



Charge controls for Wholesale Line Rental – implementation and cost orientation

Second Statement

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Section 1

Summary

Introduction

- 1.1 In our Statement of 26 October 2009¹, we set out our decisions on the charge controls to be applied to Wholesale Line Rental (“WLR”) analogue service and related charges.
- 1.2 WLR is a product Openreach² supplies to Communication Providers allowing them to rent access lines on wholesale terms, and resell the lines to customers. This product gives consumers the opportunity to choose alternative suppliers who can provide them with access and, in almost all cases, calls services. WLR has been and remains a central service supporting effective competition in fixed narrowband services at the retail level (as demonstrated by our recent finding that BT no longer held SMP in the provision of retail analogue access services).³
- 1.3 In the Statement in October, we decided that:
- the previous controls on separate Residential and Business WLR were to be replaced by a single control, for a Core WLR Rental service. The Core WLR Rental Service would be available to all customers, residential and business, and will include a standard level of service and directory listings for residential and business numbers; and
 - the implementation of the Core WLR service should be phased in order to allow Openreach the appropriate time to make the necessary changes to their systems to be able to provide products that fulfil the requirements of the Core service.
- 1.4 We also set new price controls for some related services, i.e. WLR line transfers and new connections. The control ends on 31 March 2011.
- 1.5 However, as part of that Statement, we sought additional stakeholder views on three other issues related to WLR charge controls. They were:
- The precise timing of the transition to the new *WLR Core* Rental service. We proposed full introduction after the introduction of WLR3 functionality in Openreach’s Release 1400, currently scheduled for July 2010.
 - A continued cap on £110 on the *WLR Premium* charge for the period of the transition.
 - The removal of the basis of charges (cost orientation) obligation on specific higher care services linked to WLR. We proposed that Openreach may provide higher service levels at an additional charge. Such services will continue to be subject to other SMP obligations imposed in the Review of the wholesale fixed

¹ Charge Controls for Wholesale Line Rental and related services <http://www.ofcom.org.uk/consult/condocs/wlr/>

² Openreach is the access services division formed as a result of BT’s Undertakings given to Ofcom in September 2005 in lieu of a reference to the Competition Commission under the Enterprise Act.

³ Review of Fixed Narrowband Retail Services Markets
http://www.ofcom.org.uk/consult/condocs/retail_markets/statement/

narrowband markets (the “Wholesale Narrowband Review”)⁴ (e.g. requirement not to unduly discriminate, requirement to publish a reference offer). We considered removal of cost orientation was reasonable, as the revised charge control structure offered Communications Providers an accessible chain of substitution for these services which would ensure there was a constraint from the market on the charges for higher care services.

Responses to the further consultation

- 1.6 The consultation closed on 7 December 2009 and we received seven responses.
- 1.7 All respondents supported the implementation plan and the use of the temporary cap on *WLR Premium*, though two respondents suggested that the cap should be maintained until the end of the control period and one suggested it should be maintained indefinitely. Those advocating extension to the end of the period were particularly concerned about discrimination against those customers not yet able to migrate from WLR2 to WLR3.
- 1.8 There were a range of views on the advisability of removing cost orientation from the higher care level services, though no new arguments were put forward in addition to those raised with respect to this issue in the earlier consultation. In particular, there was considerable support for Ofcom monitoring Openreach’s behaviour if cost orientation was removed.
- 1.9 Subsequent to the consultation, Openreach has offered a voluntary commitment to restrict any differential between the *WLR Core Service* and the *WLR Premium* charge to within the current difference (under £10) for the duration of the charge control. While we consider that such a commitment is not necessary for the removal of the basis of charge condition, we consider that it does offer Communications Providers additional re-assurance of price stability through the period of transition to the new services and controls.

Conclusions

- 1.10 In summary, having given careful consideration to all of the responses and taking into account the voluntary commitment from BT on *WLR Premium* charges, we have decided that it is appropriate to implement the proposals set out in October. That is:
- The full introduction of the *WLR Core* service will commence after the introduction of WLR3 functionality in Openreach’s Release 1400, currently scheduled for July 2010 (“the implementation date”).
 - We will impose a cap of £110 on the *WLR Premium* charge for the period of the transition to the implementation date.
 - We will remove the basis of charges (cost orientation) obligation on specific higher care services linked to WLR. Ofcom will continue to monitor BT’s behaviour in this area in the context of future reviews.

⁴ http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/main.pdf

Section 2

Framework for decisions

Introduction

- 2.1 In this Section, we set out the background to our decisions on charge control implementation and the cost orientation of enhance care services presented in Sections 3 and 4.
- 2.2 Specifically, we summarise parts of the decisions already made in the Wholesale Narrowband Review⁵, where relevant to the issues consulted on, and the legal framework in which we operate when considering and imposing SMP service conditions.

Regulatory background and context

- 2.3 In 2003, Oftel conducted a *Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets*⁶ which found that BT had SMP in the exchange line markets. BT was required to provide WLR as a result of SMP condition AA10. This continued the position under the previous regime when, from 2002, BT had been required to provide WLR as part of its licence conditions under part of the Telecommunications Act 1984 (now repealed).
- 2.4 In addition to the requirement to provide WLR, the 2003 review also imposed charge controls on various services including the provision of WLR. The charge controls applied to WLR were set on an RPI-X basis to run from 1 September 2003 to 31 August 2006.
- 2.5 In September 2005, BT offered and Ofcom accepted a set of undertakings pursuant to section 154 of the Enterprise Act 2002. The Undertakings included the commitment to establish a new, functionally separate organisation, Openreach, in order to manage BT's wholesale access network. Openreach's remit therefore includes the provision of WLR.
- 2.6 On 24 January 2006, Ofcom published Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services (the "First WLR Statement")⁷. It replaced the price controls set by Oftel with new fixed price ceilings for the provision of residential and business WLR services as follows:
- | | | |
|-----------------|---|------------|
| Residential WLR | - | £100.68 pa |
| Business WLR | - | £110.00 pa |
- 2.7 In 2008, we started a review of certain fixed charges for regulated network access services provided by Openreach, as we were concerned that since they were set on a static basis they might have become out of balance with the efficiently incurred costs of providing those services (the Openreach Pricing Framework Review⁸).

⁵ http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/

⁶ http://www.ofcom.org.uk/static/archive/Oftel/publications/eu_directives/2003/fix_narrow0803_1.pdf

⁷ <http://www.ofcom.org.uk/consult/condocs/wlrcharge/statement/statement.pdf>

⁸ <http://www.ofcom.org.uk/consult/condocs/openreachframework/statement/>

2008/9 Review of the Wholesale Fixed Narrowband Markets

- 2.8 In 2008, Ofcom undertook a review of the wholesale narrowband fixed markets and on 15 September 2009 published the conclusions of the Wholesale Narrowband Review, the scope of which included wholesale exchange line services⁹.

Market definition and market power assessment

- 2.9 In the Wholesale Narrowband Review, we concluded there was a single market for wholesale analogue exchange line services in the UK (excluding the Hull area). This market definition differs from the previous position of two separate markets defined by Oftel in 2003, namely:
- Wholesale residential analogue exchange line services; and
 - Wholesale business analogue exchange line services.
- 2.10 We determined that BT had SMP in the market for wholesale analogue exchange lines with particular reference to BT's sustained high market share (around 81%) and the existence of high barriers to entry. We further concluded that there was a risk of BT having the ability and the incentive to price excessively.¹⁰

SMP Remedies

- 2.11 In the Wholesale Narrowband Review, we also considered what remedies would be appropriate to address the identified competition problems. The following SMP conditions were set on the wholesale analogue exchange lines market:
- Condition AAA1(a) – requirement to provide network access on fair and reasonable terms;
 - Condition AAA1(b) – requests for new network access;
 - Condition AAA2 – requirement not to unduly discriminate;
 - Condition AAA3 – basis of charges;
 - Condition AAA5 – requirement to publish a reference offer;
 - Condition AAA6(a) – requirement to notify charges;
 - Condition AAA6(b) – requirement to notify technical information;
 - Condition AAA7 – transparency as to quality of service;
 - Condition AAA10 – requirement to provide Wholesale Line Rental etc.
- 2.12 We decided that BT should be required to provide a wholesale analogue WLR product. This remedy addresses BT's SMP by requiring it to provide a product that allows Communications Providers to compete with BT's downstream businesses on an equivalent basis.
- 2.13 In addition to setting the above SMP conditions, the Wholesale Narrowband Review found that there was a risk of excessive pricing of WLR by BT and therefore decided that there was a need for a charge control to be applied to the provision of the required analogue WLR product.
- 2.14 We published our consultation document "Charge controls for Wholesale Line Rental and related services"¹¹ (the "July WLR Consultation") on 3 July 2009. In the July

⁹ http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/main.pdf

¹⁰ Paragraph 5.80 of the Wholesale Narrowband Review.

