

concentrating on 1 Gbit/s circuits. There does not seem to be a significant demand for LLU backhaul at higher bandwidths; and

- demand for broadband in other areas, where the lower ability to exploit economies of scale makes LLU generally less attractive, is currently being met largely by use of bitstream access. This is unlikely to change in the near future.

7.157 In 2006, half of the total AISBO ends were in greater London and half were in the rest of the UK. BT's service share in greater London was higher than for the rest of the UK. This is also consistent with the view that BT's current market share is not misleadingly low because demand is heavily concentrated in London. (We do not have a geographic breakdown for the April 2008 market share figures).

7.158 In the light of this, we think that any advantages which BT may derive from its network are unlikely to be so large as to give BT SMP within the timeframe of this market review. New demand is likely to be concentrated in areas where it is economic for OCPs to compete, given the high value nature of these services.

Ease of market entry

7.159 In the January 2008 consultation, we suggested that the relatively high expected revenues that can be earned in this market offered an assurance to CPs that sunk costs can be recovered, thereby making the market more attractive to potential entrants.

7.160 We believe that entry since December 2006 by new providers illustrates this. Providers who have only entered the market within the last 18 months already having nearly a fifth of the market, by volume. Also, another CP has told Ofcom that it is planning to enter this market shortly.

Conclusion

7.161 We have reviewed the finding of SMP in the light of both the responses and the revised market share estimates. Our conclusion is unchanged: we do not believe that BT, or any other operator, has SMP in this market. The arguments for this are set out in the January 2008 consultation, supplemented by the revised market share and further analysis above. Our conclusion is based particularly on the following:

- while still relatively high at around 38 to 40 per cent, BT's market share is continuing to fall and we do not believe there is evidence to suggest this trend will reverse in the near future;
- there has been significant entry in the market in the recent past, and we are aware of likely future entry;
- the very high revenues that can be earned in the downstream market mean that CPs are generally willing to sink the high fixed costs that are necessary to operate in this market;
- BT's advantages in terms of economies of scale and scope are not so large in this market: the very large amount of traffic that can be carried over a single high bandwidth AISBO service enables CPs to attain scale in this market and prevent other factors such as economies of scope from placing BT at a significant cost advantage.

7.162 We recognise that the high bandwidth AISBO market is continuing to develop and that demand is likely to increase over the period of the market review. However, we do not have any evidence which suggests that this demand is likely to develop to any significant degree in geographic areas outside of areas with a concentration of large business sites. On this basis, the available evidence suggests that there is no operator which can be found to be in a position of SMP in this market for the reasons outline above. That said, we intend to keep developments in this market under review to ensure that these conclusions remain appropriate over the period of this market review.

Wholesale trunk segments market in the UK

January 2008 consultation

7.163 Paragraphs 7.351 to 7.461 of the January 2008 consultation set out the reasons for Ofcom's proposal that BT has SMP in the wholesale trunk segments market in the UK. Our view was based on:

- BT's high market share estimated to be in the range of 58 per cent to 86 per cent (which appears to reflect not only its own retail operations but also a high share of sales to other CPs);
- BT's apparent high profitability in this market (discussed further below);
- the ubiquity of BT's infrastructure and the number of routes subject to little or no competition;
- economies of scale; and
- barriers which impede other CPs entering or expanding in this market.

Review of responses to the consultation

7.164 BT disagreed with our market definition analysis and argued that a different assessment of competitive conditions should be used for the geographic market definition. BT argued that this would justify putting some routes into a separate geographic market in which BT would not have SMP.

7.165 BT argued that the focus on the ROCE in the trunk segments market was misleading. It argued that other providers purchase either end-to-end circuits consisting of trunk and termination, or termination alone. They do not purchase trunk alone. BT said that its returns from termination were low and so consequently its return from complete circuits sold to other CPs was around 15 to 16 per cent.

7.166 In the context of the European Commission's three criteria test, BT did not believe that the first criterion, relating to the existence of high and non-transitory entry barriers, is met for this market. BT argued that there is already extensive parallel infrastructure. BT set out evidence of trunk infrastructure of other CPs.

7.167 None of the other respondents who commented on these proposals disagreed with Ofcom's market power findings.

Ofcom's response to respondents' views

- 7.168 We have discussed BT's criticisms of our approach to geographic markets in Section 6, together with a consideration of BT's suggested approach. We concluded in Section 6 that our view on a national market as proposed in the January 2008 consultation is appropriate.
- 7.169 The profitability figures in the January 2008 consultation were 59 per cent ROCE for wholesale trunk segments in 2006/07 and 50 per cent in 2005/06. These figures were taken from BT's published current cost financial statements. Since the January 2008 consultation, BT has published its 2007/08 current cost financial statements. These restate the 2006/07 ROCE to be 45 per cent, while for 2007/08 it is 67 per cent. When we consider these figures in the leased lines charge control review, we have made various adjustments to them. Even after these adjustments, the ROCE remains well in excess of the cost of capital used at the last review (11.4 per cent). CPs do not have to buy trunk bundled with other products. In deciding whether to build their own trunk or use that of another CP or use BT's, they will be considering the charges for BT's trunk in isolation to other services from BT. Therefore we consider it is meaningful to consider the revenues of the trunk segments market in isolation. We consider that BT's high profitability in the trunk segments market tends to suggest SMP.
- 7.170 Whilst as set out in paragraph 2.30 we do not believe that passing of the three criteria test constitutes a legal requirement for the undertaking of a market review, we consider that the trunk segments market meets all three of the European Commission's criteria. In terms of the first criterion, the mere fact that other CPs have entered the trunk segments market does not imply that there are no entry barriers in the market. As noted in the January 2008 consultation, other CPs still depend significantly on BT for the supply of trunk capacity. In particular, over 50% of PPCs are still purchased with a trunk segment from BT (see paragraph 7.386 of the January 2008 consultation).
- 7.171 Entry barriers arise from the very high investments that have to be sunk in order to have a substantial presence in this market. Further, switching from acquired to self-supplied trunk segments often requires substantial investments in new interconnect and associated infrastructure. This includes circuit rearrangement costs associated with interconnection and costs associated with the transmission infrastructure necessary to support TI services. Furthermore, there are current uncertainties regarding the development of TI services (particularly their status under Next Generation Networks) which would result in a relatively short 'payback' period for investment in any self-provided trunk. This uncertainty further increases the risk associated with these investments.
- 7.172 The second criterion is discussed in the following sub Section, as part of the forward looking analysis.
- 7.173 In terms of the third criterion, we consider that in the absence of ex ante regulation, there is a significant risk that BT would only supply trunk services to other CPs on discriminatory terms, and this would reduce competition in downstream markets and result in consumer harm. As noted in the discussion of this criterion as applied to the retail market, we consider that it is more efficient to prohibit this conduct via ex ante regulation, which because of its relative ease of interpretation, administration and application, will tend to encourage greater compliance.

