quality provisioning and repair services.
- 2.157 Following on from the above, to give effect to this proposal, we propose to set SMP Condition 8 at Volume 4 requiring KCOM to comply with any QoS reporting requirement we may direct in relation to network access it provides for the WLA and the LL Access markets (including dark fibre). Section 87(6)(b) of the Act authorises the setting of SMP services conditions requiring the dominant provider to publish, in such manner as OFCOM may from time to time direct, all such information as they may direct for the purpose of securing transparency in relation to matters connected with network access.

2.158 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the test set out in section 47 of the Act.

## Consistency with the BEREC Common Positions

2.159 We have had utmost account to the BEREC Common Positions on wholesale leased lines<sup>59</sup> (including BP22, BP24) and wholesale (physical) network infrastructure access<sup>60</sup> (including BP32, BP34). We noted the recommendation that ‘NRAs should impose a generic requirement on SMP operators to provide Key Performance Indicators (KPIs) as a means to monitor compliance with a non-discrimination obligation and ensure that SMP operators fulfil their SLAs (unless there is evidence that this is unnecessary or would not be cost effective)’. We consider that where there are SLGs in the RO, and absent specific evidence of QoS failings by KCOM generally, it would be disproportionate at this stage to impose QoS obligations or QoS reporting obligations. The appropriate incentives on KCOM are secured by Ofcom having a power of direction in regard to publishing of information.

## Regulatory Financial Reporting

2.160 The accounting separation and cost accounting obligations we are proposing form part of a package of remedies to address the competition concerns identified in this consultation.

### Proposed accounting separation requirements

2.161 The proposed accounting separation requirement allows Ofcom and stakeholders to monitor the activities of KCOM to ensure that, where relevant, it does not discriminate unduly in favour of its own downstream business and to monitor KCOM’s activities in respect of the fair and reasonable pricing obligations. This, combined with the cost accounting obligation, helps us to ensure that costs are not inappropriately loaded onto one set of regulated services to the benefit of KCOM, where KCOM uses primarily another set of regulated services.

2.162 We consider that our proposal to impose an accounting separation obligation, together with a cost accounting obligation (see below), in respect of KCOM’s provision of WLA services and LL Access will help ensure these regulatory reporting objectives are met.

### Proposed cost accounting requirements

2.163 The proposed cost accounting obligation is necessary to ensure the appropriate maintenance and provision of accounts in order to monitor KCOM’s activities with regard to the pricing remedies we are implementing and to monitor their effectiveness in addressing the competition concerns. It is also necessary to secure that information continues to be created and captured so as to secure, and to give stakeholders confidence, that pricing can continue to be appropriately regulated in future, creating the conditions

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<sup>59</sup> BoR (12) 126.

<sup>60</sup> BoR (12) 127.

for the price controls we are now proposing to impose to be effective. It also relates to the need to ensure competition develops fairly, to the benefit of consumers, by providing transparency of KCOM's compliance with rules set to address the risk of exploitative or anti-competitive pricing.

- 2.164 We consider that our proposal to impose an accounting separation obligation, together with a cost accounting obligation, will help to ensure that these objectives are met.

## **Our proposals and conclusion**

- 2.165 We set out our detailed proposals in relation to the SMP conditions that impose the cost accounting and accounting separation remedies in Section 3.
- 2.166 Sections 87(7) and 87(8) of the Act allow us to impose accounting separation conditions on a dominant provider relating to network access to the relevant networks or the availability of relevant facilities, including requirements about the accounting methods to be used in maintaining the separation.
- 2.167 Section 87(6)(b) of the Act authorises us to set SMP conditions which require a dominant provider to publish, in such manner as we may direct, such information as we may direct, for the purpose of securing transparency in relation to matters connected with network access to the relevant network or with the availability of the relevant facilities. Article 9(1) of the Access Directive specifies that such information can include accounting information.
- 2.168 Section 87(9)(c) authorises us to set conditions imposing on the dominant provider such rules as we may make about the use of cost accounting systems for the purposes of price controls in relation to matters connected with the provision of network access to the relevant network, or with the availability of the relevant facilities; and such rules as we may make in relation to those matters about the recovery of costs and cost orientation.
- 2.169 Under section 87(10) this can include conditions requiring the application of presumptions in the fixing and determination of costs for the purposes of the price controls, recovery of costs and cost orientation rules, and the cost accounting system. Where such conditions are imposed, section 87(11) imposes a duty on us to set an SMP condition which requires the dominant provider to publish a description of the cost accounting system and to include in that description details of:
- the main categories under which costs are accounted for; and
  - the rules applied for the purposes of that system with respect to the allocation of costs.
- 2.170 These provisions implement, and must be read in the context of, Articles 9, 11 and 13 of the Access Directive, and Articles 17 and 18 and Annex VII(2) of the Universal Service Directive.
- 2.171 In Section 4 below, we explain why the setting of these draft SMP conditions would satisfy the tests set out in sections 47 and 88 of the Act.
- 2.172 We must also take due account of relevant recommendations, although in light of particular factors it may be appropriate to depart from them. We consider the 2005 EC

Recommendation on accounting separation and cost accounting systems<sup>61</sup> to be particularly relevant.

- 2.173 We have also considered the 2013 EC Recommendation on consistent non-discrimination obligations and costing methodologies to promote competition and enhance the broadband investment environment.<sup>62</sup>

## Requirement to produce a Pricing Transparency Report (LL Access only)

- 2.174 KCOM is currently required to submit to Ofcom an annual Pricing Transparency Report (PTR) relating to the LL Access market. We are proposing that this requirement should continue, and to extend this requirement to cover the dark fibre remedy.
- 2.175 For LL Access, KCOM is currently required to list all the wholesale leased lines access services that are provided by KCOM (both internal and external sales) that fall within the regulated wholesale leased lines access services market in the Hull Area, accompanied with information about each leased line. For dark fibre access, we would require KCOM to provide the equivalent information for all dark fibre links sold (both internally and externally) that fall within the regulated dark fibre access market in the Hull Area.

### Our reasoning

- 2.176 A requirement to produce a PTR and submit it to us would provide us with information about the actual charges that are being paid by customers for active LL Access and dark fibre. This information will enable us to monitor charges against the benchmarks we have proposed as appropriate for KCOM's dark fibre and active LL Access products (see paragraphs 2.21 to 2.23 above), and determine whether KCOM is complying with the obligation to charge fair and reasonable charges.
- 2.177 Moreover, a PTR enables the monitoring of KCOM's compliance with its other SMP conditions, such as the obligation to publish a RO and not depart from the charges, terms and conditions set out within it, and the obligation not to discriminate unduly.

### Conclusion

- 2.178 We consider that imposing this requirement on KCOM is necessary to achieve the aim and effect of the regulation in the LL Access market where we provisionally find KCOM to hold SMP. We therefore propose to reimpose the condition on KCOM to produce a PTR to be sent to us on an annual basis.

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<sup>61</sup> [Commission Recommendation of 19 September 2005](#) on accounting separation and cost accounting systems under the regulatory framework for electronic communications (2005/698/EC) (the 2005 EC Recommendation) [Accessed 9 July 2020].

<sup>62</sup> Costing and Non-Discrimination Recommendation.