¹¹ Charge controls for WLR and related services, <http://www.ofcom.org.uk/consult/condocs/wlrcc/>

WLR Consultation we consulted on proposals for a new WLR charge control. We proposed moving from rental charge controls on both residential and business lines to a single control on a new Core WLR rental service (based on a revised WLR Basic service) which will be available to residential and business customers.

2.15 On 26 October 2009, we published our statement and additional consultation "Charge controls for Wholesale Line Rental and related services" ("the October WLR Consultation")¹². In the October WLR Consultation, we set out our decisions on the new structure for WLR charge controls. In summary, we decided that:

- the controls on Residential and Business WLR would be replaced by a single control, for a Core WLR Rental service. The Core WLR Rental Service would be available to all customers, residential and business, and would include a standard level of service and directory listings for residential and business numbers;
- the implementation of the Core WLR service would be phased, in order to allow Openreach appropriate time to ensure that they can make necessary changes to their systems, to be able to provide products that fulfil the requirements of the Core service;
- the new price controls for some WLR related services would be as shown in the table below; and
- the control would apply for the period to March 2011.

| | Current price | Oct 09 –March 10 | 2010/11 |
|-----------------------------|---------------|------------------|-----------|
| New WLR Core Rental Service | £100.68 | £100.68 | RPI +3.8% |
| WLR transfer charge | £2.00 | £3.00 | RPI +3.8% |
| WLR new connection | £88.00 | £67.00 | RPI -16% |

2.16 We also consulted further on three issues on which we are setting out our final decisions in this Statement:

- The transition to the new WLR Core Rental service.
- Operation of the WLR Premium charge ceiling for the period of the transition.
- The removal of the basis of charges (cost orientation) obligation on specific higher care services linked to WLR.

Legal Framework

2.17 Price controls are a specific remedy that Ofcom can impose under the harmonised framework for the regulation of electronic communications across the European Community (known as the Common Regulatory Framework, "the CRF"). The CRF

¹² <http://www.ofcom.org.uk/consult/condocs/wlr/wlrcondoc.pdf>

comprises (amongst others) the Framework Directive¹³ and four other directives referred to in the Framework Directive as the Specific Directives. The most relevant Specific Directive as regards decisions made in this Statement is the Access Directive¹⁴, particularly its Articles 8 and 13 (on price controls).

- 2.18 The requirements of the CRF were mainly implemented in the United Kingdom by the Communications Act 2003 (the “Act”); Part 2 transposes the CRF to a significant proportion. Section 45 of the Act gives Ofcom the power to set two categories of conditions – general conditions and specific conditions, the latter comprising (amongst others) SMP services conditions. According to section 45(8), such conditions may only contain provisions that are authorised or required by one or more of sections 87 to 92. Section 45(10) provides that the power to set conditions includes (amongst others):
- the power to impose a requirement on the person to whom the condition is applied to comply with such directions with respect to the matters to which the condition relates as may be given from time to time by Ofcom; and
 - the power to revoke or modify the conditions which are for the time being in force.
- 2.19 Conditions imposed pursuant to section 45, including SMP services conditions, can only be applied in accordance with section 46. In respect of SMP conditions, section 46 provides that the particular person to whom an SMP services condition is applied must be a communications provider whom Ofcom has determined to be a person having significant market power (“SMP”) in a specific market for electronic communications networks, electronic communications services or associated facilities.
- 2.20 Section 87 of the Act then provides that, where Ofcom has made a determination that a person has SMP, it shall set such SMP conditions authorised by that section as it considers it appropriate to apply to that person. Section 87 goes on to list the subject-matter of the SMP conditions that Ofcom can impose, which list corresponds to the specific obligations identified in Articles 9 to 13 of the Access Directive, including price controls as authorised SMP conditions by section 87(9).
- 2.21 This Statement imposes a new SMP condition — Condition AAA4(B) — using Ofcom’s powers under section 45 of the Act. Ofcom has set that condition in accordance with the process prescribed by section 48 of the Act under a notification published at Part I of Annex 1 to this Statement. The Condition maintains the charge ceiling for the annual rental of a Wholesale Analogue Line Rental (business quality of service), which service was subject to the charge ceiling imposed by means of a direction given by Ofcom in the First WLR Statement. The history of the charge ceilings is discussed earlier in this Section and we discuss the decision to impose this Condition in more detail in Section 3.
- 2.22 Our decisions also involve giving two new directions following the process prescribed by section 49 of the Act. The directions remove the cost orientation obligation for enhanced care services and amend the definition of Analogue Core Rental to reflect its extension to include business directory entries. The associated legal instruments are published at Parts II and III of Annex 1 to this Statement respectively.

¹³ Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services.

¹⁴ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities.

2.23 The decisions referred to above address Ofcom's findings made in the Wholesale Narrowband Review with respect to Ofcom's determination, that the relevant market for wholesale analogue exchange line services is not effectively competitive, as BT is a communications provider having SMP in that services market. They are also based on the nature of the problems identified from that market analysis. In light of this, we summarise below, Ofcom's statutory duties and legal tests, relevant to the decisions discussed in the remainder of this Statement. We set out, in Sections 3 and 4 of this Statement, how they are secured and met in setting out our conclusions.

Sections 47 and 49

2.24 Section 47 of the Act requires that any condition set, must be:

- i) objectively justifiable;
- ii) not such as to unduly discriminate;
- iii) proportionate;
- iv) transparent.

2.25 Section 47 was considered in the Wholesale Narrowband Review, including as to whether a charge control is an appropriate remedy to address the competition problems identified in Ofcom's market analysis. This review has concentrated on the design and mechanics of the charge ceiling for *WLR Premium*, and, in setting the related SMP condition, applies the tests set out in section 47.

2.26 Like section 47, section 49 of the Act requires that any direction given or direction withdrawn must be:

- i) objectively justifiable;
- ii) not such as to unduly discriminate;
- iii) proportionate;
- iv) transparent.

2.27 We have, therefore, applied those tests to the two directions.

Section 88

2.28 Before Ofcom imposes a price control under an SMP condition authorised by section 87(9) of the Act, we must ensure that the setting of such condition complies with section 88 of the Act.

2.29 Section 88(1) requires that such conditions must only be set where it appears to Ofcom from the market analysis that there is a relevant risk of adverse effects arising from price distortion, such as if the dominant provider might fix or maintain some or all of his prices at an excessively high level.

2.30 Furthermore, it must also appear to Ofcom that the setting of the condition is appropriate for the purposes of:

- (i) promoting efficiency;
- (ii) promoting sustainable competition; and
- (iii) conferring the greatest possible benefits on end users.

2.31 In addition, under section 88(2), we must take account of the extent of the investment made by the dominant provider.

Section 3 – Ofcom’s general duties

2.32 Under the Act, our principal duty in carrying out functions is to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

2.33 In so doing, we are required to secure a number of specific objectives and to have regard to a number of matters, as set out in section 3 of the Act. As to the prescribed specific statutory objectives in section 3(2), we consider that the objective of securing the availability throughout the UK of a wide range of electronic communications services objectives as particularly relevant to this Statement.