7.174 Furthermore, putting in place ex ante regulation enables Ofcom to place a greater emphasis on promoting competition than would be possible simply by relying on competition law. For example, Ofcom seeks to put in place a charge control in respect of BT's trunk services. It is generally acknowledged that general competition law is not an effective means to regulate prices. Courts are generally ill-equipped for the long-term and fact-intensive task involved in such a process, and are typically reluctant to engage in the ongoing monitoring role necessary to ensure that there is compliance with such regulation. This also applies to the other regulation that Ofcom intends to put in place in this market i.e. reviewing the Service Level Agreement regime, requiring BT to address issues in its accounting regime and encouraging BT to address the obstacles to replicability.

Forward looking analysis and conclusion

7.175 Our conclusion remains that BT has SMP in the wholesale trunk segments market in the UK for the reasons given in the January 2008 consultation⁷⁰ and summarised in paragraph 7.163 above.

7.176 We consider that the SMP that presently characterises the market is likely to remain for the period covered by this review. We have not been able to identify any developments that would serve to reduce the high structural barriers to entry and expansion that characterise the market, which would generate sufficient competitive pressures within the relevant timeframe to alter the current finding of SMP. In particular, Ofcom considers that the low rate of growth which characterises many of the retail leased line markets that make use of trunk segments is likely to prevent BT's wholesale competitors expanding to a scale where they can operate as efficiently as BT.

7.177 Further, Ofcom is not aware of any other CP having plans to expand its trunk network coverage in the foreseeable future. It appears likely that such expansion would be too costly and time consuming for the prospect of it to provide a substantial constraint on BT's conduct.

Retail market for low bandwidth TI leased lines (including analogue circuits and digital circuits at bandwidths up to and including 8Mbit/s) in the Hull area

January 2008 consultation

7.178 In paragraphs 7.418 to 7.424 of the January 2008 consultation, we proposed that KCOM no longer has SMP in the retail market for low bandwidth TI leased lines.

7.179 This conclusion was based largely on KCOM's low market share (25 per cent), which appears to have fallen considerably since the 2003/04 Review when it was estimated to be approximate 76 per cent. This suggests that the retail leased line market in Hull has become competitive and that there are no significant barriers to entry and expansion in the market.

⁷⁰ We have assessed BT's market share in light of the changes to aggregation nodes used to inform the break between trunk and TISBO segments. This has a minor impact as our estimate of BT's market share would be somewhere between 62% to 86%, which is similar to the estimated range in the January 2008 consultation.

Review of responses to the consultation

7.180 KCOM believed that it is no longer appropriate to define Hull as a separate market at the retail level. They argued that the Hull area is very small with a limited number of businesses that require leased line connectivity, and that leased lines, being point-to-point products, are likely to have one end of the circuit outside of the Hull area.

7.181 Another respondent made broadly similar comments to KCOM.

Ofcom's response to respondents' views

7.182 We have discussed the appropriate geographic market in Section 6.

Conclusion

7.183 Our conclusion remains that a separate retail market in the Hull area is appropriate and no operator has SMP.

Wholesale market for low bandwidth TISBOs up to and including 8Mbit/s in the Hull area

January 2008 consultation

7.184 Paragraphs 7.427 to 7.442 of the January 2008 consultation set out Ofcom's view that KCOM has SMP in the low bandwidth TISBO market. Our view was that the factors which are generally accepted to give rise to entry barriers in telecommunications markets apply strongly in this market, and that these are not offset by the high revenues which can be earned in higher bandwidth markets or in markets which provide greater opportunities for traffic aggregation.

7.185 We considered that the following factors provide strong evidence that KCOM has SMP in this market:

- KCOM's high market share (estimated to be at least 51%);
- the ubiquity of KCOM's infrastructure and the fact that this infrastructure is not easily duplicated;
- KCOM's ability to exploit economies of scale and scope; and
- the existence of significant barriers to entry and expansion, including as a result of sunk costs.

Review of responses to the consultation

7.186 KCOM responded that they enjoy a strong market position local to Hull in wholesale TISBO markets, but that no abuse has taken place and therefore there has been no market failure. On this basis they oppose the proposed wholesale regulation of TISBOs in Hull.

7.187 None of the other respondents who commented on these proposals disagreed with Ofcom's market power findings.

Ofcom's response to respondents' views

7.188 KCOM's argument on the appropriate regulatory remedy is discussed in Section 8.

Forward looking analysis and conclusion

7.189 Our conclusion remains that KCOM has SMP in this market for the reasons set out in paragraph 7.185 above.

7.190 We have assessed whether the SMP that presently characterises the market is likely to be attenuated during the period covered by this review. We have not been able to identify any developments that would serve to reduce the high structural barriers to entry that characterise the market, which would generate sufficient competitive pressures within the next four years to alter the current finding of SMP. We therefore consider that the barriers to entry and expansion that currently exist are likely to continue for the next four years.

Wholesale market for high bandwidth TISBOs above 8Mbit/s up to and including 45Mbit/s in the Hull area

January 2008 consultation

7.191 Paragraphs 7.443 to 7.459 of the January 2008 consultation set out Ofcom's view that KCOM has SMP in the high bandwidth TISBO market in Hull. We considered that the following factors provided strong evidence that KCOM has SMP in this market:

- KCOM's very high market share, estimated to be 80%, which appeared to have risen since the last review;
- the ubiquity of KC's infrastructure and the fact that this infrastructure is not easily duplicated;
- KCOM's ability to exploit economies of scale and scope; and
- the existence of significant barriers to entry and expansion, including as a result of sunk costs.

Review of responses to the consultation

7.192 As above, KCOM responded that they enjoy a strong market position local to Hull in wholesale TISBO markets, but that no abuse has taken place and therefore there has been no market failure. On this basis they oppose the proposed wholesale regulation of TISBOs in Hull.

7.193 None of the other respondents who commented on these proposals disagreed with Ofcom's market power findings.

Ofcom's response to respondents' views

7.194 KCOM's argument on the appropriate regulatory remedy is discussed in Section 8.

Forward looking analysis and conclusion

7.195 Our conclusion remains that KCOM has SMP in this market for the reasons set out in paragraph 7.191 above.

7.196 We have assessed whether the SMP that presently characterises the market is likely to be attenuated during the period covered by this review. We have not been able to identify any developments that would serve to reduce the high structural barriers to entry that characterise the market, which would generate sufficient competitive pressures within the next four years to alter the current finding of SMP. We therefore consider that the barriers to entry and expansion that currently exist are likely to continue for the next four years.