- 2.179 The current condition requires KCOM to include in the PTR the following information separately for each wholesale connection:
- For active LL Access products:
    - a specification of each of the service type, interface, bandwidth and circuit orientation;
    - the amount of the connection charge;
    - the date on which the rental charge was agreed;
    - any fixed or minimum term agreed by the dominant provider and a third party in respect of the rental charge;
    - the amount and the frequency of the rental charge; and
    - such characteristics of each connection as required to fully determine the connection charge and annual rental charge from the KCOM price list.
  - For dark fibre LL Access products:
    - a specification of each of the service type, presentation and circuit orientation;
    - the amount of the connection charge;
    - the date on which the rental charge was agreed;
    - any fixed or minimum term agreed by the dominant provider and a third party in respect of the rental charge;
    - the amount and the frequency of the rental charge; and
    - such characteristics of each connection as required to fully determine the connection charge and annual rental charge from the KCOM price list.
- 2.180 Section 87(6)(b) of the Act authorises the setting of SMP services conditions requiring the dominant provider to publish, in such manner as OFCOM may from time to time direct, all such information as they may direct for the purpose of securing transparency in relation to matters connected with network access.
- 2.181 In Section 4 below, we explain why the setting of this SMP condition would satisfy the test set out in section 47 of the Act.

## Consistency with BEREC

- 2.182 We consider that the proposed condition is consistent with the BEREC Common Positions on wholesale leased lines<sup>63</sup> (including BP30 and BP35) and wholesale (physical) network infrastructure access<sup>64</sup> (including BP41 and BP48).

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<sup>63</sup> BoR (12) 126.

<sup>64</sup> BoR (12) 127.

## Consultation question

Question 2.1: Do you agree with our proposed remedies? Please set out your reasons and supporting evidence for your response.

## 3. Detail of regulatory financial reporting requirements

### Introduction

#### Purpose of regulatory reporting

- 3.1 As we set out in the 2019 KCOM Regulatory Reporting Statement<sup>65</sup> (2019 KCOM RFR Statement) KCOM is currently subject to regulatory financial reporting requirements in relation to the SMP markets in which it is regulated. These requirements are imposed on KCOM by way of a significant market power (SMP) condition set in each regulated market, and directions imposed in each market pursuant to the associated SMP condition. The SMP condition sets out our general regulatory financial reporting requirements, including accounting separation and cost accounting. The directions then set out our detailed regulatory financial reporting requirements.
- 3.2 As part of these requirements, each year KCOM must prepare Regulatory Financial Statements (RFS). The RFS are prepared according to a defined framework and methodology and include published statements as well as information that is not published, but submitted to Ofcom privately.
- 3.3 KCOM's regulatory financial reporting obligations secure the creation and retention of the information needed for our regulation of SMP markets, particularly price controls, to be, and be seen to be, effective. They provide us with the information necessary to help us make informed regulatory decisions and information necessary to assess the impact and effectiveness of our decisions, for example, trends in the usage and returns associated with regulated services. They also enable us to monitor and, if necessary, enforce no undue discrimination and price control regulations.
- 3.4 Publication of some information helps inform stakeholders so they can have confidence that KCOM is complying with its obligations, and that regulation is effective and appropriate to achieve its purpose. It enables stakeholders to identify and bring issues to our attention and effectively contribute to the regulatory regime. This promotes confidence in the market, which in turn creates the conditions for effective competition.
- 3.5 As we set out in the 2019 KCOM RFR Statement, effective reporting should have the following attributes:
- a) **Relevance.** The information needs to answer the right questions, in the right way and at the right time.
  - b) **Reliability.** The underlying data must be reliable, suitable rules for treatment of data must be chosen and those rules need to be followed.

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<sup>65</sup> Ofcom, February 2019. [KCOM Regulatory Financial Reporting: Statement](#).

- c) **Transparency.** The basis of preparation should be understood by the users of the reports and the presentation of the data should be clear.
- d) **Proportionality.** The reporting requirements should be proportionate to the benefits.

3.6 Our main regulatory financial reporting proposals are summarised in Figure 3.1 below.

**Figure 3.1: Summary of the regulatory financial reporting proposals**

#### Regulatory Financial Reporting Proposals

In respect of the markets where we have made a provisional SMP finding (WLA and LL Access (including dark fibre)), maintain the requirement on KCOM to publish KCOM wide and market level information at the current level.

Require KCOM to provide service level information in respect of certain WLA services and LL Access (including dark fibre) in confidence to Ofcom.

### Reporting for SMP Markets

- 3.7 We currently require KCOM to publish information relating to the preparation of the RFS, the financial performance of regulated markets and assurance over the RFS. We also require KCOM to provide us with information privately. We discuss each of these requirements below in relation to markets with a provisional SMP finding, we set out our proposals and explain how these will be implemented.
- 3.8 In respect of the following wholesale markets, we are not proposing to make an SMP finding:
- a) WBA
  - b) WFAEL
  - c) ISDN 2
  - d) ISDN 30
  - e) WCO
- 3.9 Cost Accounting and Accounting Separation remedies relating to these markets would therefore fall away. Whilst we have proposed a 12-month transition period where there would be some regulation in relation to the WFAEL, ISDN2, ISDN30 and WCO markets, none of these remedies proposed for the transitional period require a financial reporting remedy.
- 3.10 In respect of the following markets where we have proposed to make an SMP finding, we propose a Financial Reporting SMP Condition to impose Cost Accounting and Accounting Separation Remedies:
- a) WLA
  - b) LL Access (including dark fibre)

- 3.11 The purpose of this SMP condition, and our consideration of the legal tests for imposing it, is set out in Section 2 above.
- 3.12 We intend to impose the same SMP condition 8 as set out in the 2018 WLA/WBA Statement to apply to these markets (SMP Condition 9 in Volume 4 of this consultation), with the exception of:
- a) a proposal to extend the deadline for KCOM to publish its RFS by five months;
  - b) the changes required to reflect the deadline for KCOM to introduce the new dark fibre products; and
  - c) a provision relating to the maintenance of accounting records for Network Services and Network Activities, which currently applies to LL Access, would now apply to both the WLA and LL Access markets.

### Proposed SMP directions

- 3.13 To give effect to our proposals we also intend to give five directions under section 49 of the Act and the Regulatory Financial Reporting SMP condition we are imposing in relation to WLA and LL Access. In respect of the WLA and LL Access Markets, we propose to give the following Regulatory Financial Reporting Directions:
- a) Network Components Direction
  - b) Transparency Direction
  - c) Form of the PPIA Audit Opinion for the RFS Direction
  - d) Preparation, Audit, Delivery and Publication of the RFS Direction
  - e) Form and Content Direction
- 3.14 The proposed Network Components Direction, Transparency Direction and Form of the PPIA Audit Opinion for RFS Direction are unchanged from 2019 KCOM RFR Statement.
- 3.15 The Preparation, Audit, Delivery and Publication Direction would include new reporting requirements in relation to WLA and LL Access markets. In relation to both markets we propose to require service level information to address concerns over excessive pricing of certain services and to help evaluate the effectiveness of the remedies, including in some cases using Openreach equivalent prices as a benchmark for KCOM's fair and reasonable prices. This information would be provided to us in confidence as Additional Financial Information (AFI).
- 3.16 The Form and Content Direction includes a proposal for KCOM to disaggregate the SMP markets within the two KCOM wide schedules.
- 3.17 The rest of this section is structured as follows:
- Proposal to extend KCOM's reporting deadline;
  - Proposed requirements unchanged from the 2019 KCOM RFR Statement;
  - Proposed new requirements in respect of the Preparation, Audit, Delivery and Publication of the RFS directions and the Form and Content Directions.