2.34 In performing our duties, we are also required to have regard to a range of other considerations, as appear to us to be relevant in the circumstances. In this context, we consider that a number of such considerations are relevant, namely:

- the desirability of promoting competition in relevant markets;
- the desirability of encouraging investment and innovation in relevant markets; and
- the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom.

2.35 We must also have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, and targeted only at cases in which action is needed, as well as the interest of consumers in respect of choice, price, quality of service and value for money.

2.36 Ofcom has, however, a wide measure of discretion in balancing its statutory duties and objectives. In so doing, we have taken account of all relevant considerations, including responses received during this consultation process, in reaching our conclusions set out in this Statement.

Section 4 – European Community requirements for regulation

2.37 As noted above, our decisions involve Ofcom exercising functions falling under the CRF. As such, section 4 of the Act requires us to act in accordance with the six European Community requirements for regulation.

2.38 In summary, these six requirements are:

- to promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories;
- to contribute to the development of the European internal market;
- to promote the interests of all persons who are citizens of the European Union;
- to take account of the desirability of Ofcom’s carrying out of its functions in a manner which, so far as practicable, does not favour one form of or means of

providing electronic communications networks, services or associated facilities over another, i.e. to be technologically neutral;

- to encourage, to such extent as Ofcom considers appropriate for certain prescribed purposes, the provision of network access and service interoperability, namely securing efficient and sustainable competition and the maximum benefit for customers of communications providers;
- to encourage compliance with certain standards in order to facilitate service interoperability and secure freedom of choice for the customers of communications providers.

2.39 We consider that the first and fifth of those requirements are of particular relevance to this Statement and that no conflict arises in this regard with those specific objectives in section 3 that we consider are particularly relevant in this context.

Impact assessments

2.40 The analysis presented in the rest of the Sections and Annexes of this Statement represents an impact assessment, as defined in section 7 of the Act.

2.41 Specifically, pursuant to section 7, an impact assessment must set out how, in our opinion, the performance of our general duties (within the meaning of section 3 of the Act) is secured or furthered by, or in relation to what we propose.

2.42 The decision in the Wholesale Narrowband Review that a charge control was appropriate for analogue WLR services was subject to an impact assessment set out in that review. The decisions made in this Statement relate to how a control should be implemented. They, therefore, also concern an important proposal, since they have a significant impact on Openreach and other Communications Providers who purchase its WLR product and, as a result, we have undertaken a further impact assessment as part of this specific review. The discussion of the options available to us in deciding on our approach to a charge control, how they meet our statutory obligations and how they impact on competition and stakeholders, is an integral part of this review as a whole. Accordingly, we consider that this Statement in its entirety constitutes the impact assessment.

2.43 We have also considered the requirement for a detailed Equality Impact Assessment (EIA). Our analysis of the impact of the proposals did not indicate any specific equality issues arising from the matters covered in this review.

Section 3

WLR Core rental service implementation

Introduction

- 3.1 In this Section, we re-cap on the issues associated with the implementation of the new control and set out the implementation plan.
- 3.2 The change to the regulatory regime will require a transitional period to allow stakeholders including Openreach time to adapt to the new requirements. It will therefore be introduced on a phased basis as follows:
- The first phase (in progress – i.e. since 23 November 2009) is from the introduction of the SMP condition AAA4 (WLR) which relates to the new *WLR Core Rental* service. This is now available to all Communications Providers, but Openreach is not required, in this phase, to offer a business directory listing.
 - Since an acceptable substitute product is not available during this transitional phase, we will impose a safeguard cap, for the duration of this phase, on the charge for *WLR Premium* at a level equal to the 2006 charge ceiling¹⁵ (i.e. £110 p/a) for WLR (business quality of service).
 - We note that some stakeholders would prefer that we continue this cap until the end of the control period, but we consider that this may have adverse impacts on the incentives on Communications Providers to move to WLR3. In any event, Openreach have offered a voluntary undertaking to limit charge increases for *WLR Premium* to no more than £9.32 above the *WLR Core Service Rental* for the duration of the charge control.
 - The second phase will extend the obligation to require Openreach to offer business listings as part of the Core service (ie the requirement will then form part of the AAA4 (WLR) SMP Condition). It will commence either after WLR3 Release 1400, or on 31 July 2010, whichever is the earlier.

Transition period and phased implementation

Phases of implementation

The October WLR Consultation position

- 3.3 In the October WLR Consultation, we considered options for the timing of introduction of the new *WLR Core Rental* service.
- 3.4 We considered that the new *WLR Core Rental* service should be available as soon as possible. However, we were mindful that mandating a transition which was too quick would run the risk of creating inefficient costs, and accelerating the systems developments needed for creation of the *WLR Core Rental* service at the expense of other agreed developments. In considering the timing of implementation, we took account of the views expressed and information provided by a number of stakeholders. They indicated that a period of transition will be needed to enable

¹⁵ <http://www.ofcom.org.uk/consult/condocs/wlrcharge/statement/>

Openreach to develop the capability to provide the new *WLR Core* Rental service, and also for other Communications Providers to adapt their systems and plan appropriately for its introduction.

- 3.5 We, therefore, proposed to phase the introduction of the new Core Rental service to allow for the practical system integration issues Openreach faces in introducing the new product, and the preparatory work required of other Communications Providers. After discussion with stakeholders, including industry groups, we considered it was appropriate to incorporate the changes into Release 1400 proposed for July 2010 as this was least disruptive to other developments of the WLR management system valued by Communications Providers.¹⁶
- 3.6 To achieve this, we proposed a direction which would require BT to make the Core Rental service fully available, including the ability to include either residential or business directory entries¹⁷, simultaneously with Release 1400. In the proposed direction, we included a back-stop date of 31 July 2010 to provide certainty and transparency to stakeholders on the timing of this development. We refer to this date in the direction as the *WLR Business Implementation Date*. In the event that changes to the requirement are appropriate (e.g. because of legitimate unavoidable delay to Release 1400), Ofcom has the ability, under section 49 of the Communications Act, to modify the direction appropriately.
- 3.7 Until the availability of the new *WLR Core* Rental service at Release 1400, we proposed only to require Openreach to offer a residential directory to comply with this first phase of the Core service. Openreach's current *WLR Basic* product will therefore be compliant with this requirement.
- 3.8 In addition, given Openreach's clear plans to phase out WLR2, we considered it would not be appropriate for Openreach to incur additional costs from developing the WLR2 platform to support a new product. We understood from Openreach offering the Core Service on WLR2 would significantly increase development costs.

Stakeholder responses

- 3.9 All respondents supported the proposal to link the full implementation of the Core service to the system work being undertaken as part of WLR3 Release 1400.
- 3.10 In giving their endorsement, Talk Talk Group requested that "Ofcom ensures that Openreach is required to implement an orderly transition between the legacy and new products, to minimise any business disruption to Openreach's customers". The FCS noted that this may only be a first step as there may be a need to incorporate additional functionality into the Core service in later releases.

Our conclusion

- 3.11 Given the advantages of linking the transition to an existing software release and the clear support of all stakeholders for Release 1400, we will, therefore, require BT to offer the full functionality of the *WLR Core* service from Release 1400 in July 2010 (at the latest by 31 July 2010).

¹⁶ The March 1300 release would have been technically possible but this would have required other upgrades being re-prioritised.

¹⁷ Business directory entries required for WLR3 rentals only.