Wholesale very high bandwidth 155 Mbit/s TISBO market in the Hull area

January 2008 consultation and July 2008 consultation

7.197 Paragraphs 5.98 to 5.101 of July 2008 consultation summarised the reasons for Ofcom's view that KCOM has SMP in this market. In particular, our proposal was based on:

- KCOM's very high market share (98%);
- the ubiquity of KCOM's infrastructure and the fact that this infrastructure is not easily duplicated;
- KCOM's ability to exploit economies of scale and scope; and
- the existence of significant barriers to entry and expansion, including as a result of sunk costs.

7.198 The full reasons were set out in paragraphs 7.460 to 7.477 of the January 2008 consultation. This analysis related to all TISBOs over 45 Mbit/s. However, for the reasons set out in the July 2008 consultation, we have introduced a further break in the product market by introducing a separate market for TISBOs over 155 Mbit/s. As there are no TISBO circuits in the Hull area over 155 Mbit/s, the analysis set out in the January 2008 consultation for the market we were then proposing applies to the market as now defined.

Review of responses to the consultation

7.199 As above, in response to the January 2008 consultation, KCOM argued that they enjoy a strong market position local to Hull in wholesale TISBO markets, but that no abuse has taken place and therefore there has been no market failure. On this basis they oppose the proposed wholesale regulation for TISBOs in Hull. KCOM did not respond to our July 2008 consultation.

7.200 None of the other respondents who commented on these proposals disagreed with Ofcom's market power findings.

Ofcom's response to respondents' views

7.201 KCOM's argument on the appropriate regulatory remedy is discussed in Section 8.

Forward looking analysis and conclusion

- 7.202 Our conclusion remains that KCOM has SMP in this market for the reasons set out in paragraph 7.197 above.
- 7.203 We have assessed whether the SMP that presently characterises the market is likely to be attenuated during the period covered by this review. We have not been able to identify any developments that would serve to reduce the high structural barriers to entry that characterise the market, which would generate sufficient competitive pressures within the next four years to alter the current finding of SMP. We therefore consider that the barriers to entry and expansion that currently exist are likely to continue for the next four years.

Wholesale very high bandwidth 622 Mbit/s TISBO market in the Hull area**July 2008 consultation**

- 7.204 Paragraphs 5.102 to 5.105 of July 2008 consultation set out the reasons for Ofcom's view that no operator has SMP in this market. These are summarised below.
- 7.205 There are currently no TISBO circuits over 155 Mbit/s in the Hull area. As the incumbent fixed line operator in the Hull area, KCOM would be the most likely candidate were any operator to be considered to have SMP
- 7.206 KCOM would probably have greatest scope to take advantage of any economies of scope. However, as with this market in the rest of the UK, we believe that economies of scope are less likely to create significant advantages for very high bandwidth 622 Mbit/s TISBO services compared to the lower bandwidth TISBO markets, because of relatively high revenues that can be earned.
- 7.207 In the event that demand for 622 Mbit/s circuits did emerge in the Hull area, it may be appropriate to undertake a more substantive SMP assessment. In the absence of such demand, and based on the fact that we do not consider that economies of scope are large in this market, we conclude that no operator has SMP in the wholesale very high bandwidth 622 Mbit/s TISBO market in the Hull Area.

Review of responses to the consultation

- 7.208 For the markets in Hull where we found no SMP, KCOM agreed with our findings.
- 7.209 The only other respondent to comment specifically on this market agreed with our finding of no SMP, though believed that Ofcom should maintain a close eye on the situation if demand for 622 Mbit/s TISBOs emerged in the Hull area.

Conclusion

- 7.210 We conclude that no operator has SMP in the wholesale very high bandwidth 622 Mbit/s TISBO market in the Hull area, for the reasons set out above.

Wholesale market for low bandwidth AISBOs up to and including 1Gbit/s in the Hull area

January 2008 consultation

- 7.211 Paragraphs 7.478 to 7.494 of the January 2008 consultation set out Ofcom's view that KCOM has SMP in the low bandwidth AISBO market in the Hull area. Our view was that the factors which are generally accepted to give rise to entry barriers in telecommunications markets apply strongly in this market. These are not offset by the high revenues which can be earned in higher bandwidth markets or in markets which provide greater opportunities for traffic aggregation.
- 7.212 Ofcom considered that the following factors provide strong evidence that KCOM has SMP in this market:
- KCOM's high market share, estimated to be at least 67%;
 - the ubiquity of KCOM's infrastructure and the fact that this infrastructure is not easily duplicated;
 - KCOM's ability to exploit economies of scale and scope; and
 - the existence of significant barriers to entry and expansion, including as a result of sunk costs.

Review of responses to the consultation

- 7.213 KCOM did not agree with the continued imposition of regulatory remedies, though did not explicitly disagree with the finding of SMP. None of the other respondents who commented on these proposals disagreed with Ofcom's market power findings.

Ofcom's response to respondents' views

- 7.214 KCOM's comments on the appropriate regulatory remedies are discussed in Section 8.

Forward looking analysis and conclusion

- 7.215 We conclude that KCOM has SMP in the wholesale market for low bandwidth AISBOs up to and including 1Gbit/s in the Hull area, for the reasons set out in paragraph 7.212 above.
- 7.216 We have assessed whether the SMP that presently characterises the market is likely to be attenuated during the period covered by this review. We have not been able to identify any developments that would serve to reduce the high structural barriers to entry that characterise the market, which would generate sufficient competitive pressures within the next four years to alter the current finding of SMP. We consider that the barriers to entry and expansion that currently exist are likely to continue for the next four years.

Wholesale market for high bandwidth AISBOs over 1Gbit/s in the Hull area

Summary of proposals

7.217 In paragraphs 7.495 to 7.511 of the January 2008 consultation, Ofcom set out its view that KCOM has SMP in the high bandwidth AISBO market in the Hull area. This conclusion was partly based on an understanding that KCOM had a 100 per cent market share.

Revised proposals

- 7.218 However, it has since become apparent that there are no high bandwidth AISBO circuits sold in the Hull area. We have therefore reconsidered our preliminary conclusion.
- 7.219 While there are currently no high bandwidth AISBO circuits in Hull, it nevertheless makes sense to consider whether any operator is likely to have SMP should demand for such services materialise in the future. This is considered below.
- 7.220 As the incumbent fixed line operator in the Hull area, KCOM would be the most likely candidate were any operator to be considered to have SMP. KCOM may have advantages, especially in terms of its ability to exploit economies of scale and scope given the ubiquity of its infrastructure in the Hull area and its high market share in other markets.
- 7.221 In the high bandwidth AISBO market in the UK excluding the Hull area, we concluded that BT does not have SMP, because we considered that the very high revenues that can be earned in the downstream retail markets mean that OCPs are generally willing to sink the high fixed costs that are necessary to operate in this market. Further, the very large amount of traffic that can be carried over a single high bandwidth AISBO service enables OCPs to attain scale in this market and prevent other factors such as economies of scope from placing BT at a cost advantage. We considered that these conclusions are reflected in the relatively unconcentrated nature of the market in the rest of the UK.
- 7.222 We consider that these factors are also likely to apply in the Hull area. The revenues that can be earned in the downstream retail markets mean that OCPs are likely to be willing to sink the high fixed costs that are necessary to operate in this market. Further, the very large amount of traffic that can be carried over a single high bandwidth AISBO service enables OCPs to attain scale in this market and prevent other factors, such as economies of scope, from placing KCOM at such a cost advantage that it would necessarily have SMP.
- 7.223 In the event that demand for high bandwidth AISBO circuits did emerge in the Hull area, it may be appropriate to review this finding. In the absence of such demand, and based on the above reasoning, we conclude that no operator has SMP in this market.
- 7.224 For the reasons set out above, we now propose to find that no operator has SMP in the Hull area for high bandwidth AISBOs.