## Proposal to extend KCOM's reporting deadline

### Current requirement

- 3.18 Under the current SMP Condition 8<sup>66</sup>, KCOM is required to publish the RFS and corresponding audit opinion within 4 months after the end of the financial year to which they relate. KCOM's current financial year ends on 31 March, and therefore it must publish its RFS no later than 31 July.

### Consent request

- 3.19 KCOM wrote to us on 27 March 2020 to explain that the 31 July deadline for submitting its RFS for 2019/20 and subsequent financial years was impracticable given a change in KCOM's corporate status and its deadline to file its statutory financial statements. KCOM requested an extension of five months, with a new deadline of 31 December. Ofcom published a proposal to consent to this request on 4 June 2020.<sup>67</sup>

### Proposal

- 3.20 Following the acquisition of KCOM by MEIF 6 Fibre Limited,<sup>68</sup> KCOM was delisted from the London Stock Exchange on 2 August 2019. As a result of the delisting, it is no longer subject to the listing rules requirement to file its financial statements within four months after its financial year end. It is now subject to the Companies Act 2006 requirement to file its statutory accounts within nine months of its financial year end.
- 3.21 As set out in the proposed consent, we still consider that the prompt publication of KCOM's RFS is important because it provides Ofcom with the information necessary to make informed regulatory decisions. It also provides transparency and reasonable confidence to stakeholders that KCOM has complied with its SMP obligations. Nevertheless, for the reasons given in our proposal to consent we were minded to consent to a five-month deferment to the deadline for publication and delivery to Ofcom of KCOM's RFS and corresponding audit opinions for 2019/20 and 2020/21.
- 3.22 We propose that the new SMP Condition 9 includes the requirement that KCOM must publish and deliver to Ofcom the RFS and the corresponding audit opinion no later than nine months after the end of the financial year to which the RFS relate.

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<sup>66</sup> 2018 WLA/WBA Statement. Section 8.6, page 146.

<sup>67</sup> Ofcom, June 2020. [Proposed Consent for KCOM to defer its 2019/20 and 2020/21 Regulatory Financial Statements: Consultation](#) (the 2020 Regulatory Reporting Consultation).

<sup>68</sup> London Stock Exchange, 3 June 2019. [Recommended Cash Offer for KCOM Group PLC](#) [Accessed 9 July 2020].

## Proposed requirements unchanged from the 2019 KCOM RFR Statement

3.23 We propose that the Network Components Direction, Transparency Direction and Audit of the RFS Direction are imposed in the same form as in the 2019 KCOM RFR Statement

### Proposed Network Component Direction

3.24 To preserve the integrity and consistency of KCOM's Regulatory Financial Reporting it is important that there is a single list of components used to attribute costs to services in regulated markets.

3.25 We propose to give a direction specifying the cost components to be used by KCOM to prepare the RFS as at 1 April 2021, i.e. the components that must appear in the Cost Component List as at this date.

3.26 We propose to give the Network Components Direction in relation to KCOM in each of the proposed SMP markets as set out in Volume 4.

3.27 To ensure we can monitor KCOM's activities and that it complies with the no undue discrimination and fair and reasonable charging obligations imposed in all markets in which KCOM is regulated through the use of relevant network components, we propose the same list of network components as set out in the 2019 KCOM RFR Statement.

3.28 We propose the direction continues to contain the following network components:

- Electronics;
- Field provision;
- Field maintenance;
- Local Loop infrastructure;
- Exchange concentrator;
- Exchange-exchange Transmission link;
- Back-office Provision;
- Back-office Maintenance;
- Sales and Product Management;
- PPP for narrowband call services;
- Net Current Assets; and
- Other.

3.29 Our proposed direction which specifies the list of network components ensures that the presentation and usability of the RFS continues and gives confidence to stakeholders about the absence of bias in the preparation of the RFS. It specifies no more network components than necessary to ensure we can monitor KCOM's activities.

3.30 The proposed direction is set out in Volume 4 (see Draft Direction 1, Schedule to the Notification).

3.31 In Section 4 below, we explain why the giving of this direction would satisfy the test set out in section 49 of the Act.

## Proposed Transparency Direction

- 3.32 In order for regulatory financial reporting to secure its objectives, it is important that Ofcom and other stakeholders can understand the information presented. It is therefore necessary that a sufficiently transparent description of KCOM's regulatory cost accounting system (including attribution and valuation methodologies) be published, such that a suitably informed reader can gain a clear understanding of the information presented in KCOM's RFS.
- 3.33 We therefore propose to give a Transparency Direction in relation to KCOM in each of the proposed SMP markets as set out in Volume 4. This direction reflects our proposals set out in above.
- 3.34 The proposed Transparency Direction requires KCOM to publish documentation that describes its regulatory cost accounting system, that is, the accounting system that is used to meet KCOM's obligations on cost accounting and accounting separation. The documentation (DOCAS) sets out the KCOM organisational structure, the objectives of the accounting separation framework and how KCOM's system meets that objective through a 'tier framework and cascade approach'. It sets out in more detail how the tier framework and cascade approach works. It explains KCOM's attribution methods for revenues and costs. It explains its methodology for valuing assets on a current cost basis (CCA). It provides detail on the methodology used to estimate traffic minutes and routing factors for different types of calls. As well as providing transparency to stakeholders on KCOM's regulatory cost accounting system, the document also serves as a reference point for KCOM's auditors for their PPIA opinions (see below). The current documentation (for 2018/19) is published on KCOM's website.<sup>69</sup> This information is necessary for Ofcom and other providers to understand the information presented in the RFS and enable the RFS to fulfil their function.
- 3.35 We consider that the current transparency direction requires a sufficiently transparent description of KCOM's regulatory cost accounting system (including attribution and valuation methodologies) such that a suitably informed reader can gain a clear understanding of the information presented in KCOM's RFS. Our proposed direction does not require more information than necessary to ensure that presentation of the basis of preparation is transparent for users of the RFS. On this basis, we consider that the current transparency requirement remains appropriate.
- 3.36 We note that the proposal for KCOM to provide new WLA and LL Access products, i.e. ancillary interconnection products for WLA Access (paragraph 2.108) and dark fibre services (paragraphs 2.32 and 2.47), will require KCOM to consider how accounting for the new services should be explained in the DOCAS. This does not require a change to the direction.

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<sup>69</sup> KCOM, 30 September 2019. [Description of Cost Accounting System \(DOCAS\): Representing the Primary and Secondary Accounting Statements Together with Wholesale and Retail Catalogues](#) (KCOM 2018/19 DOCAS) [Accessed 9 July 2020].

- 3.37 The proposed direction is set out in Volume 4 (see Draft Direction 2, Schedule to the Notification).
- 3.38 In Section 4 below, we explain why the giving of this direction would satisfy the test set out in section 49 of the Act.

### **Proposed Form of the PPIA Audit Opinion for the RFS Direction**

- 3.39 KCOM is currently required to secure from its regulatory auditor a Properly Prepared in Accordance With (PPIA) opinion. This opinion considers whether the RFS has been prepared in accordance with the 'rules'. The 'rules' in this case refer to the DOCAS prepared by KCOM, as well as the regulation surrounding the RFS. The PPIA opinion represents a view on whether the rules have been followed.
- 3.40 This direction gives users confidence that the information provides a fair reflection of financial performance, is free from error and has been prepared following the accounting methodology statements published by KCOM and relevant directions issued by Ofcom. To preserve the integrity and consistency of the RFS we consider that all markets should be subject to the same audit direction.
- 3.41 We consider that the current PPIA audit opinion provides us and stakeholders with reasonable confidence that KCOM's RFS is free from material error and has been prepared following the DOCAS published by KCOM and relevant directions issued by us.
- 3.42 We consider this confidence to remain necessary. We propose to give the Audit of the RFS Direction in relation to KCOM in each of the proposed SMP markets as set out in Volume 4. The audit direction requires KCOM to secure PPIA (properly prepared in accordance with) opinions on the RFS. We consider that the audit requirements are no more than is necessary to ensure that an appropriate level of assurance is provided on the RFS.
- 3.43 In Section 4 below, we explain why the giving of this direction would satisfy the test set out in section 49 of the Act.