The *WLR Premium Charge Ceiling*

The October WLR Consultation position

- 3.12 In the October WLR Consultation, we were mindful that, until Release 1400, there would be no WLR service available with a business directory listing except *WLR Premium*. We considered it was important that business customers should be adequately protected from Openreach's ability to set excessive prices for business WLR services in the period before availability of the new *WLR Core* Rental service with the option of business directory listing. Accordingly, we proposed a new Condition which will establish the existing charge for WLR business quality of service rental, i.e. £110, as a ceiling. The proposed Condition included a sunset clause to coincide with the full availability of the new Core WLR Rental Service (proposed for July 2010).
- 3.13 This charge was previously established as a ceiling in 2005, but the ceiling was withdrawn in September 2009 as a result of withdrawal of SMP conditions in the Wholesale Narrowband Review. Because we believe it is important that business WLR customers are protected against excessive charges, we proposed to re-introduce the ceiling through the new Condition.
- 3.14 We considered that this charge ceiling could exist concurrently with the new Core Rental Service charge control, at least until the Core Rental Service is developed to include business directory listings. We considered that this did not impose any inconsistent obligation on Openreach.
- 3.15 Openreach recognised in its response that there would be a transition period and that the control imposed on the new Core rental would likely be in place before the full implementation of the Core product. Therefore, Openreach offered to provide a voluntary commitment that it would not "exceed the current ceiling for *WLR Premium* rental service until the *WLR Core* functionality had been delivered".
- 3.16 While we consider Openreach's proposal would provide Communications Providers and customers with some level of assurance, in their consultation responses other stakeholders have sought greater certainty.
- 3.17 The ability of all customers to move between different care levels is important in constraining Openreach's prices for its premium service options. However, this constraint would be limited, whilst a business directory listing was not available with the Core service. The proposed new Condition was intended to protect WLR business customers during this phase.
- 3.18 In proposing the Condition, we considered the appropriate timing for the ending of the obligation. We looked at two options – ending of the obligation when the Core service is fully available after the WLR3 release 1400 or maintaining the ceiling obligation through to the end of the charge control (March 2010).
- 3.19 In considering the relative advantages of both options for the timing of withdrawal of the WLR2 business price ceiling, we proposed that the withdrawal of the cap in July 2010 was the better approach since we did not want to create a distorted pricing framework which could incentivise customers against migration. While noting there would be a significant minority of WLR business customers remaining on the WLR2 platform after Release 1400 (July 2010), we believed that SMP remedies which will apply to in the WLR exchange lines market – e.g. no undue discrimination and

equivalence requirements – would provide adequate protection for these Communications Providers.

Stakeholder responses

- 3.20 All Respondents who commented on this issue endorsed the cap on the *WLR Premium* service for the transition period until full implementation of the *WLR Core* service. Openreach has already announced that it will be maintaining the charge of £110 for this period¹⁸.
- 3.21 C&W questioned whether it was appropriate to allow the cap to lapse before the completion of the transition of communications providers from WLR2 to WLR3. They noted that

“Ofcom’s proposals however do not consider that many end users are currently being serviced via the WLR2 and will be migrated to WLR3 in line with their service providers migration plans (which will have most probably have been determined in the absence of Ofcom’s regulatory changes). These users are not classified as purchasers of the new *WLR Core* product and therefore not protected by the regulations applying to it. WLR2 users in general will receive extra protection as a result of the interim charge ceiling for WLR proposed to be set until delivery of EMP 1400. Subsequent to EMP 1400 Ofcom appears to envisage a situation whereby service providers migrate users of WLR2 directly to WLR3 upon its availability. Therefore users remaining on WLR2 due solely to issues of system switch-over will potentially fail to see the benefit of the newly formed regulation. Cable & Wireless believes that these customers merit the benefits of a safeguard cap on their existing services, in particular as end users of WLR2 belong to external Communications Providers and could become the target of BT gaming in the absence of sufficiently long term protection. Cable & Wireless requests the creation of a safeguard charge ceiling for WLR2 basic and premium customers for the duration of the control period and not just to the point of availability of EMP 1400.”

- 3.22 The FCS again raised the question of not controlling the *WLR Premium* charge permanently. They noted:

“It may have been assumed that use of *Premium* lines would be relatively unusual – restricted to the small number of cases where the customer requires a network test and termination point (NTTP)¹⁹. However, we highlight the following statement made by Openreach in a recent presentation to the CPS-WLR Commercial Group which means that use of *Premium* lines will continue to be relatively widespread. “End users requiring ships in dock, managed payphones etc, NTTP termination types, multi lines, or Presentation Number²⁰ will still require the *Premium* PSTN product.” We are also surprised that the need for a *Premium* line for the above products has emerged at this relatively late stage and do not see any justification for this requirement. We deduce that this represents Openreach providing the simplest solution to reduce development costs. We believe that this approach is inappropriate and dilutes the concept of the Core WLR service which has been proposed by Ofcom. Consequently, we believe that Ofcom should continue to impose a charge control on

¹⁸ Announced in EIP notice 10

¹⁹ An NTTP installation allows a business to more simply link multiple internal lines to a single (or multiple) external lines.

²⁰ Presentation Number is a number nominated or provided by the caller that can identify who is calling. It can also be used to make a return or subsequent call. The number is different from the telephone number associated with the line from which the call is made.

Premium lines beyond introduction of the new Core service and that Openreach should also be required to carry out the development necessary to enable Core lines to be used for the services specified above.”

3.23 Openreach noted that:

“The *WLR Core* Rental service development increases CP choice — indeed, this concept is at the heart of the WLR Charge Control proposals. Additionally, a significant (and growing) number of Communications Providers are already established on WLR3. For Communications Providers seeking to establish onto WLR3, there are options available for how they can achieve this, while the timescales associated with establishment continue to improve. In view of this, there is no need to unnecessarily prolong maintenance of the *WLR Premium* Rental service charge ceiling. It would be appropriate to send out a clear and positive message, via removal of the *WLR Premium* Rental charge ceiling, that recognises the accessibility of WLR3 and reinforces the positive extra incentives for WLR3 adoption that the *WLR Core* development contains.”

3.24 In subsequent correspondence with Openreach, in recognition of the concerns expressed by Stakeholders, Openreach has offered a voluntary commitment (attached at Annex 2) that states that:

- Openreach will not charge a different or higher rental, transfer or new connection price for the WLR2 Premium product versus the WLR3 Premium product and this commitment will remain in place until the scheduled withdrawal of WLR2 on June 30 2011²¹.
- Openreach will not to increase the difference in rental prices between the Core rental service (being made available for consumption on WLR3 from Release 1400 in July 2010) and Premium service (for WLR2 or WLR3) versus the difference that exists today between Basic and Premium rental charges, that is £9.32 per annum (based on annual rental price of £100.68 for WLR Basic and £110 per annum for WLR Premium). This commitment will remain in place until the end of the charge control period, 31 March 2011.

Our conclusion

3.25 It is clear that there is support for the extension of a cap on the *WLR Premium* service charge until the end of the transition phase.

3.26 We understand the concerns expressed by FCS and C&W that the functional scope of the *WLR Core* excludes a number of service elements which are, therefore, only available under *WLR Premium* at this time.

3.27 This limitation was discussed in the July Consultation and the responses to that Consultation, and in the October WLR Consultation with a particular focus on the NTTTP lines. If *WLR Premium* customers were solely limited to those requiring this additional functionality then there would not be an effective chain of substation between the Core service and higher care services to control prices. However, there is no evidence that this is likely to be the case.

²¹ Openreach note that this commitment does not forgo them from introducing WLR Premium "special offer" arrangements during the period of the commitment provided they are available to consumers of both WLR2 and WLR3 products

- 3.28 *WLR Premium* offers a range of Special Line Types, including Short Duration Lines which includes lines for events and exhibitions, port-a-cabins and ships in dock, and there are currently around 5,000 of these in service (see page 15 of the Openreach response to the first Consultation²²).
- 3.29 Of approximately 5 million *WLR Premium* lines, 3.7 million are *WLR Premium* single lines and 1.2 million are *WLR Premium* multi-lines. NTTTP today only accounts for fewer than 100,000 installations (Table 3.1 below sets out the numbers of other special feature lines raised by FCS).
- 3.30 It is, therefore, clear that *WLR Premium* usage is not dominated by those seeking these additional features. Its Core benefit to business end-customers is a higher level of care and reliability of supply. There is clear evidence from discussions with Communications Providers that business customers value this higher care and that there will remain a substantial broad base of *WLR Premium* customers.
- 3.31 As we discussed in the October WLR Consultation and further in Section 4, it is only necessary for a proportion of customers to indicate their willingness to switch for there to be a constraining impact on charges, as one of the characteristics of partial substitutability between services is that it benefits all customers, provided that the supplier is not able to price discriminate between different users or groups of users. We consider, therefore, that there is sufficient protection against excessive charging for all *WLR Premium* customers from the incentives on Openreach to maintain a financially attractive offering.