Question 1: Do stakeholders agree with our revised proposal not to find any operator to have SMP in the high bandwidth wholesale AISBO market in the Hull area?

Section 8

Regulatory remedies and impact assessment

Introduction

- 8.1 In this Section Ofcom sets out the regulatory remedies it is imposing on BT and KCOM in those markets where in Section 7 they have been found to have SMP. This Section also includes an Impact Assessment, as defined in Section 7 of the Communications Act (the Act).
- 8.2 Having considered respondents comments on the market definition and SMP analysis in both the January 2008 and July 2008 consultations, we have finalised in Section 3 to 7 our market definitions and findings of SMP for the markets covered by this review.
- 8.3 BT has been found to have SMP in the following markets for retail leased lines, wholesale symmetric broadband origination terminating segments, and trunk segments in the UK, excluding the Hull area:
- Retail market for low bandwidth TI leased lines;
 - Wholesale market for low bandwidth TISBO;
 - Wholesale market for high bandwidth TISBO in the UK excluding the CELA;
 - Wholesale market for very high bandwidth 155 Mbit/s TISBO in the UK excluding the CELA;
 - Wholesale market for low bandwidth AISBO; and
 - Wholesale trunk segments.
- 8.4 In Section 7 we also concluded that KCOM has SMP in the following markets for wholesale symmetric broadband origination terminating segments in the Hull area:
- Wholesale market for low bandwidth TISBO;
 - Wholesale market for high bandwidth TISBO;
 - Wholesale market for very high bandwidth 155 Mbit/s TISBO; and
 - Wholesale market for low bandwidth AISBO.
- 8.5 This Section is organised as follows. Firstly, we set out the legal framework for setting SMP conditions on undertakings found to have SMP in an electronic communications market.
- 8.6 We then consider the imposition of remedies on BT. We first set out what the current obligations on BT are, and then move on to review, for each market where BT has

been found to have SMP, what the appropriate obligations should be going forward, including obligations relating to interconnection and accommodation services.

- 8.7 We then move on to consider the imposition of remedies on KCOM. We first set out what the current remedies applying to KCOM are, and then move on to consider, for those markets where KCOM has been found to have SMP, what the appropriate remedies should be going forward. Finally, we consider what regulatory accounting obligations should apply to BT and KCOM in the future in relation to those retail and wholesale leased lines markets where we have found them to have SMP.

The legal framework for imposing SMP conditions

- 8.8 When considering the setting of SMP conditions, Ofcom has had regard to its duties under the Act and the European Commission's framework for the regulation of electronic communications networks and services. It has also taken utmost account of relevant guidelines and common positions produced by the European Commission (the Commission), the European Regulators' Group (ERG), Oftel and Ofcom.
- 8.9 Section 87(1) of the Act, which implements Art. 8 of the Access Directive, provides that, where Ofcom has made a determination that a person is dominant in a particular market, it shall set such SMP conditions as it considers appropriate and as are authorised under the Act.
- 8.10 In assessing the appropriateness of regulatory remedies Ofcom has taken into account paragraphs 21 and 114 of the Commission's SMP Guidelines which state that NRAs must impose one or more appropriate SMP services conditions on a dominant provider, and that in the view of the Commission it would be inconsistent with the objectives of the Framework Directive not to impose any SMP services conditions on an undertaking which has SMP.
- 8.11 The Act sets out the conditions Ofcom may impose if it finds that any undertaking has SMP. Sections 87 to 92 of the Act implement Articles 9 to 13 of the Access Directive and Articles 17 to 19 of the Universal Service Directive.
- 8.12 The SMP conditions which Ofcom is authorised to impose on a dominant provider include requirements to do the following:
- To provide network access to the relevant network and facilities;
 - Not to discriminate unduly in their provision;
 - Obligations to secure transparency in relation to interconnection and/or network access; and
 - To maintain separated accounts.
- 8.13 Ofcom may also impose:
- Price controls;
 - Rules about the recovery of costs and cost orientation;
 - Rules about the use of cost accounting systems; and
 - Rules about the adjustment of prices.

- 8.14 In considering the remedies to impose, we have also had regard to our general duties as set out in Section 3 of the Act. Section 3(1) states that Ofcom's principal duty is to further the interests of citizens in relation to communications matters and of consumers in relevant markets, where appropriate, by promoting competition. Specifically, Section 3(2)(b) states that Ofcom is required to secure the availability of a wide range of electronic communications services throughout the UK.
- 8.15 Section 3(4)(b) explains that, in meeting these requirements, Ofcom must have regard to the desirability of promoting competition in relevant markets. Section 3(4)(e) states that Ofcom must have regard, in performing its duties, to the desirability of encouraging the availability and use of high speed data transfer services throughout the UK. Also, pursuant to Section 3(5) of the Act, in furthering the interests of consumers, Ofcom must have regard to choice, price, quality of service and value for money.
- 8.16 Section 4 of the Act sets out the duties of Ofcom to act in accordance with its Community obligations which flow from Article 8 of the Framework Directive, and include the duties:
- To promote competition;
 - To contribute to the development of the internal market;
 - To promote the interests of all EU citizens;
 - Not to favour one type of network, service or facility over another;
 - To encourage network access and service interoperability in order to promote efficiency and competition; and
 - To encourage compliance with relevant international standards.
- 8.17 Ofcom is also required under Section 6 of the Act to ensure that regulation by Ofcom does not involve the imposition or maintenance of unnecessary burdens and to consider the scope for effective self-regulation.
- 8.18 When considering our proposals, we have also taken particular account of:
- The Commission's SMP Guidelines⁷¹;
 - The Access Guidelines published by Oftel in September 2002(the 2002 Access Guidelines)⁷²;
 - The Revised ERG Common Position on the approach to appropriate remedies in the regulatory framework for electronic communications networks and services (the ERG Remedies Position)⁷³; and

⁷¹ Commission guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services (2002/C 165/03).

⁷² These guidelines can be found at

http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/acce0902.htm.