## **Reporting requirements in relation to the preparation, audit, delivery and publication of KCOM's RFS direction and the form and content direction**

### **Current requirements**

- 3.44 The current Preparation, Audit, Delivery and Publication of KCOM's RFS Direction sets out the financial information KCOM is required to provide for the RFS. Some elements of the published RFS relate to KCOM as a whole, while others are market specific. The direction sets out:
- a) the titles of the schedules KCOM is required to provide and publish both in general and for each regulated market; and

- b) that KCOM is required to prepare, secure and publish an audit opinion in relation to the KCOM-wide schedules and the regulated markets.
- 3.45 The current Form and Content Direction sets out the detail of what information KCOM's regulatory financial reporting should include. It is closely related to the preparation and publication requirements of the Preparation, Audit, Delivery and Publication of KCOM's RFS Direction. The Form and Content Direction sets out the format (i.e. the description) of the information contained within the schedules that KCOM is required to produce under the Preparation, Audit, Delivery and Publication of KCOM's RFS Direction.
- 3.46 The requirements relating to the titles of the schedules KCOM provides and publishes must be consistent with the Form and Content Direction, which sets out the detail to be included within the schedules.
- 3.47 This Preparation, Audit, Delivery and Publication of KCOM's RFS Direction also sets out that KCOM is required to prepare, secure and publish an audit opinion in relation to the KCOM-wide schedules and the regulated markets. The requirements relating to the publishing of the audit opinion must be consistent with the Form of the PPIA Audit Opinion for the RFS Direction. The effect of the Preparation, Audit, Delivery and Publication of KCOM's RFS Direction (which sets out the names and descriptions of the required schedules) and the Form and Content Direction (which sets out the detail to be contained within the schedules) is to require KCOM to produce information on a KCOM wide and on a Market basis. Some of this information is published, some provided in private. Whilst KCOM's regulatory cost accounting system holds information on a service level, we have not previously required this to be published or provided to us in confidence.
- 3.48 Both directions are, in our view, necessary and appropriate to preserve the integrity and consistency of the RFS. We consider that all proposed SMP markets should be subject to appropriate reporting requirements.
- 3.49 We propose to give the Preparation, Audit, Delivery and Publication of the RFS Direction in relation to KCOM in each of the proposed SMP markets as set out in Volume 4.
- 3.50 In Section 4 below, we explain why the giving of this direction would satisfy the test set out in section 49 of the Act.

## Published information

### KCOM wide information

- 3.51 We propose that KCOM continue to publish the schedules listed in Figure 3.2 in relation to KCOM-wide information.

Figure 3.2: KCOM wide schedules to be provided and published

Schedule Currently provided – 2018/19 RFS (page reference)	Justification for retention and publication
Consolidation Cost Profit and Loss. (page 7). Consolidation MCE (page 8).	These schedules set out the return KCOM is making from regulated markets. This demonstrates to stakeholders the effectiveness of regulation across KCOM.
Reconciliation Profit and Loss. (pages 35 and 36). Reconciliation MCE (page 37)	These schedules reconcile KCOM's RFS to its statutory accounts. This provides us and stakeholders with confidence that the information in the RFS is a record of KCOM's actual costs.
Consolidated Network Activity Statement (page 9)	This schedule provides confidence to stakeholders that KCOM is attributing costs correctly across network components in accordance with its cost accounting and accounting separation obligations.

- 3.52 We propose that in respect of the Preparation, Audit, Delivery and Publication of KCOM's RFS Direction, KCOM must continue to provide and publish these schedules.
- 3.53 In respect of the form and content of the Consolidation Cost Profit and Loss and Consolidation MCE schedules, we propose that KCOM disaggregates the Current Year and Prior year totals into the individual SMP market and Residual Activities. In line with our provisional SMP findings we would expect the figures under the 'Total' to be split between "WLA", "LL Access" and "Residual Activities". We also propose that the Current Year and Prior Year figures are disclosed on separate pages. This disaggregation does not involve the disclosure of any new information (the WLA and LL Access figures would be disclosed in the relevant market statement (see below), whilst Residual Activities can be calculated<sup>70</sup>). This proposal provides transparency to stakeholders by setting out in one place the level of revenues, costs, assets and returns for each market allowing easier comparisons of markets and trends within KCOM.
- 3.54 The proposed requirements are included in the 'Preparation, Audit, Delivery and Publication of KCOM's RFS' Direction and 'Form and Content' Direction in Volume 4 (see Draft Direction 3, Schedule to the Notification).

<sup>70</sup> By subtracting the WLA and LL Access figures from the KCOM wide figures.

### Market Level Information

3.55 We propose that KCOM continues to publish information Market Level information for markets in relation to which we are proposing to make an SMP finding. This is information is consistent across the regulated markets and is set out below in Figure 3.3.

**Figure 3.3: Market Level schedules to be provided and published**

Schedule currently provided	Market – Currently provided –2018/19 RFS page reference		Justification
Current Market where services are currently reported	WLA <sup>71</sup>	CISBO <sup>72</sup>	
Proposed Market	Now proposed for 2021/22 onwards– WLA	LL Access (including dark fibre)	
Market Profit and Loss Summaries	Page 13	Page 21	Trends in market-level financial performance allow us to monitor developments in the market and are informative in the context of considering the impact and effectiveness of remedies.
Market MCE	Page 14	Page 22	<p>Market-level cost information also provides transparency regarding how KCOM has attributed costs between regulated markets (and between regulated and unregulated markets).</p> <p>We see this as facilitating stakeholder confidence that such costs have been attributed consistently.</p>

<sup>71</sup> Currently WLA is subsumed within the WBA market for reporting purposes. In practical terms, the Form and Content of the schedule is the same (revenues and costs etc). What will change is the quantum of the numbers being reported on as they will only relate to the WLA market.

<sup>72</sup> Whilst we will require reporting of the LL Access market, the nearest approximation to that market is the current CISBO market which includes Active Leased Line services. As with WLA, the form and content will be the same, but the quantum of the numbers will change.

- 3.56 In respect of WLA, KCOM currently reports WLA services within the WBA market. As set out in Volume 2 Section 4, we propose to deregulate the WBA market. Consistent with that proposal, the WLA market should only contain information relating to WLA services.
- 3.57 In general, we consider that some information should be published where KCOM has regulatory reporting obligations to allow stakeholders to have reasonable confidence that KCOM has complied with its SMP conditions, is providing the required data to Ofcom and the reporting regime overall is working as planned.<sup>73</sup>
- 3.58 We propose that KCOM must continue to publish these schedules in respect of the WLA and LL Access markets. We also propose no changes to the form and content of these schedules.
- 3.59 The proposed requirements for private information related to interconnection are included in the ‘Preparation, audit, delivery and publication of KCOM’s RFS’ Direction and ‘Form and Content’ Direction in Volume 4.