TABLE 3.1 – Volumes of *WLR Premium* lines split by feature

| | Single (number of NTTTP installations) | Multi-line (number of NTTTP installations) | Short duration lines and hot sites | Public and managed phone lines |
|--------------------|--|--|--|--------------------------------------|
| Total lines | 3.7M | 1.2M | c5,000 ²³ | Under 100k |

- 3.32 Notwithstanding the above, as discussed in Section 4, there remains scope for the adjustment of the functional specification of the *WLR Core* service in the future subject to user demand (see Section 4, paragraph 4.33).
- 3.33 With respect to those Communications Providers that are not yet purchasing the services through WLR3, we consider that, as with the additional feature users discussed above, there is no significant risk of disadvantage in terms of charges. Openreach, in the provision of the services, was already subject to the SMP condition that ensures no undue discrimination in the provision or charging of services. Further, Openreach have now confirmed that they have no intention of seeking to vary the charges between WLR2 and WLR3 customers of *WLR Premium*.
- 3.34 Therefore, we consider that there is no requirement for an extension of the charge cap beyond the transition period. Further, Openreach's commitment to maintaining a charge gap of no more than £9.32 between the *WLR Core* service and *WLR Premium* for the duration of the control will provide additional reassurance for stakeholders.

²² http://www.ofcom.org.uk/consult/condocs/wlrcc/responses/bt_response.pdf

²³ By nature the number of these lines vary very frequently

- 3.35 We will, therefore, be imposing the *WLR Premium* cap of £110 from the date of this Statement until the WLR Business Implementation Date.

Legal tests with respect to the redefinition of the Analogue Core WLR Rental to include a business style directory listing

(as detailed in Annex 1 Part III – Direction regarding an amendment of the definition of Analogue Core WLR Rental)

- 3.36 We have set out above the need to allow BT time to ensure that it can fully upgrade its systems to offer an integrated Core rental product to service both residential and business end users.

- 3.37 SMP condition AAA4(WLR) defines in AAA4(WLR).12(a) ‘Analogue Core WLR Rental’ as follows:

“(a) “Analogue Core WLR Rental” means, unless Ofcom directs otherwise from time to time for the purpose of the meaning of this expression, such services as the Dominant Provider is required to provide under SMP services condition AAA10.1(a) and which on the date this Condition takes effect include:

- i. the rental of an analogue exchange line for control and billing purposes;*
- ii. maintenance which is part of the service provided by the Dominant Provider in consideration of the charge for an Exchange Line and includes a maintenance service level with a fault repair time of no more than provided for Level 1 service care level for Basic lines, as defined in the Dominant Provider’s standard terms and conditions; and*
- iii. one residential style main directory listing per telephone number;”*

- 3.38 BT is currently required to provide one residential style main directory listing only for each *Analogue Core WLR Rental*. Businesses and similar organisations are not currently able to be listed in the residential directory.

- 3.39 BT will be able to offer listings in the business directory once they have rolled out Release 1400 upgrades in July 2010. Once this has occurred, we need to amend the definition in AAA4(WLR).12(a) to reflect this change. As seen above, the condition provides for a direction making power under section 49 of the Act, and therefore we have already proposed a direction to modify this definition in relation to the minimum directory entry requirements.

- 3.40 Specifically, we require that BT should, from the WLR Business Implementation Date, provide a Core WLR service to include as a minimum:

- the rental of an analogue narrowband access line for control and billing purposes;
- maintenance, which is part of the service provided by BT in consideration of the charge for an exchange line, and which includes a maintenance service level with a fault repair time of no more than provided for Level 1 service care level for *WLR Basic* lines, as defined in BT’s standard terms and conditions; and
- one main directory listing per telephone number, comprising of either:
 - i. a residential style listing; or

- ii. a business style listing, where BT provides to Communications Providers a WLR3 service, as defined in BT's standard terms and conditions.
- 3.41 We consider that the direction which will modify the definition of Analogue Core WLR Rental in SMP Condition AAA4 (WLR) complies with the tests in section 49 of the Act for the reasons set out below.
- 3.42 The direction is objectively justifiable as it updates a definition, in order that, the required charge control applied to WLR services operates, in relation to both residential and business supply, as soon as BT is in a technical position to offer that service. This fulfils the original intent of the charge control.
- 3.43 It is not unduly discriminatory as it applies the control equally for all customers of WLR rental products.
- 3.44 It is proportionate as it does not alter any other aspect of the control, and simply extends the price control regulation to reflect BT's ability to provide a full service, including provision of a business directory listing.
- 3.45 It is transparent as it seeks to make a clear amendment to the minimum level of supply for the Core service. It is clear to both BT and Communications Providers what will be required to be supplied as part of the Core service.
- 3.46 We also consider that this direction complies with our general duties under sections 3 and 4 of the Act. In particular we consider that the extension of the charge controlled product to include a requirement to provide a business directory listing will increase the choice of products available to business consumers and also increase competition in the related wholesale and retail markets. This will further the interests of both citizens and consumers, especially having regard to the choice, pricing and value for money of WLR analogue business services.

Legal tests with respect to the charge ceiling for *WLR Premium*

(as set out in Annex 1 Part I: Setting of SMP Condition)

- 3.47 As we have explained above, BT can and are obliged to offer the new Core service (based on their current *WLR Basic* product) from 23 November 2009. But, until its systems can be upgraded in July 2010, it should not be obliged to offer a business directory listing. This means that the only product that BT will offer prior to July 2010 which comes with a business directory listing as standard will be *WLR Premium*. *WLR Premium*, as a specific product will not be charge controlled by SMP condition AAA4(WLR). We need therefore need to ensure that business users are protected in the period up until July 2010 from Openreach being able to set excessive prices for their Premium product.
- 3.48 We consider that, in the interim, it would be appropriate to cap *WLR Premium* charges by means of the SMP condition AAA4(B), but only in so far as it applies to WLR (business level of service), which maintains a price ceiling of £110 for such services. *WLR Premium* is the Openreach product that is constrained by this ceiling.
- 3.49 The Condition also confirms that the *WLR Premium* charge will not be subject to a basis of charges obligation (under SMP conditions AAA3 and AAA10). We are removing the basis of charge obligation in this instance as the charge ceiling provides a sufficient control on the charge for this service.

- 3.50 We consider that we have, in setting this Condition, discharged our duties under sections 3 and 4 of the Act. The Condition is appropriate to promote competition in the relevant market as it prevents BT from exploiting its market power and setting an excessive price for its WLR analogue business product. It is time limited so that it remains effective only until BT are required to offer an alternate WLR business analogue product under SMP Condition AAA4(WLR).
- 3.51 Again, we must be satisfied under section 47 of the Act that the condition is objectively justifiable, not unduly discriminatory, proportionate and transparent. We consider, in particular, that SMP condition AAA4(B) is:
- objectively justifiable as it ensures that BT is unable to exploit its market power and enables competing providers to purchase services at levels that enable them to compete in downstream markets to the benefit of consumers;
 - proportionate as it protects customers requiring a business listing but still allows BT a fair rate of return that it would expect in competitive markets;
 - not unduly discriminatory to BT because there is no other provider with SMP currently specifically required to provide WLR services; and
 - transparent in that the requirements on BT are clearly set out in the face of the condition.
- 3.52 In setting a price ceiling, we have also taken into account the tests set out in section 88 of the Act. In the October WLR Consultation, we addressed the section 88 tests in relation to the setting of the substantive charge control, SMP condition AAA4(WLR), applied to Analogue Core WLR rental. We describe above that SMP condition AAA4(B) is only required to bridge the gap created by the necessary phased implementation of the Core service, in order to ensure that the available wholesale rental product with business directory entry is not priced excessively. We consider that, for this short transitional period, condition AAA4(B) is complementary to the substantive charge control and their effects should be considered together. We consider that the setting of a transitional price ceiling, in combination with the substantive charge control, therefore fulfils the tests in section 88 for the reasons we set out previously in relation to SMP condition AAA4(WLR).