⁷³ See http://erg.eu.int/doc/meeting/erg_06_33_remedies_common_position_june_06.pdf

- The ERG Common Position on Wholesale Leased Lines remedies⁷⁴ (ERG WLL CP).
- 8.19 Recital 15 of the Recommendation on Relevant Markets⁷⁵ set out that:
- “Regulatory controls on retail services should only be imposed where national regulatory authorities consider that relevant wholesale measures or measures regarding carrier selection or pre-selection would fail to achieve the objective of ensuring effective competition and the fulfilment of public interest objectives. By intervening at the wholesale level, including with remedies which may affect retail markets, Member States can ensure that as much of the value chain is open to normal competition processes as possible, thereby delivering the best outcomes for end-users.”*
- 8.20 Ofcom agrees with the Commission’s view. Regulation at the wholesale level can serve a twofold purpose. First, it can be used to address SMP concerns in the relevant wholesale market. Second, this might, in turn, increase competition in the downstream markets that rely on these wholesale inputs and render retail regulation unnecessary.
- 8.21 The Commission’s SMP Guidelines state at paragraph 15 that regulation should aim to promote an open and competitive market, and at paragraph 16 that *ex ante* regulations should be imposed to ensure that an SMP provider cannot use its market power to restrict or distort competition on the relevant market or leverage market power into adjacent markets.
- 8.22 The 2002 Access Guidelines describe the circumstances in which Ofcom would consider the imposition of wholesale access obligations to be appropriate, give guidance on the nature of the wholesale products Ofcom would expect to be supplied as a result of an obligation to provide access, and describe the conditions under which products should be made available.
- 8.23 As well as being appropriate, as required by Section 87(1) of the Act, each SMP condition must also satisfy the tests set out in Section 47(2) of the Act. These are that each condition must be:
- objectively justifiable in relation to the networks, services or facilities to which it relates;
 - not such as to discriminate unduly against particular persons or a particular description of persons;
 - proportionate to what the condition is intended to achieve; and
 - in relation to what it is intended to achieve, transparent.
- 8.24 Section 88 of the Act, which implements Article 13 of the Access Directive, further requires that, when considering a cost orientation obligation, we are able to demonstrate that:

⁷⁴ See http://erg.eu.int/doc/publications/erg_07_54_wll_cp_final_080331.pdf

⁷⁵ See: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:344:0065:0069:EN:PDF>

- there is a risk of adverse effect from price distortion; and
 - that the cost orientation obligation is appropriate to: promote efficiency, promote sustainable competition, and confer the greatest possible benefits on end-users.
- 8.25 Paragraph (3) of Section 88 further sets out that there is a relevant risk of adverse effects arising from price distortion if the dominant provider might:
- so fix and maintain some or all of its prices at an excessively high level, or
 - so impose a price squeeze, as to have adverse consequences for end-users of public electronic communications services.
- 8.26 According to Section 91 of the Act, which implements Article 17 of the Universal Service Directive (2002/22/EC), in order to impose SMP service conditions at the retail level, Ofcom further needs to be able to demonstrate, that it would not be able to fully perform its duties under Section 4 with wholesale regulation alone.
- 8.27 It is Ofcom's view that the SMP service conditions imposed on KCOM and BT in this Section satisfy the relevant requirements specified in the Act and relevant Directives. This is explained later in this Section.

Impact Assessment

- 8.28 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in Section 7 of the Act, which states that generally we have to carry out impact assessments where our proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of our policy decisions. For further information about our approach to impact assessments, see our guidelines "Better policy-making: Ofcom's approach to impact assessment" which are on our website⁷⁶.
- 8.29 In this Statement, the impact assessment is included in this Section alongside the discussion of the appropriate remedies for each market where we have found SMP in Section 7. Those assessments along with the assessment set out in the January 2008 consultation and July 2008 consultation constitute Ofcom's impact assessment for this market review. We have not, in this document repeated our assessment of the impacts of our different available options on different groups of stakeholders. This is because we did not receive any comments on our original assessments in the January and July 2008 consultations and our original assessments remain valid.

Revocation of existing remedies

- 8.30 The 2003/04 Review imposed SMP conditions on BT and KCOM in a number of markets. In some of those markets, our analysis indicates that SMP no longer exists. In others, new SMP conditions are proposed, on the basis of either new or existing market definitions. In either case, all of the SMP conditions introduced by the 2003/04 Review should no longer apply, once this Statement is published.

⁷⁶ http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

Review of regulatory remedies - BT

- 8.31 In the January 2008 consultation, we asked the following questions in relation to our proposed remedies for markets where BT was found to have SMP:

Question 16: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale TISBO markets in the UK excluding the Hull area?

Question 17: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale low bandwidth AISBO market in the UK excluding the Hull area?

Question 18: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale trunk market?

Question 19: Do stakeholders agree with Ofcom's assessment about the appropriate regulatory option and our proposed remedies for the retail low bandwidth TI market in the UK? In particular, do you think that Ofcom should accept BT's proposed voluntary undertakings that it will continue to supply new analogue and sub-2Mbit/s retail circuits until 2011 or earlier if, subject to industry agreement and consent by Ofcom, the underlying platform is closed at an earlier date; that it will not increase its prices for analogue services more quickly than the rate of inflation (RPI-0%) for a period two years following the publication of the LLMR statement i.e. from 2008 to 2010; and that it will commit to a further two-year cap, the level of which would be agreed with Ofcom prior to 2011?

- 8.32 In the July 2008 consultation, we further asked the following question in relation to the market for wholesale very high bandwidth 155 Mbit/s TISBO in the UK excluding the CELA, where we proposed to find BT to have SMP:

Question 10: Do stakeholders agree with our assessment of the appropriate regulatory option and our proposed remedies for the wholesale very high bandwidth 155 Mbit/s TISBO market in the UK excluding the CELA and the Hull area?

- 8.33 In this sub Section dedicated to reviewing BT's remedies, we first set out the remedies that currently apply to BT as a result of the 2003/04 Review. Secondly, for each of the markets where we concluded in Section 7 that BT had SMP, we present a summary of the proposals put forward in the January and July 2008 consultations. We then discuss the responses received and provide Ofcom's response to the issues raised. Finally, having regard to all consultation responses and all evidence available to us, we review our the assessment of regulatory options, the proposed remedies, and our conclusions with respect to the appropriate remedies that will apply to BT in each of the markets where it has been found to have SMP.