## Private information

- 3.60 We currently require KCOM to provide us with some information privately. We require this information to make informed regulatory decisions, monitor compliance with SMP conditions and ensure that those SMP conditions continue to address the underlying competition issues.
- 3.61 Currently KCOM provides us with both KCOM wide information and Market Level information as follows:

### KCOM wide

Figure 3.4: KCOM wide schedules to be provided in confidence

Schedule currently provided	Justification for non-publication and continued provision in private
Residual profit and loss	While this information will help demonstrate to us that KCOM is using an appropriate regulatory cost accounting system to attribute costs to markets, including residual markets, stakeholders are already provided information on how costs are attributed to regulated and both Wholesale and Retail residual market in the Reconciliation Statements and the KCOM Network Activity Statement. Whilst we need the information to ensure the correct attribution of costs between regulated and unregulated markets, we do not consider that it is necessary to provide detailed information on non-regulated services to stakeholders.
Residual MCE	

<sup>73</sup> 2020 Regulatory Reporting Consultation, paragraphs 4.56 to 4.60.

<b>Inter market turnover</b>	This schedule allows us to see the retail residual revenue from each regulated market and is required by us to monitor accounting separation obligations in relation to sales made to retail residual. It is not however appropriate to provide to stakeholders as it relates to non-regulated services.
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### Market level

Figure 3.5: KCOM market level schedules to be provided in confidence

Schedule currently provided	Justification for non-publication and continued provision on a confidential basis
<b>Market network activity statements</b>	<p>While this information will help demonstrate to us that KCOM is using an appropriate regulatory cost accounting system to attribute costs to markets, including residual markets, stakeholders are already provided information on how costs are attributed to regulated markets and residual in the Reconciliation Statements and the KCOM Network Activity Statement.</p> <p>We do not consider it appropriate to provide detailed information on a regulated market basis where a cost-based charge control is not being imposed.</p>

3.62 We propose KCOM continue to provide us with this information in relation to the WLA and LL Access markets. We propose no changes to the form and content of these schedules.

### Service level Information

3.63 In respect of service level information, we propose to require KCOM to provide us with two new schedules specific to services within the WLA and LL Access markets. The two new confidential schedules are:

- a) **Service level information.** Information on the volume of specified services (set out in paragraph 3.64) sold, the average prices, revenues and FAC costs. The proposed form and content for each market is as follows;

Figure 3.6: Service level information proposed form and content

Service Level Information	Internal Volume	External Volume	Internal Price	External Price	Internal Revenue	External Revenue	Total Revenue	Internal Cost FAC	External Cost FAC	Total Cost FAC	Internal Unit Cost	External unit cost
Name of service (split between internal and external if cost differences)												
Service 1	x	x	£x.xx	£x.xx	£xk	£xk	£xk	£xk	£xk	£xk	£x.xx	£x.xx
Service 2	x	x	£x.xx	£x.xx	£xk	£xk	£xk	£xk	£xk	£xk	£x.xx	£x.xx
Service 3	x	x	£x.xx	£x.xx	£xk	£xk	£xk	£xk	£xk	£xk	£x.xx	£x.xx
Other services (aggregated)					£xk	£xk	£xk	£xk	£xk	£xk		
Total					£xk	£xk	£xk	£xk	£xk	£xk		
Note 1	These total should agree to Market Summary											
Note 2	This unit costs should agree to breakdown of service level costs. Can be combined if internal and external are identical											

b) **Breakdown of service level costs.** Information on specified services on a fully allocated costs (FAC) basis by network cost component.

**Figure 3.7: Service level costs breakdown**

Breakdown of service level costs	Service 1		Service 2		Service 3	
	Int	Ext	Int	Ext	Int	Ext
Electronics	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
Field provision	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
Field maintenance	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
Local Loop infrastructure	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
Exchange concentrator						
Exchange-exchange						
Transmission link						
Back-office Provision	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
Back-office Maintenance	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
Sales and Product Management	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
PPP for narrowband call services						
Net Current Assets	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
Other	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx	£x.xx
<b>Total FAC</b>	<b>£x.xx</b>	<b>£x.xx</b>	<b>£x.xx</b>	<b>£x.xx</b>	<b>£x.xx</b>	<b>£x.xx</b>

Note 1

These totals should agree to Service level information

Note 2

Where internal and external service costs are identical, can amalgamate

Note 3

Network Components not used by services within that market can be omitted

- 3.64 We propose separate schedules in respect of both AFI's for the WLA and LL Access markets, which must reconcile to the total figures in the published RFS.<sup>74</sup> We propose the following specified services be included in the schedules:
- a) WLA Services
    - i) Wholesale FibreLine Local Access (WFLLA) FTTP End User Rental Charges (All Bandwidths)
    - ii) WFLLA FTTC
    - iii) WFLLA End User New Provide
    - iv) Other WFLLA End User Connection Charges
    - v) Other WFLLA Fixed Charges
    - vi) WFLLA Excess Construction Charges
    - vii) Time related Charges
    - viii) Other services in the WLA Market (not specified)
    - ix) The specified services in this list are the current service names as per the KCOM website<sup>75</sup>, that for reasons set out in in Section 2 are subject to fair and reasonable charging obligations. The 'Other' services have been specified to enable to reconcile the AFI to the published RFS, for groups of services or to the market itself.
  - b) LL Access
    - c) Dark Fibre Services**
      - i) Single Fibre Rental Charges
      - ii) Fibre Pair Rental Charges
      - iii) Single Fibre Connection Charges
      - iv) Fibre Pair Connection Charges
      - v) Charge per Right When Tested<sup>76</sup>
      - vi) Charge per Cessation<sup>77</sup>
      - vii) Patch Panels<sup>78</sup>
      - viii) Dark Fibre Excess Construction Charges
      - ix) Other dark fibre services in the LL Access Market (not specified).

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<sup>74</sup> For example, the revenues for the WLA services must add up to the total revenues in the published WLA Market. This would not be possible where the units of measurement are not consistent across the services – e.g. volumes would be a mixture of connections, rentals etc.

<sup>75</sup> KCOM, [WFLLA Price list](#) and KCOM, [Ethernet Direct Access Service](#) (EDAS Price list) [Accessed 9 July 2020].

<sup>76</sup> Single Fibre and Fibre pair reported together unless different prices are charged.

<sup>77</sup> Single Fibre and Fibre pair reported together unless different prices are charged.

<sup>78</sup> Single Fibre and Fibre pair patch panels reported together unless different prices are charged.

**d) Active Services**

- i) ECAS 1Gbit/s rentals
- ii) Other ECAS rentals
- iii) ECAS Connection Charges<sup>79</sup>
- iv) ECAS Excess Construction Charges
- v) Other ECAS services in the LL Access Market (not specified)
- vi) EDAS 1Gbit/s rentals
- vii) Other EDAS rentals
- viii) EDAS Connection Charges<sup>80</sup>
- ix) EDAS Excess Construction Charges
- x) Other EDAS services in the LL Access Market (not specified)

**e) Other services in the LL Access Market**

3.65 The specified dark fibre services in this list are not currently provided by KCOM and cover Access Circuits and End to End Access Circuits. For the reasons set out in Section 2, we propose that these will be subject to fair and reasonable charging obligations. The Active services specified in this list are the current service names per the KCOM current price lists<sup>81</sup> The 'Other' services have been specified to enable the AFI to be reconciled to the published RFS.