Section 4

Treatment of enhanced care service for WLR and other issues

Introduction

- 4.1 In this Section, we set out our conclusions on the controls for charges for enhanced WLR services – i.e. care level options.
- 4.2 In summary, we have decided that it is appropriate to dis-apply the basis of charges condition in relation to enhanced care level options for WLR. However, all other SMP conditions applying to this market will continue to apply to enhanced care level options and we will monitor the setting of such charges, with a view to preventing exploitative or unfair pricing.
- 4.3 Additionally, this Section considers other issues raised by Stakeholders in their most recent responses, the charge for transition movement to the *WLR Core Service* and the future development of the *WLR Core Service* and sets out our position on these issues.

The October WLR Consultation position

- 4.4 In the July Consultation and Wholesale Narrowband Review, we explained that there is some substitution between *WLR Premium* and *WLR Basic*. Our analysis showed that the two are parts of the same market and that *WLR Basic* is a suitable service for some business customers.
- 4.5 Based on this conclusion, we considered that the level of charges for *WLR Basic* acts as a constraint on charge levels for *WLR Premium*, including the enhanced care element. This is because a proportion of the *WLR Premium* customer base would be able to switch to *WLR Basic* in response to any increase in the charge for the enhanced care level element of *WLR Premium*. We did not regard this as a competitive effect on both prices since the same company (Openreach) supplies both *WLR Basic* and *WLR Premium*, but it is clearly a constraint on Openreach's ability to set the charges for the enhanced care element of *WLR Premium* at an excessive level. We then considered whether the new WLR Core Service would impose a similar constraint on all higher care services for WLR.
- 4.6 Substitutability between WLR with and without enhanced care is not perfect because there are likely to be some customers for whom enhanced care is an indispensable part of the package they buy. However, the willingness of a proportion of customers to switch should also act as a constraint on levels of charges for all enhanced care packages since some customers have the option to purchase the Core WLR service without enhanced care. Customers also have the option to purchase support services on a piecemeal basis when needed, e.g. using 'expedite repair', if they do not wish to have an ongoing support arrangement with Openreach.
- 4.7 We explained that we expected the constraint on charges for optional care levels through substitutability to increase under the new pricing framework for WLR. This is

because the new *WLR Core* service will incorporate the possibility of directory listings in either the residential or business directories. Whilst there is already evidence²⁴ of business users finding *WLR Basic* to be a suitable alternative to *WLR Premium*, the availability of both options for directory listings under a new *Core* service should make the ability to migrate between flexible options even stronger.

- 4.8 We noted that there was some stakeholder concern that substitutability between services would not benefit all customers, and that some vulnerable customer groups (such as house bound individuals requiring higher care on their telephone access to ensure alarms always operated) might be particularly disadvantaged by charge increases for enhanced care options, if the *WLR Core* service is not a viable product to serve them and there is no basis of charges regulation on enhanced care options.
- 4.9 We considered the proposed structure of the regulation should address this concern. One of the characteristics of partial substitutability between services is that it benefits all customers, provided that the supplier is not able to price discriminate between different users or groups of users which is true in the case in this market.²⁵ It is only necessary for a proportion of customers to indicate their willingness to switch for there to be a constraining impact on charges, from which all customers will benefit.
- 4.10 We considered that substitutability between WLR enhanced care options and the ability of some customers to opt out of enhanced care altogether does impose a market driven constraint on charges for these services.
- 4.11 We also noted that through its Service Harmonisation initiative, Openreach is currently in discussion with industry about the development of new care level options for a number of its services, including WLR. We expected that this process would result in improvements to the range and quality of options available.
- 4.12 We noted that Openreach has expressed concern about the impact of a basis of charges obligation on incentives for innovation in development of new enhanced care services.
- 4.13 We agreed that some risk to innovation may result from the imposition of an obligation that restricts or controls pricing, particularly as care level options are currently in development through the service harmonisation process. We also noted that it would be difficult to establish robust guidance on floors and ceilings for these services and hence the interpretation of any basis of charges obligation may not be clear. We noted the views of respondents that the potential for high cost ceilings would allow strong incentives for innovation. However, on balance, we believe that the absence of clear guidance on how a basis of charges requirements would be interpreted would create a risk that incentives to innovate would be diluted.
- 4.14 Furthermore, we considered that the framework of regulatory controls on WLR set by the Wholesale Narrowband Review²⁶ provides general safeguards which would allow Ofcom to intervene in the event that these services are provided on a basis that was not fair and reasonable. In particular, Openreach has obligations to provide network

²⁴ As set out in Section 5, paragraphs 5.115-5.117 of the Wholesale Narrowband Review Consultation http://www.ofcom.org.uk/consult/condocs/review_wholesale/fnwm.pdf

²⁵ In the case of WLR, Openreach has always operated uniform pricing. Given the 'white label' nature of the service, we believe it would be difficult for Openreach to do anything other than continue uniform pricing, and Openreach would need to demonstrate that any move away from uniform pricing would comply with the no undue discrimination requirements which apply to WLR.

²⁶ http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/main.pdf

access and new network access on fair and reasonable terms and conditions (Condition AAA1), to provide WLR (AAA10), to notify charges (Condition AAA6), and not to unduly discriminate (Condition AAA2). These conditions provide that:

- In the case of Condition AAA2, Openreach cannot discriminate unduly between persons or a particular description of persons in the setting of charges for these services. As explained above, this provides additional protection to customers who are unable to switch between services.
- In the case of Condition AAA6, Openreach must give notice of charge changes 28 days before they are implemented giving wholesale customers and Ofcom the opportunity to scrutinise the charges before they become effective. This allows Communications Providers to raise the issue with Ofcom and for Ofcom to begin an investigation before any changes have been implemented.
- In the case of Condition AAA1 and AAA10, access services provided within this market must be fair and reasonable. This provides a general level of protection in relation to the basis upon which services are offered, with the terms conditions and charges being specifically within the condition.

4.15 Taking account of all the evidence available to us, including earlier submissions from stakeholders made in response to the Wholesale Narrowband Review and the July WLR Consultation and on the basis of our analysis explained above, Ofcom's preferred approach for the regulation of enhanced care level options for WLR set out in the October WLR Consultation was to dis-apply current obligations on Openreach for cost orientation in relation to enhanced care levels for WLR.

Stakeholder responses

4.16 There was a diversity of views from the respondents on the question of the removal of cost orientation.

4.17 Openreach supported the removal noting that:

“Openreach already provides innovative services where prices have been set based on the value of that service to the customer purchasing it. For example, Openreach provides 6 hour repair services (Care Level 4) where the incremental rental price of £48 per annum has been discussed with, and positively received by, industry. Further, Openreach offers advanced project services such as consultancy services where again the pricing has to reflect the value provided to the customer. The market, rather than regulation, will provide the strongest basis for continued innovation in this space. Service Harmonisation promises to deliver a number of new value-added services to Communications Providers including Flexible Appointments, in addition to offering improvements to existing care levels (typically with no extra charge to the CP). Openreach strongly believes that Communications Providers will only purchase these enhanced care levels where the price reflects the economic value to the CP, and end-user, of those additional elements which are not provided as part of the rental service. Given the Openreach commitment to Service Harmonisation as one of its main strategic development programmes, it is important that the market and CP discretion continue to be the medium for driving innovation and positive outcomes.”

4.18 Openreach also suggested that the proposed definition of enhanced care services, should be reworded in order to ensure that it reflects that the base ISDN2 package is provided with level 2 care.