The existing regulatory obligations on BT

Retail markets

- 8.34 In the 2003/04 Review, BT was found to have SMP in the market for analogue and low bandwidth retail TI leased lines, comprising analogue and digital services at speeds up to and including 2 Mbit/s and 8 Mbit/s. This was the only retail product market in which SMP was found and hence in which remedies could be imposed. As a result of the SMP finding, the following remedies were imposed:

- an obligation to supply on reasonable request the minimum set of retail leased lines and to continue to supply existing 8Mbit/s retail TI leased lines being provided on the date the conditions entered into force;
 - a requirement not to unduly discriminate;
 - for all leased lines in this market, a requirement to publish a reference offer (obligation to publish current prices, terms and conditions; and same day price notification); and
 - a requirement to publish information concerning delivery and repair times.
- 8.35 In addition, Ofcom accepted from BT a voluntary undertaking not to increase the weighted average price of analogue and 8 Mbit/s leased lines by more than RPI before June 2006 or the implementation of the next market review, whichever was the earlier, combined with cost orientation and a cost accounting system to take effect only if BT breaches this voluntary undertaking.
- 8.36 For digital retail leased lines, Ofcom decided to rely on the increased competition expected as a result of wholesale regulation, in particular the price control on symmetric broadband origination PPC services, to constrain prices at the retail level.

Wholesale markets

- 8.37 The 2003/04 Review found BT to have SMP in the wholesale markets for low and high bandwidth TISBO, AISBO at all speeds, and trunk segments. As a result of the SMP findings, a series of regulatory obligations were imposed on BT in these markets:
- a general obligation to provide access on reasonable request;
 - a requirement not to unduly discriminate;
 - basis of charges obligations (cost orientation and a cost accounting system);
 - charge controls (only for TISBO products and services);
 - accounting separation obligations;
 - a requirement to publish a reference offer;
 - an obligation to give 90 days notice of changes to prices, terms and conditions for existing TI symmetric broadband origination services;
 - an obligation to give 28 days notice of the introduction of prices, terms and conditions for new TI symmetric broadband origination services;
 - same day notification of changes to prices, terms and conditions for wholesale trunk segment products;
 - a requirement to provide quality of service information;
 - a requirement to notify technical information with 90 days notice; and

- obligations relating to requests for new network access.

8.38 BT is also subject to:

- a Direction under the general access condition to provide Partial Private Circuits (PPCs) at a range of bandwidths, Radio Base Station (RBS) backhaul link products, and Local Loop Unbundling (LLU) backhaul products, subject to specific terms and conditions;
- a Direction under the cost orientation condition covering pricing matters relating to PPCs and LLU backhaul; and
- a Direction under the quality of service condition to require specific information in respect of PPCs.
- a Direction under the general access condition to provide Ethernet-based LLU backhaul products, subject to specific terms and conditions; and
- a Direction under the cost orientation condition covering pricing matters relating to Ethernet-based LLU backhaul.

Cost accounting and accounting separation obligations

8.39 BT is currently subject to cost accounting and accounting separation requirements in a range of markets in which they have been found to have SMP, including the leased lines markets covered by the 2003/04 Review. Those requirements were set out in a Statement issued in July 2004 (the 2004 Statement on Regulatory Reporting)⁷⁷.

Interconnection and accommodation services

8.40 For those wholesale markets where BT was found to have SMP in the 2003/04 Review, Ofcom had also identified the need to impose obligations relating to certain accommodation and interconnection services in addition to the SMP Conditions in the relevant SMP markets. As a result, BT is currently subject to certain obligations in relation to the following services:

- In Span Handover (ISH);and
- Customer sited Handover (CSH).

Wholesale market for low bandwidth TISBO in the UK

Introduction

8.41 In this sub Section, we set out the regulatory obligations that we impose on BT as a result of our finding of it having SMP in the provision of low bandwidth TISBO in the UK excluding the Hull area.

8.42 We first provide a summary of the proposals as set out in the January 2008 consultation. Secondly, we review the responses to the consultations and provide our response to the issues raised. Thirdly, we review the choice of the appropriate

⁷⁷ http://www.ofcom.org.uk/consult/condocs/fin_reporting/fin_report_statement/

remedies, having regard to all the responses and available evidence available to us. We then set out our conclusions and the remedies we have decided to impose on BT.

8.43 The last part of this sub Section sets out how we believe our obligations comply with the relevant tests in the Act. In addition, we set out how we have taken into account the ERG WLL CP in setting our obligations.

Summary of proposals

8.44 In paragraphs 7.187 to 7.239 of the January 2008 consultation we set out our proposals in support of the finding of SMP for BT in this market. We have now confirmed in Section 7 the SMP finding on BT. In the table below, we set out the key findings in support of our view.

Table 8.1 Key market power indicators

	Wholesale low bandwidth TISBO market	Downstream retail market
<i>Quantitative indicators</i>		
Market Share	89% (was 84-88% in the 2003/04 Review)	80%(was 84-88% in the 2003/04 Review)
Profitability	Potentially above the low returns shown in the Regulatory Accounts due to shortcomings, among other things, in the transfer charging regime	Above the level expected to be found in competitive markets
<i>Qualitative indicators</i>		
The ubiquity of BT's infrastructure and the fact that such infrastructure is not easily duplicated		
BT's ability to exploit economies of scale and scope		
The existence of significant barriers to entry and expansion, including as a result of sunk costs		

8.45 In paragraphs 8.109 to 8.179 of the January 2008 consultation we then reviewed the regulatory options available to us, identified which option we believed would most appropriately serve our policy objectives, and which remedies, if any, should apply to BT in relation to its proposed SMP determination in the provision of low bandwidth TISBO in the UK excluding the Hull area. We present a summary of that assessment in the following paragraphs.

Options assessment

8.46 Before setting out our analysis of appropriate remedies, we considered broader policy options and how best we could meet our policy objectives considering BT's SMP finding. As set out in paragraphs 8.33 to 8.37 of the January 2008 consultation, our policy objectives included protecting the interests of consumers and promoting competition. We considered two main policy options, namely keeping the existing regulation or varying it to address the shortcoming we had identified, against the counterfactual of not imposing any regulation at all.

