S C H E D U L E S

SCHEDULE 1

Amendments to Communications Act 2003 and related amendments

Communications Act 2003

50. After section 89 insert—

"**Functional separation**

89A.—(1) This section applies where—

(a) OFCOM have made a determination that a person ("the dominant provider") has significant market power in an identified services market;

(b) that person is the provider of a public electronic communications network or a person who makes available facilities that are associated facilities by reference to such a network;

(c) it appears to OFCOM that the setting of conditions applying to the dominant provider under section 87 (and, where OFCOM think it appropriate, section 88) has failed to address competition problems identified by OFCOM in carrying out a market analysis for the purpose of setting or modifying those conditions; and

(d) OFCOM have identified important and persisting competition problems or market failures in relation to the provision of network access.

(2) OFCOM may set an SMP services condition (referred to in this section and section 89B as a "functional separation condition") requiring the dominant provider to transfer activities relating to the provision of network access to an independently operating business entity which is a part of the dominant provider.

(3) Where a functional separation condition is imposed on the dominant provider, the products or services specified in the condition must be given to the dominant provider and to other persons—

(a) on the same timescales, terms and conditions, including those relating to price and service levels, and

(b) by means of the same systems and processes.

(4) A functional separation condition must, where relevant, specify—

(a) the precise nature and level of separation, specifying in particular the legal status of the entity to which activities are transferred;

(b) an identification of the assets of that entity and the products or services to be supplied by it;

(c) the governance arrangements (including incentive structures) to ensure the independence of the staff employed in that entity;

(d) rules for ensuring compliance with the obligations imposed by the condition;

(e) rules for ensuring transparency of operational procedures, in particular towards persons, other than the dominant provider, who in OFCOM's opinion are likely to be affected by the condition; and

(f) a monitoring programme to ensure compliance, including a requirement for the publication of an annual report.

Functional separation conditions: consultation and notification

89B.—(1) Where OFCOM propose to apply a functional separation condition to a person, they must submit their proposal, including the draft functional separation condition, to the European Commission.

(2) The proposal must set out—

(a) evidence justifying the conclusions mentioned in section 89A(1)(c) and (d);

(b) a reasoned assessment that there is little or no prospect of effective and sustainable infrastructure based competition within a reasonable time frame;

(c) an analysis of the expected impact of the condition on—

   (i) OFCOM;

  (ii) the person on whom the condition is to be imposed;

 (iii) the staff of the entity to which activities are to be transferred;

 (iv) the electronic communications sector as a whole;

  (v) incentives to invest in the electronic communications sector, particularly with regard to the need to ensure social and territorial cohesion;

 (vi) competition in the services market affected by the condition; and

(vii) other persons who in OFCOM's opinion are likely to be affected by the condition, including, in particular, consumers; and

(d) an analysis of the reasons why a functional separation condition would be the most effective means of addressing important and persisting competition problems or market failures identified by OFCOM.

(3) OFCOM may set the functional separation condition and apply it to a person if—

(a) the Commission has approved the imposition on the person of the obligations contained in the condition, and

(b) OFCOM have considered the impact that the obligations contained in the condition and approved by the Commission are likely to have on SMP services conditions set in relation to the services markets which, in OFCOM's opinion, will be affected by the proposed condition.

(4) A proposal for a functional separation condition is to be submitted to the European Commission under this section before OFCOM carry out a consultation under section 48A in relation to the condition.

Obligation to notify OFCOM of voluntary separation

89C.—(1) This section applies where—

(a) OFCOM have made a determination that a person ("the dominant provider") has significant market power in an identified services market;

(b) the dominant provider is the provider of a public electronic communications network or a person who makes associated facilities available; and

(c) the dominant provider decides to transfer a substantial part or all of the dominant provider's local access network assets to an independently operating business entity (which may be a part of the dominant provider or another person) for the purpose specified in subsection (2).

(2) That purpose is to use the assets to provide products or services to the dominant provider and to other persons—

(a) on the same timescales, terms and conditions, including those relating to price and service levels; and

(b) by means of the same systems and processes.

(3) The dominant provider must notify OFCOM of—

(a) the decision to transfer the assets;

(b) any changes to its intentions; and

(c) the taking effect of the transfer.

(4) Where OFCOM receive a notification under this section, they must, as soon as reasonably practicable, consider the impact that the transfer is likely to have on SMP services conditions set in relation to the services markets which, in OFCOM's opinion, will be affected by the proposed transfer."