- 4.19 Gamma and C&W also supported the approach though C&W sought a commitment that the impact of the removal was reviewed in the context of the next charge controls. C&W also was concerned that “the removal of the cost-orientation obligation for WLR enhanced (i.e. beyond basic) care does not set precedent for the removal of cost-orientation of enhanced care (or basic care) in relation to other services.”
- 4.20 Talk Talk questioned whether the decision was premature as there had not been sufficient research on the motivations behind existing switching between *WLR Basic* and *WLR Premium* services to support a reliance on this switching to control charges. It noted that it did “not believe that monitoring and the use of backstop powers is sufficient to prevent pricing above a competitive level. In particular we are concerned that Ofcom’s residual powers may not be a sufficiently quick remedy to avoid competitive distortions arising in the market.”
- 4.21 SSE and FCS were opposed to the decision. FCS noted “we believe that a cost oriented approach is the correct principle for the pricing of ancillary services and features and should continue to be so. We urge Ofcom to continue to regulate on this basis.”
- 4.22 In the event that cost orientation was removed, SSE and FCS stressed the importance of monitoring Openreach’s charging behaviour. FCS called on Ofcom to be “ready to intervene to prevent exploitative or unfair pricing.” SSE noted that if “Ofcom confirms this approach, monitoring of the proposed charges for these services would be appropriate. Competition law remedies are necessarily retrospective and we would urge Ofcom to develop links with representative industry groups so that it can be informed and act upon concerns raised by industry in a proactive and timely manner.”

Our conclusion

- 4.23 The treatment of the higher care services with respect to the basis of charges condition was discussed in the July Consultation, the October WLR Consultation and the Wholesale Narrowband Market Review.
- 4.24 The concerns raised by SSE and FCS were considered in those consultations and review. While noting these concerns, we consider that the evidence of existing substitution behaviour and the improvements to the range of services available to Communications Providers, which will allow smoother substitution, should ensure that Openreach’s charging behaviour is sufficiently controlled by market conditions.
- 4.25 We disagree with Talk Talk’s view that further research is required on the motivations behind existing switching. The key issue, as discussed above, is that it is only necessary for a proportion of customers to indicate their willingness to switch for there to be a constraining impact on charges, as one of the characteristics of partial substitutability between services is that it benefits all customers, provided that the supplier is not able to price discriminate between different users or groups of users. It is clear from the responses to this, and the previous consultation, that there is considerable interest in taking advantage of the greater flexibility the new structure allows to choose care levels.
- 4.26 We note C&W’s concerns about precedent. We do not consider that this decision sets a precedent on the treatment of services in other markets. Each market and market remedy, including the basis of charges conditions, has to be considered on its own merits.

- 4.27 We agree with respondents that it is important to monitor Openreach behaviour with respect to these charges. We will have an opportunity to do so, in our consideration of the next round of review required for the period after April 2011.
- 4.28 Finally, we considered whether our definition of enhanced care services was appropriate given the different levels of included care for wholesale analogue and ISDN2 exchange line services. We consider that the aim of the Direction is to remove any of the enhanced care packages that could be bought either as a “bolt on” or as part of a bundled product (such as *WLR Premium*) from the cost orientation obligations that are imposed on the market more generally. We consider that BT made a valid point in relation to the difference between their analogue and ISDN2 services, and therefore we have decided to modify the direction by adopting the wording suggested by Openreach. We do not consider that the change in wording affects either the intent or application of the direction, but increases its transparency.

Other issues raised in the consultation

- 4.29 In addition to their direct response to the issues being consulted on, respondents raised two issues related to the implementation of the new WLR structure: charges for transition to the new *WLR Core* service; and the further development of the Core service definition.

Transition charges

- 4.30 FCS noted that they anticipated that “following the introduction of the new Core service, many Communications Providers will wish to transfer lines for their business customers from the current *Premium* level to the new Core product. Under current arrangements, these transfers will presumably attract the normal transfer charge of £3. We do not believe that this is appropriate and propose that the charge should not apply to such transfers or, alternatively, that a bulk transfer facility providing a nominal charge should be provided.”

Our assessment

- 4.31 Any transfer from *WLR Premium* to the new Core product would attract the regulated transfer charge, currently £3 (though this would not apply to customer currently using *WLR Basic* as this service will be subsumed by the new Core service).
- 4.32 As the transfer charge is already priced well below fully allocated costs (see discussion in the July WLR Consultation and October WLR Consultation), there may be limited scope for a bulk transfer charge. However, in any respect we consider that any bespoke determination of this nature would need to be considered on a case by case basis (depending as it does on the numbers of lines to be changed) and is appropriately left to discussions between Openreach and its customers.

Further development of the Core service

- 4.33 Both C&W and FCS noted that they considered that the scope of the *WLR Core* services should be subject to further future review. While this was discussed in the October WLR Consultation, C&W requested re-confirmation of how this might be managed. They noted that they understood “that it is Ofcom’s intent that it remains open to industry to decide whether or not to prioritise the development of the EMP to include NTTIP and multi-line users within WLR3 Core product option. We would appreciate Ofcom making a statement to this effect within the closing statement.”

- 4.34 As we set out in the October WLR Consultation, the inclusion of NTTP or other special features in the *WLR Core* service would incur additional system integration costs – both direct costs to Openreach and opportunity costs to the WLR user community as any work on a feature's inclusion could push out other updates to the WLR3 system.
- 4.35 Given the current level of demand identified for NTTP installations and, as set out in Section 3 Table 3.1 above, for other special feature, we did not consider that it was appropriate to require their inclusion in the Core service function set in the first instance.
- 4.36 However, we consider that the current decision on the scope of the *Core WLR* service should not be an impediment to future development of the *Core WLR* service functionality. We consider it is appropriate that, where the inclusion of a functional feature (such as NTTP) is related principally to the requirement to need for a WLR3 management system update, then that should be considered by the WLR community as part of the negotiations on priority for system changes in future releases. We would expect appropriate weight on the priority for inclusion to be given to expected levels of demand for these services at the lower care level provided by the *WLR Core* service. Where the inclusion of the feature is more complex than can be managed within this process then a determination may need to be considered as part of any future review.

Legal tests with respect to the removal of the cost orientation obligations

(as set out in Annex 1 Part II: Direction regarding the removal of the cost orientation obligations for Enhanced Service Level Care)

- 4.37 We have set out above our decision to remove enhanced care service from SMP condition AAA3, basis of charges and SMP condition AAA10.2 cost orientation.
- 4.38 The effect of the direction is to define a class of enhanced services, and then to exempt this class of services from basis of charges obligations. In deciding to dis-apply the current SMP condition AAA3 to certain specified services, we consider that the appropriate way of achieving this aim would be through a direction made under the authority of SMP Condition AAA3.1.
- 4.39 The direction is set out at Part II of Annex 1 which defines the class of services that is the subject of this direction.
- 4.40 In making any direction, Ofcom must be satisfied that it is objectively justifiable, not unduly discriminatory, proportionate and transparent, in accordance with section 49(2) of the Act. We set out why we consider that the direction fulfils those tests.
- 4.41 Objectively Justifiable. In assessing the direction to dis-apply SMP condition AAA3 to a specified class of service, it is important to consider why the condition was applied to the market. The condition was set as part of the Wholesale Narrowband Review on the wholesale analogue and wholesale ISDN2 exchange lines markets. In the review, we considered that without this condition BT would, in the market as a whole, have the ability to charge excessive prices in order to maximise profits.²⁷

²⁷ Paragraphs 5.80 and 11.44 of the Wholesale Narrowband Review.