3.66 We consider this extra information is justified for the following reasons.

- a) As explained, above (paragraph 1.6) we consider that for the WLA and LL Access markets there is risk KCOM might fix or maintain some or all of its prices for network access at an excessively high levels or impose a margin squeeze in relation to such access services. Service level information can be used to help identify where costs were being inapparently attributed to services required by external Telecom Providers to access KCOM's network.
- b) As explained above (paragraphs 2.14 to 2.24) we propose to impose in the WLA and LL Access markets (including dark fibre access) an obligation for charges for network access to be fair and reasonable. The proposed assessment is that KCOM's charges are fair and reasonable if they are consistent with KCOM making a reasonable return and a reasonable contribution from those services to common cost recovery, and do not equate to a margin squeeze. Service level revenue and cost information can be used to examine the level of returns in those services and would be the starting point to analyse common cost recovery.

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<sup>79</sup> ECAS and EDAS connections reported together unless different prices are charged.

<sup>80</sup> ECAS and EDAS connections reported together unless different prices are charged.

<sup>81</sup> EDAS Price list.

- c) As explained above (paragraph 2.18), in respect of WLA services, we have proposed that for bandwidths above those at or around 40Mbit/s, assessment of fair and reasonable pricing may include reference to Openreach's prices for equivalent bandwidth products. Service cost information can be compared to Openreach price information to assess the effectiveness of the pricing benchmark and consider whether differences from the Openreach benchmark are fair and reasonable.<sup>82</sup>
- d) As explained above (paragraph 2.22), in respect of LL Access, we have proposed price benchmarks against Openreach's equivalent active leased lines products. Service level cost can be used both to assess the effectiveness of the pricing benchmark and consider whether differences from the Openreach benchmark are fair and reasonable.<sup>83</sup>
- e) As explained above (paragraph 2.21) in respect of dark fibre charges, we have proposed a price benchmark set at Openreach's provision of dark fibre in Area 3. Service level cost information can be used to assess the effectiveness of this policy, including how costs compare to prices given that we do not consider rival network build is likely to materialise at scale during the review period.
- f) As set out in its DOCAS<sup>84</sup>, KCOM currently attributes costs on a service basis. Requesting this information in private will require little incremental work for KCOM.

3.67 The proposed requirements for private information related to WLA and LL Access are included in the 'Preparation, audit, delivery and publication of KCOM's RFS' Direction and 'Form and Content' Direction in Volume 4 (see Draft Direction 4, Schedule to the Notification).

## Proposed SMP condition and SMP directions

- 3.68 The proposed SMP condition is Condition 9 of the suite of SMP conditions we have proposed in Volume 4.
- 3.69 The text of the proposed Directions is in Volume 4.

## Consultation question

Question 3.1: Do you agree with our proposed regulatory financial reporting SMP condition and directions? Please set out your reasons and supporting evidence for your response.

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<sup>82</sup> On the basis that we have access to Openreach service level cost information, which we do.

<sup>83</sup> On the basis that we have access to Openreach service level cost information, which we do.

<sup>84</sup> KCOM 2018/19 DOCAS, page 4.

## 4. Legal tests

4.1 In this volume we set out our proposals to require KCOM to provide network access and associated pricing and non-pricing remedies designed to support and make effective that network access. In summary we have decided to impose to the extent set out above the following general remedies in the WLA and the LL Access (including dark fibre) markets:

- Requirement to provide network access on reasonable request, and on fair and reasonable terms, conditions and charges (excludes copper-based services in the WLA market);
- Requirements relating to requests for new forms of network access [WLA only];
- Requirement not to unduly discriminate;
- Requirement to publish a Reference Offer;
- Requirement to notify changes to charges, terms and conditions;
- Requirement to notify technical information;
- Requirement to publish quality of service information as directed by Ofcom (QoS);
- Regulatory Financial Reporting (general accounting separation and cost accounting); and
- Requirement to produce a Pricing Transparency Report (PTR) [LL Access only].

4.2 As set out in this volume, we also propose to impose a specific remedy in the LL Access (including dark fibre) market:

- Requirement to provider Ethernet and dark fibre network access in the following circuit configurations:
  - connecting end-user premises and KCOM’s ODF Site or Third Party premises; and
  - connecting an end-user premises and another end-user premises.

4.3 In order to give regulatory effect to our proposals we propose to set the draft SMP conditions set out in Volume 4.

### Section 47 tests

4.4 When imposing SMP obligations, we need to demonstrate that the obligations in question are based on the nature of the problem identified, proportionate, and justified in light of the policy objectives as set out in Article 8 of the Framework Directive. For each draft SMP condition set out in this consultation, we consider that the conditions we are proposing satisfy the tests set out in section 47 of the Act, namely that the proposed obligation is:

- objectively justifiable in relation to the networks, services or facilities to which it relates;
- not such as to discriminate unduly against particular persons or against a particular description of persons;
- proportionate to what the condition or modification is intended to achieve; and
- transparent in relation to what it is intended to achieve.

## Objectively justified

- 4.5 We consider that each of the draft SMP conditions we are proposing is objectively justifiable. The remedies that we are proposing are designed to address the competition concerns that we have identified in our market analysis (Volume 2). As explained in Section 1, our provisional market analysis has found that KCOM has the ability and incentive to:
- refuse to supply access and thus restrict competition in the provision of products and services in the relevant downstream markets;
  - set excessive wholesale charges or, in combination with downstream prices, engage in a price squeeze behaviour (also referred to as margin squeeze);
  - favour its downstream retail businesses to the detriment of its competitors in the relevant retail markets, by both price and non-price discrimination; and
  - not maintain an adequate level of service quality in the provision and repair of wholesale services or to discriminate in the quality of provision.
- 4.6 Therefore, in the absence of a requirement to provide network access, supported by associated obligations, KCOM could refuse or impede access, or it could provide access on less favourable terms and conditions compared to those obtained by its own downstream businesses. We are proposing to exercise our discretion in setting these obligations in favour of an approach that promotes wholesale access-based competition for the reasons set out in Section 1 of Volume 3. We consider that wholesale access-based competition is likely to offer the best long-term outcome for consumers and businesses.
- 4.7 We explain in Sections 2 and 3 for each obligation we are proposing, why we consider that obligation is objectively justified in the context of the markets we are reviewing.

## Not such as to discriminate unduly

- 4.8 We consider that each of the draft conditions does not discriminate unduly against KCOM. We are proposing that it is the only telecoms provider to hold SMP in the markets that we have identified and the draft conditions seek to address that market position.

## Proportionate

- 4.9 We consider that each of the draft conditions we are consulting on is proportionate to what that condition is intended to achieve. In each case, we are proposing an obligation on KCOM that: is effective to achieve our aim; is no more onerous than is required to achieve that aim; and does not produce adverse effects which are disproportionate to our aim. We explain why we consider each imposed remedy is proportionate in the context of the markets we are reviewing in Sections 2 and 3.

## Transparent

- 4.10 We consider that each of the draft SMP conditions we are proposing is transparent in relation to what is intended to be achieved. The text of the proposed draft SMP conditions is published in Volume 4 for consultation and the intended operation of those SMP

conditions explained in this document. Our final statement will set out our analysis of responses to this consultation and the basis for any final decision that we take.