8.47 In particular, in the January 2008 consultation, we considered the following regulatory options:

- *No regulation;*
 - *Status quo*, which means to continue to regulate BT's provision of low bandwidth TISBO, with the same SMP Conditions as set out in the 2003/04 Review; and
 - *Variations and additional measures*, including: reviewing the SLA/SLGs regime; applying an amended interpretation of the no undue discrimination obligation, under which we would presume that saw-tooth discounts are unduly discriminatory; requiring BT to address flaws in the PPC regulatory accounting regime; encouraging BT to address the other obstacles to replicability identified in the 2006 review; and seeking a commitment from BT to consult on the introduction of more efficiently designed SDH access and backhaul products.
- 8.48 In paragraphs 8.109 to 8.136 of the January 2008 consultation, for each option we considered how well it would serve our policy objectives, including furthering consumers' interests and promoting competition in downstream retail markets, and the impact it would have on the various key stakeholders, especially consumers.
- 8.49 Given our proposal to find that BT had SMP in this market, we set out why we believed that other providers would require regulated access from BT to be able to compete effectively in downstream retail leased lines markets. In our view, BT's market power is, *inter alia*, derived from its control of bottleneck infrastructure, in particular copper loops, which cannot be readily duplicated by competitors, given the importance of sunk costs and presence of economies of scale and scope. We had found BT to have very high market share over a period of several years, which was also reflected in the downstream retail market. In the absence of regulation, we argued, BT would be able to exploit its market power by restricting access to its network and then leveraging its market power into downstream market, thereby reducing end user access to a choice of competitive services and prices. We considered therefore that the option of no regulation would poorly serve our objectives.
- 8.50 We considered that the current regulation have had only had limited success in achieving Ofcom's policy objectives. In particular, they have not been successful in promoting competition in this market or the associated downstream market, in which BT's market share had risen marginally, to 80% against the 78% found in the 2003/04 Review.
- 8.51 Having found that some regulation was likely to be appropriate, we considered the scope for improving the current regime

Pricing and cost orientation

- 8.52 Firstly, as set out at paragraph 7.194 and following of the January 2008 Consultation, we had concerns that BT's true profitability for these services might be above the low returns showed in its Regulatory Statement at the time of the January 2008 consultation. In particular, there were some grounds for considering that BT may have been undercharging its downstream divisions for low bandwidth TISBO, and that its regulatory accounts may consequently have understated the real profitability of these services⁷⁸. One of the reasons was that, as set out in Annex 13 of the

⁷⁸ Even though, as stated at paragraph 7.198 and following of the January 2008 consultation, we did not put too much weight on BT's profitability, the concerns about undercharging to the retail arms were material and had been thoroughly analysed by Ofcom. Further references to our findings in this area were provided at paragraph 7.199 and in Annex 13 of the January 2008 consultation.

January 2008 consultation, we found that BT's retail leased lines were not yet economically and technically replicable by its competitors⁷⁹, potentially putting them at a disadvantage in competing with BT in downstream retail markets. While the SMP assessment did not rest on the replicability findings, these findings highlighted that in some respects the way that BT had implemented the remedies imposed by the 2003/04 Review may have created further obstacles to the promotion of competition in the downstream market. It is also worth noting that PPCs are not subject to a requirement for Equivalence of Input (EOI) under BT's Enterprise Act Undertakings, meaning that BT retail consumes a different network product than its competitors. In the absence of an EOI obligation, abuses of dominance such as non price discrimination are harder to deter and detect. It is therefore even more important that replicability is achieved if competition is to flourish in the downstream retail market.

SLAs/SLGs regime

- 8.53 In addition, two particular problems have emerged since the last review with the existing SLAs/SLGs regime for PPCs, which was considered ineffective by both BT and the OCPs. Firstly, the KPIs used to monitor BT's performance against BT's regulated SLAs were deemed to be ineffective. Secondly, there appeared to be a difference between the contractual SLGs for BT's wholesale Ethernet products and that for its TDM wholesale products, particularly PPCs.

SDH disaggregated access and backhaul

- 8.54 We also considered that the development of disaggregated access and backhaul products by BT could in the future support greater competition at least in backhaul services⁸⁰, where alternative providers should be able to take advantage of aggregation opportunities and increase the reach of their backhaul infrastructures. We therefore considered that BT and the rest of the industry should continue to engage on how best to meet future requirements for disaggregated products, having regard for the obligations set out in BT's Undertakings.

No undue discrimination

- 8.55 We also remained concerned that saw-tooth discounts, which are offered by BT on some products, could act as a barrier to market entry or expansion and, in a market characterised by SMP, could restrict the development of competition⁸¹. We argued that, given their potentially anti-competitive effects, we were inclined to the view that there should be a presumption that saw-tooth discounts are unduly discriminatory in the future. In future, therefore, we would generally presume that such discounts are in breach of an SMP requirement not to discriminate unduly, although we would have to judge each alleged breach on a case by case basis.

⁷⁹ As stated in Annex 13 of the January 2008 consultation, Ofcom started to work on the replicability of BT's retail leased lines in 2005, after the completion of the TSR. We then issued the Replicability Statement in September 2006, where we set out the problems with the way BT was implementing the existing SMP obligations imposed by the 2003/04 Review.

⁸⁰ Ofcom conducted a study of Converged Backhaul in 2007, where it found that if in the future competition in backhaul is to emerge, competitive providers have to have, among other things, access to disaggregated access and backhaul products, as set out in BT's Undertakings, if they are to take advantage of emerging opportunities for greater economies of scale in backhaul through the aggregation of convergent traffic from voice, leased lines and broadband.

⁸¹ Ofcom had previously received a complaint on BT's saw tooth discounts offered in conjunction with the Netstream tariff in August 2003. Further reference is provided at paragraph 8.123 and following of the January 2008 consultation.

Other measures

8.56 We also considered in the January 2008 consultation that it would be worth considering, among other things, the scope for more radical remedies such as dark fibre in the access network through a review of the dark fibre market. Annex 10 to the January 2008 consultation set out our considerations with respect to a potential review of dark fibre in the access network, and asked stakeholders to comment on it.

Conclusion on choice of option

8.57 For the reasons just discussed, our preliminary concluded in paragraphs 8.134 to 8.136 of the January 2008 consultation was that the third option would be best in terms of meeting our policy objectives of furthering consumers' interests and promoting greater competition in the downstream retail market.

8.58 We argued that, if competition in the retail market is to flourish, BT should still be required to provide access on regulated and transparent terms and conditions. There was a need, however, for some specific improvements, to improve the prospects for effective competition in downstream markets. We therefore suggested that we should adopt the following variations and additional measures:

- review the SLAs/SLGs regime;
- work with BT to address the obstacles to replicability, including the flaws in the regulatory accounting regime;
- seek a commitment from BT to consult on the launch of disaggregated SDH products that would represent a future Eol input for SDH leased lines; and
- clarify our interpretation of undue discrimination in relation to saw tooth discounts.