## Section 49 tests

- 4.11 In Section 2, we propose to make a Direction in the WLA market relating to KCOM's RO.
- 4.12 We consider the Direction we are proposing satisfies the tests set out in section 49(2) of the Act, namely that it is:
- Objectively justifiable because the requirements will remove an unnecessary barrier to entry for access seekers in that market, and secure the provision of access wherever in the Hull Area it is reasonably appropriate.
  - Not unduly discriminatory because it reflects KCOM's market position in the Hull Area.
  - Proportionate because the requirements will be no more than is necessary to ensure the effectiveness of the proposals in this consultation.
  - Transparent because it is clear that the intention of the modifications is to make sure that KCOM's RO contains appropriate provisions as to ancillary services.
- 4.13 In Section 2, we also propose to make certain Directions in the WLA and LL Access (including dark fibre) markets relating to regulatory accounting.
- 4.14 We consider that the Directions we are proposing satisfy the tests set out in section 49(2) of the Act, namely that in each case the proposed Direction is:
- Objectively justifiable because the requirements will seek to ensure that through the information to be provided, both in public and on a confidential basis, stakeholders have sufficient robust information about the products and services they purchase to provide them with reasonable confidence about KCOM's compliance with its SMP conditions and that we have sufficient information necessary to carry out our functions.
  - Not unduly discriminatory because it reflects KCOM's market position in the Hull Area. BT is the only other SMP provider, and also has regulatory accounting obligations, and we have explained the reasons for requiring relevant information from KCOM both publicly and on a confidential basis.
  - Proportionate because the requirements will be no more than is necessary to ensure the effectiveness of the proposals in this consultation and ensures that Ofcom and stakeholders are provided with a sufficient level of appropriately robust information and does not extend beyond these.
  - Transparent because it is clear that the intention of the modifications is to make sure that the RFS remain fit for purpose and that Ofcom and stakeholders are provided with a sufficient level of information and assurance.

## Section 88 tests

- 4.15 We set out in paragraph 1.6 the risks we see that KCOM might fix its prices at an excessively high level or may impose a price squeeze as a consequence of its SMP in the

WLA and LL Access markets, which would have adverse consequences for end-users of public electronic communications services.

- 4.16 In relation to our proposed controls on prices and the associated accounting separation and cost accounting obligations, as required by section 88 of the Act, we consider that the setting of the draft SMP conditions would be appropriate for the following purposes:
- 4.17 Promoting efficiency – we consider that supporting access-based competition promotes efficiency. In the absence of competitive pressures, we believe that KCOM would have limited incentives to reduce the cost of providing WLA services and LL Access. Our proposals encourage KCOM to achieve greater productive efficiency by allowing it to keep any profits it earns from reducing costs over the review period.
- 4.18 Promoting sustainable competition – the draft conditions are intended to encourage competitive entry at the most upstream level where we consider that it will be effective in the Hull Area. We consider that during the review period there is a reasonable prospect of wholesale access-based competition emerging.
- 4.19 Conferring the greatest possible benefits on end-users of public electronic communications services – we consider that wholesale access-based competition will offer the best long-term outcome for consumers and businesses. Our view is that it is necessary to require KCOM to provide wholesale access on fair and reasonable charges in order to set the right conditions for competitive entry. We consider that the long-term benefits to consumers of our proposed approach will be larger than any short-term costs incurred by KCOM.
- 4.20 We have also taken account of the extent of KCOM’s investment in building a full-fibre network. We consider that a price control is an appropriate measure in each of the WLA and LL Access markets. A price control allows KCOM the ability to recover its costs (including a reasonable return on its investments) and can incentivise KCOM to increase its productive efficiency as a way of increasing its profitability. Our proposals also address the risk that KCOM would set wholesale access charges at a level which would discourage competitive entry.
- 4.21 As discussed in Annex 5, we anticipate that the test set out in section 88 of the Act may be amended before we issue our Final Statement, to give effect to Article 74 of the EECC. This requires NRAs, in determining whether price control obligations would be appropriate, to take into account the need to promote competition and long-term end-user interests related to the deployment and take-up of next-generation networks, and in particular of very high capacity networks. NRAs are also required to ensure that any mandated cost recovery methodology or pricing mechanism serves to promote the deployment of new and enhanced networks. We have explained in detail above how we expect our proposed pricing remedies to promote access-based competition, and why we consider this will be for the long-term benefit of consumers. We consider that these proposals will allow KCOM to adequately recover its costs of investment in deploying a high capacity full-fibre network.
- 4.22 Article 74 of the EECC also states that, when NRAs consider it appropriate to impose price control obligations on access to existing network elements, they should also take account

of the benefits of predictable and stable wholesale prices in ensuring efficient market entry and sufficient incentives for all undertakings to deploy new and enhanced networks. We consider that our proposals would incentivise KCOM to keep prices sufficiently stable and predictable.

## **Ofcom's duties**

- 4.23 As set out in this volume, we consider the proposed package of SMP conditions and directions both individually and together meet our duties in sections 3 and 4 of the Act.

## 5. Fixed voice transitional arrangements

- 5.1 Article 16(3) of the Framework Directive and section 84(4) of the Act require Ofcom to revoke SMP conditions where we find that a market is competitive.
- 5.2 However, as set out in Article 16(3) of the Framework Directive, where Ofcom revokes SMP conditions, it should provide an appropriate period of notice to parties affected by such a withdrawal.
- 5.3 Therefore, where Ofcom concludes that an undertaking no longer has SMP in a relevant market, it must revoke all SMP conditions which it had previously applied in that market. In doing so, Ofcom needs to consider the disruptive effects on the market of a removal of regulation and whether maintenance of existing regulation is necessary for a transitional period prior to the formal revocation of those conditions.
- 5.4 In Volume 2 we set out our proposals to deregulate the WFAEL, ISDN2/30 and WCO markets. In this section we set out our proposals for regulation of these markets for a transitional period.
- 5.5 We propose to maintain aspects of the existing regulation on the WFAEL, ISDN2/30 and WCO markets for a transitional period of 12 months. In particular, we consider that it is necessary that there should continue to be a requirement to provide general network access on fair and reasonable terms and conditions, and price regulation in the form of a fair and reasonable charges obligation for telecoms providers that currently purchase KLR from KCOM.

### Summary of existing regulation

- 5.6 In the 2017 NMR Statement, we imposed the following remedies on KCOM in the WFAEL, ISDN2, ISDN30 and WCO markets (Figure 5.1).

**Figure 5.1 Summary of the remedies imposed on KCOM in the WFAEL, ISDN2, ISDN30 and WCO markets in the Hull Area**

WFAEL market	ISDN2 and ISDN30 markets	WCO market
Provide network access on reasonable request	<u>All lines</u> Accounting separation	Provide network access on reasonable request
Requirement not to unduly discriminate	Cost accounting <u>Existing lines</u> <sup>85</sup>	Publish a Reference Offer Notify changes to charges
Publish a Reference Offer		Accounting separation

<sup>85</sup> On the ISDN2 and ISDN30 markets, the remedies (with the exception of accounting separation and cost accounting which apply to all ISDN2 and ISDN30 lines) only apply to “existing” ISDN2 and ISDN30 lines. Lines that were purchased or ordered prior to 1 December 2018 are defined as “existing”. 2017 NMR Statement, paragraphs 11.8 to 11.12.