Preliminary conclusions: proposed regulatory obligations

8.59 In the January 2008 consultation we set out in paragraphs 8.137 to 8.177 why we thought it would be appropriate to impose on BT certain obligations relating to the provision of network access on regulated terms and conditions, including prices. We proposed the following obligations should apply to BT:

- an obligation to provide Network Access;
- a requirement not to unduly discriminate;
- cost orientation;
- requirement to publish a reference offer;
- an obligation to give 90 days notice of changes to prices, terms and conditions for existing services;
- an obligation to give 28 days notice of the introduction of prices, terms and conditions for new services;
- a requirement to publish quality of service information;

- a requirement to notify technical information with 90 days notice; and
 - obligations relating to requests for new network access.
- 8.60 In addition, we argued that Ofcom should consider further the imposition of charge controls, including a review of the charge controls going forward after the current control expired in September 2008 and considering the possibility of extending it to wholesale SDSL. We indicated that our intention was to consult separately on the proposed charge control.
- 8.61 With respect to the types of access BT should provide, we considered that BT shall continue to be subject to the PPC Direction and the requirement to provide RBS Backhaul. However, we considered that we should lift the LLU Backhaul requirement currently imposed on BT.
- 8.62 With respect to SLAs/SLGs, we proposed to amend the current PPC Direction to reflect the work that was being done by the OTA and industry on KPIs and, once Ofcom's work on Ethernet SLAs/SLGs would be completed, to align the SLGs in the PPC regime with those of the Ethernet regime.
- 8.63 We proposed to continue to engage with BT to ensure that any reasonable request for disaggregated access and backhaul products is properly considered, and that such new services are promptly developed.
- 8.64 Finally, we set out our view that, in the future, Ofcom should be inclined to the view that there should be a presumption that saw-tooth discounts are unduly discriminatory.
- 8.65 Paragraph 8.179 of the January 2008 consultation had a discussion of how we thought the proposed remedies met the Communications Act tests. We have set out at the end of this sub Section the appropriate Communications Act tests in detail for each regulatory obligations we have concluded will apply to BT.

Responses to the consultations and Ofcom's response

Charge controls

- 8.66 Several respondents commented on the proposal to impose further charge controls on BT's wholesale low bandwidth TISBOs.
- 8.67 UKCTA urged Ofcom to be cautious in the setting of charge controls because, as the TISBO and AISBO markets converge, charge controls could artificially affect the rate of substitutions between the two.
- 8.68 One CP responded that they would prefer to see no charge controls at all in markets where BT has SMP, and, if introduced, there should be a price cap of RPI - 0% so as not to stifle competition.
- 8.69 Several respondents supported the renewal of charge controls, including for 64kbit/s PPCs. Cable and Wireless argued that new (lower) starting charges should be set at the start of the charge controls period. BT proposed that 64kbit/s TISBO circuits should be covered by voluntary commitments similar to those they have offered in relation to retail analogue circuits.

- 8.70 One MNO commented that they believed charge controls should be extended to RBS backhaul and RBS backhaul provided using Ethernet transmission. BT opposed this on the grounds that RBS services are expected to decline and a charge control would involve disproportionate expense. BT suggested making a voluntary commitment to keep RBS backhaul prices in line with PPC prices.
- 8.71 There were differing views on the inclusion of wholesale SDSL within the charge control. UKCTA and one CP supported the proposal. However, Cable and Wireless, the Welsh Assembly Government, and BT opposed it, with BT arguing that continuing regulation is disproportionate because, amongst other factors, the product is in decline.
- 8.72 Having considered these responses, we remain of the view charge controls should be applied to the services provided by BT in this market, given BT's dominant position and the fact that the market is not prospectively competitive. In the absence of a charge control, we consider there is a significant risk that BT could increase its charges above competitive levels, and that this could lead to higher prices in retail markets, to the detriment of consumers. We accept that there is a possibility that lower prices may deter some infrastructure investment by competing operators. However, we consider the likelihood of this occurring to be low, given the declining nature of the TISBO market. In addition, such investments may be inefficient, if they are prompted solely by prices being above competitive levels.
- 8.73 We acknowledge UKCTA's point that charge controls should not artificially affect the rate of substitution between TISBO and AISBO products, and the points raised by other stakeholders concerning the coverage of the controls, but consider that these issues can be addressed when determining the scope and form of the charge controls. We are publishing a separate consultation on the detail of our charge control proposals alongside this Statement.

Business grade wholesale broadband access products

- 8.74 UKCTA and other respondents wanted Ofcom to recognise, firstly, that the provision of business grade wholesale broadband access (asymmetric as well as symmetric) as a separate market from residential broadband services (business grade broadband) and, secondly, that such a market should be reviewed for the purpose of imposing SMP conditions on BT in this review, which, they considered, would have been found to have SMP, at least in some parts of the UK.
- 8.75 At paragraph 3.96 of this Statement, we have discussed the comments from respondents with respect to the finding of a separate market for business grade wholesale broadband access, having had regard, *inter alia*, for the market definition set out in the WBA Statement for asymmetric broadband services⁸². We have set out the reasons why we have concluded that a separate business grade wholesale broadband access market does not exist. It would therefore not be appropriate for Ofcom to consider regulatory remedies in relation to such services.
- 8.76 We further consider that the promotion of competition in the provision of broadband services to all users, including businesses, is well served by the policy set out in the WBA Statement. We do not consider therefore that this issue requires further consideration in this Statement.

⁸² <http://www.ofcom.org.uk/consult/condocs/wbamr07/statement/statement.pdf>

Review of proposals for remedies

- 8.77 Having considered the responses and representations received and the evidence available to us following the consultations of January 2008 and July 2008, in this sub Section we summarise the key arguments in support of our conclusions on the appropriate remedies. A fuller analysis of the remedies was set out in paragraphs 8.137 to 8.177 of the January 2008 consultation.
- 8.78 We then complete our review for this market by setting out our final decisions on the regulatory obligations that should apply to BT as a result of our finding of SMP in this market. Finally, we set out why we believe the Communications Act tests are met, including why ex ante regulation is appropriate and reliance on competition law alone would be insufficient.

Aims of regulation

- 8.79 We set out our policy objectives in paragraphs 8.33 to 8.37 of the January 2008 consultation. Given that we have found in Section 7 that BT has SMP in this market, we consider that regulation should have the following principal aims in this market:
- to protect wholesale customers and, via the retail market, consumers from the exploitation of that SMP, for example to protect them from excessive prices; and
 - to promote competition in the retail market by ensuring that SMP in this wholesale market is not leveraged into downstream retail markets.
- 8.80 Restricted competition in the associated retail markets is likely to be detrimental to end users as it could result in higher prices, poorer customer service and less choice. Although the retail markets could themselves be regulated, in general competition is more effective at delivering benefits to consumers than regulation.
- 8.81 The justification for the remedies we are imposing is summarised below. In doing this, we have divided the specific conditions into the following four categories:
- network access;
 - prohibition of undue discrimination;
 - cost orientation; and
 - transparency and notification obligations.
- 8.82 We discuss our conclusions on cost accounting and accounting separation obligations separately at the end of this Section.

Network Access

- 8.83 As set out in Section 7, BT has SMP in this market. Access to BT's network is important in enabling BT's competitors to compete in the retail market, as alternative access infrastructures account for only 20% of the total access infrastructures in this market. Without an obligation to provide wholesale services to rival CPs, including an obligation to provide interconnection services, BT is likely to have an incentive to refuse to provide access and leverage its market power into the downstream retail market. In order to meet the objective of promoting competition in the retail market, an obligation to provide network access is required. As discussed further later in this