Notify changes to charges	Provide network access on reasonable request	Cost accounting
Accounting separation	Requirement not to unduly discriminate	<b><u>Interconnection</u></b>
Cost accounting	Publish a Reference Offer	Provide network access on reasonable request
	Notify changes to charges	Publish a Reference Offer
		Notify changes to charges

## Partial maintenance of regulation for a 12-month transitional period

- 5.7 While the WFAEL, ISDN2 and ISDN30 and WCO markets are no longer suitable for *ex ante* regulation we are conscious that there will remain a small number of telecoms providers who will continue to purchase KLR in order to serve consumers in the Hull Area.<sup>86</sup>
- 5.8 To enable telecoms providers that currently purchase these products sufficient time to consider their business case and transition to alternative arrangements if they wish, avoiding shocks to the market and harm to consumers, we provisionally consider it would be proportionate for these telecoms providers already purchasing regulated KLR services to be able to continue to purchase regulated KLR services for a transitional period of 12 months.

### Network access on reasonable request, subject to a fair and reasonable pricing

- 5.9 We provisionally consider it would be proportionate for existing KLR customers to be able to continue to purchase KLR services that are subject to a fair and reasonable pricing obligation for a 12-month period. Furthermore, we propose that such providers should also be able to continue to purchase WCO subject to a fair and reasonable pricing obligation, in relation to calls made on any regulated KLR services, for a 12-month period.
- 5.10 This means that KCOM would only be required to provide a given telecoms provider with KLR services subject to fair and reasonable pricing if they are purchasing any KLR services immediately prior to the beginning of the forthcoming market review period. The fair and reasonable pricing obligation would apply to existing regulated KLR circuits, as well as new KLR circuits that are purchased by such telecom providers within the first 12 months of the review period. KCOM would not be required to provide any other telecoms providers with new KLR circuits.
- 5.11 Consistent with the regulation of ISDN2 and ISDN30 markets in the 2017 NMR Statement, transitional regulation would only apply ISDN exchange lines that were purchased prior to 1 December 2018.

<sup>86</sup> Less than 0.5% of fixed telephone services are supplied by telecoms providers using KLR. KCOM's 1<sup>st</sup> RFI response.

- 5.12 Similarly, a requirement to provide reasonable network access to WCO, subject to a fair and reasonable pricing obligation should apply to calls originated on regulated KLR services. We propose that these existing WCO obligations should only apply to regulated KLR services purchased before the beginning of the market review period, as well as any new regulated KLR services which are purchased by those telecoms providers within the first 12 months of the review period. Existing WCO obligations should not apply to KLR services used to provide ISDN2 or ISDN30 exchange lines purchased after 1 December 2018.

### **Publication of a reference offer**

- 5.13 KCOM is currently required to publish a Reference Offer for its services in the WFAEL, ISDN 2/30 and WCO markets, which include:
- a) a clear description of the services on offer including technical characteristics and operational processes for service establishment, ordering and repair;
  - b) the locations of points of network access and the technical standards for network access;
  - c) conditions for access to ancillary and supplementary services associated with the network access including operational support systems and databases etc.;
  - d) contractual terms and conditions, including dispute resolution and contract negotiation/renegotiation arrangements;
  - e) charges, terms and payment procedures; and
  - f) SLAs and SLGs.
- 5.14 We propose to retain the condition on KCOM to publish a Reference Offer for its services in the WFAEL, ISDN 2/30 and WCO markets. We have proposed retaining the obligation to give visibility to the terms and conditions on which other providers can purchase wholesale services, and thereby ensure that KCOM complies with its obligations in relation to the WFAEL and WCO markets during the 12-month transitional period. The Reference Offer publication obligation is only to apply to services in the WFAEL, ISDN 2/30 and WCO markets that are still subject to the fair and reasonable pricing obligation.
- 5.15 While we acknowledge that some KLR users may have negotiated terms and conditions that differ from KCOM's standard contract for KLR, we expect that others may continue to use the standard terms and conditions, and therefore consider it is important for transparency for changes to KCOM's standard contract to be published.

### **Notify changes to charges**

- 5.16 We propose that KCOM should be subject to an obligation to notify (by means of a written notice) changes to standard charges for wholesale network access in the WFAEL and WCO markets in the Hull Area for the first 12 months of the market review period. This

obligation to notify would only apply to services in the WFAEL and WCO markets that are still subject to the fair and reasonable pricing obligation.

### **No undue discrimination**

- 5.17 A non-discrimination obligation is intended to prevent the dominant provider from discriminating in favour of its own downstream divisions and, more generally, to ensure that competing providers are placed in an equivalent position. The retention of the non-discrimination obligation for the WFAEL and ISDN markets will ensure that there is appropriate protection to remedy the incentive and ability for KCOM to engage in discriminatory pricing and/or discriminatory non-pricing practices for KLR services.
- 5.18 The no undue discrimination obligation is only to apply to services in the WFAEL and ISDN 2/30 markets that are still subject to the network access obligation. As already indicated in Figure 5.1 above, in the 2017 NMR Statement we did not impose a no undue discrimination obligation for the WCO market.

### **Accounting separation and cost accounting obligations**

- 5.19 We propose that it is not necessary for KCOM to publish any financial information in relation to its regulated services in the WFAEL, ISDN32/30 and WCO markets for the first 12 months of the market review period. Given that transitional regulation is only to relate to existing services, we consider that the obligation to publish a Reference Offer for its services in the WFAEL, ISDN 2/30 and WCO markets is sufficient to ensure it complies with its transitional obligations.

### **Interconnection**

- 5.20 The existing regulation on interconnection with KCOM's voice network is due to its SMP in the WCO market.<sup>87</sup> The ability of competing telecoms providers to request, and be provided with, interconnect circuits is required in order to allow other providers to continue to offer competing fixed voice services using KLR during the first 12 months of the market review period.

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

- 5.21 We therefore propose that SMP obligations requiring KCOM to meet reasonable requests to provide access to interconnect circuits and to provide such access on fair and reasonable terms and conditions remain in place for the first 12 months of the market review period. This is necessary as KCOM could have an incentive not to provide interconnect circuits on a fair and reasonable basis, which would reduce the effectiveness of the other transitional remedies we are imposing on KCOM for WCO, in particular its network access obligation.

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<sup>87</sup> 2017 NMR Statement, paragraphs 17.112 to 17.113.

## Transparency

- 5.22 We propose that it is necessary to maintain requirements for the transparency of charges, terms and conditions in order to complement the requirement to provide access to interconnect circuits and to provide such access on fair and reasonable terms and conditions. We consider that these requirements will ensure other telecoms providers will be able to make effective use of KCOM's voice network for the first 12 months of the market review period.
- 5.23 We propose that KCOM should be required to publish a Reference Offer that includes:
- a) A clear description of the services on offer.
  - b) Terms and conditions including charges and ordering, provisioning, billing and dispute resolution procedures. The Reference Offer should provide sufficient information to enable providers to make technical and commercial judgments such that there is no material adverse effect on competition.
  - c) Conditions relating to maintenance and quality (service level agreements and guarantees). The inclusion of service levels, as part of the contractual terms of the Reference Offer, that provide for a minimum acceptable level of service, will ensure that services are provided in a fair, reasonable and timely and non-discriminatory fashion.
  - d) Information relating to technical interfaces and points of interconnection. Such information should ensure that providers are able to make full and effective use of all the services provided.
  - e) Terms and conditions on which KCOM supplies its services.
- 5.24 We also propose that KCOM should still be required to notify changes to charges during the first 12 months of the review period. This should ensure that telecoms providers have sufficient time to plan for changes that could occur once KLR services cease to be regulated.

## Consultation question

Question 5.1: Do you agree with our proposed transitional remedies for the WFAEL, ISDN2, ISDN30 and WCO markets? Please set out your reasons and supporting evidence for your response.