- 4.42 We have set out above why we consider that Openreach is constrained from setting excessive prices in relation to this type of product by virtue of the substitutability that exists between the different levels of care offered by Openreach and the level of care provided within the Core, charge controlled service. This constraint is not present in other aspects of the market, and therefore we consider that it is justifiable to treat these services separately, given that the risk of setting prices at an excessive level, is significantly reduced for this set of products.
- 4.43 We have also considered an important rationale for *ex ante* regulation is an ability to set controls which create legal certainty and easily monitored. The provision of enhanced care relies, in part, on Openreach being able to re-prioritise existing resources. Whilst the underlying cost of care services as a whole can be analysed, it is difficult to assess the cost difference between services that are differentiated on grounds of priority. Although there are analytical approaches that can be used to assist in such an analysis, it remains difficult to accurately assess cost levels. In such circumstances it would mean that there would be potentially wide variations between cost floor and ceiling estimates and, therefore, reliance upon a condition that required such estimates would fail to provide the legal certainty that should be achieved by *ex ante* obligation. We consider that the continued imposition of a basis of charges obligation, where there remains an uncertainty as to how it may be applied, would not be appropriate. The proposed direction removing this requirement, and that uncertainty for specified services, is objectively justifiable.
- 4.44 Not unduly discriminatory. The direction applies only to products provided by Openreach, so it affects all Communications Providers and therefore their customers equally. We do not consider that the differentiation of regulation within this market creates unduly discriminatory regulation, as the products that we are removing from the basis of charges obligation relate only to the provision of enhanced service care.
- 4.45 Proportionate. We consider that the direction is proportionate as we have recognised that the key driver for the implementation of the basis of charges obligation on the market as a whole, the risk of excessive pricing, is less likely to be present in respect of these services. It would be disproportionate on that analysis to continue to apply a remedy to these services. The exemption of these services from the requirement ensures that the regulation on this market remains targeted on areas where there is an identified competition concern.
- 4.46 Further, for the reasons set out above, we consider that the continued application of a control in circumstances where its application was unclear would not be consistent with the principle of proportionality.
- 4.47 Transparent. We consider that the direction clearly sets out the position as to how the basis of charges obligation should apply to this market. We consider that we have clearly identified a class of services that should be exempted from the obligation in order to ensure that it is clear and unequivocal as to when the obligation does not apply.

We have also taken account of our duties under sections 3 and 4 of the Act. We consider that if enhanced care services remain subject to cost orientation there may be some risk to further innovation by Openreach. In setting a direction to remove this obligation for such services, we consider that this will further the interests of citizens and consumers by the promotion of competition, specifically having regard to the desirability of encouraging investment and innovation by Openreach. The development of enhanced care products should increase choice and flexibility in the market, promoting competition and benefitting end users.

Annex 1

Legal Instruments

Part I – SETTING OF AN SMP CONDITION

NOTIFICATION UNDER SECTION 48(1) OF THE COMMUNICATIONS ACT 2003

The setting of SMP service condition AAA4(B) as a result of the market power determination made by Ofcom in its statement entitled *Review of the fixed narrowband services wholesale markets*, published on 15 September 2009, in respect of the services market for wholesale analogue exchange line services in the United Kingdom but excluding the Hull Area in which it has been determined that BT is a person having significant market power

Background

1. On 28 November 2003, the Director General of Telecommunications (the “**Director**”) published a statement entitled *Review of the fixed narrowband line, call origination, conveyance and transit markets* (the “**2003 Statement**”)²⁸ setting out his conclusions of the market analyses he had carried out on the relevant markets. Pursuant to sections 48(1) and 79 of the Act and by way of publication of a Notification published at Annex A (the “**November 2003 Notification**”) to the 2003 Statement, the Director identified (among others) the markets for wholesale residential analogue exchange line services and wholesale business analogue exchange line services in the UK, excluding the Hull Area as relevant services markets for which he determined BT to be a person having significant market power (“**SMP**”).
2. As a result, the Director set certain SMP conditions to apply on BT in those two above-mentioned services markets, including:
 - (a) SMP condition AA3, which required BT to secure that its charges are reasonably derived from the costs of provision on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed; and
 - (b) SMP condition AA10, which required BT to provide specific Wholesale Line Rental Services on reasonable terms and modify its charges for the provision of Wholesale Line Rental in the manner in which the Director may direct.
3. On 29 December 2003, Ofcom took over the functions and responsibilities under the Communications Act 2003 relating to the EC Communications directives from the Director.
4. On 10 February 2005, Ofcom published a statement entitled *Modifications to BT’s SMP services conditions AA4, BA4 and PA1*²⁹.
5. On 24 January 2006, Ofcom published a statement entitled *Wholesale Line Rental : Reviewing and setting charge ceilings for WLR services*³⁰. SMP Condition AA4 was disapplied to analogue WLR services and the following charge ceilings were introduced by a

²⁸ http://www.ofcom.org.uk/static/archive/Oftel/publications/eu_directives/2003/fix_narrow0803_1.pdf

²⁹ http://www.ofcom.org.uk/consult/condocs/bt_smp/amend_ccc/btsmp_amend_ccc.pdf

³⁰ <http://www.ofcom.org.uk/consult/condocs/wlrcharge/statement/statement.pdf>

direction (the “**2006 Direction**”, as published at Annex 1 to that statement) given by Ofcom under SMP conditions AA3 and AA10, respectively:

“1. The Dominant Provider shall not charge more than:

(a) for the annual rental of a Wholesale Analogue Line Rental (residential quality of service), £100.68 (the charge for which shall be pro rated and levied on no less than a quarterly basis);

(b) for the annual rental of a Wholesale Analogue Line Rental (business quality of service), £110.00 (the charge for which shall be pro rated and levied on no less than a quarterly basis);

(c) for the Existing Line Transfer of a single analogue Exchange Line (residential quality of service), £2.00;

(d) for the Existing Line Transfer of a single analogue Exchange Line (business quality of service), £2.00;

(e) for the New Line Installation (analogue) (residential quality of service), £88.00; and

(f) for the New Line Installation (analogue) (business quality of service), £88.00.”

6. On 19 March 2009, Ofcom published a consultation document entitled *Review of the fixed narrowband wholesale markets*³¹ (the “**Wholesale Consultation**”). The Wholesale Consultation (amongst other things) proposed that:

(a) wholesale analogue exchange line services be defined as a single market for the United Kingdom, except the Hull Area, in place of the two separately defined services markets referred to in paragraph 1 above;

(b) BT be determined as a person having SMP in that defined market;

(c) BT be subject, by means of appropriate SMP conditions, to requirements of:

(i) providing Network Access on reasonable request by a Third Party in that single market (now Condition AAA1(a));

(ii) unless otherwise directed, charges being reasonably derived reasonably from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed (now Condition AAA3);

(iii) providing Wholesale Line Rental on reasonable request by a Third Party in that single market (now Condition AAA10), including a specific basis of charges requirement in respect of such provision;

(iv) the required wholesale analogue WLR service be subject to a charge control;

³¹ http://www.ofcom.org.uk/consult/condocs/review_wholesale/

- (d) as result of the above proposals to set new SMP conditions, the SMP conditions existing at that time be revoked.

7. The Wholesale Consultation further proposed that the method and design as to how that charge control should be applied, should be considered in a separate consultation.

8. On 3 July 2009, Ofcom published a consultation entitled *Charge Controls for Wholesale Line Rental and related services*³² (the “**WLR Consultation**”) setting out proposals for the imposition of a charge control on analogue WLR line rental services and ancillary services, modifying the basis of charges SMP condition proposed in the Wholesale Consultation and proposing a phased withdrawal of existing charge ceilings applied to analogue WLR products under the 2006 Direction.

9. On 15 September 2009, Ofcom published a statement entitled *Review of the fixed narrowband wholesale markets, statement and further consultation*³³ (the “**Wholesale Statement**”) which (amongst other things) in the Notification published at its Annex 7 (the “**September 2009 Notification**”) adopted the proposals from the Wholesale Consultation set out at paragraph 6 above, including the setting of SMP conditions AAA1(a), AAA3 and AAA10 and the revocations of SMP conditions for exchange line services markets (except for ISDN30) such as SMP conditions AA3 and AA10 under which the 2006 Direction had previously been given.

10. On 26 October 2009, Ofcom published its statement entitled *Charge controls for Wholesale Line Rental and related services* (the “**WLR Charge Controls Statement**”) to conclude on proposals set out in the WLR Consultation, including the setting of SMP condition AAA4(WLR) to impose charge controls on BT for WLR services and the modification to SMP condition AAA3. Additionally, Ofcom made further proposals including the setting of a new SMP condition AAA4(B) under the market definition and market analysis as set out in the Wholesale Statement in order to address the identified risk of BT having the ability and the incentive to price excessively. In particular, in light of the revocation of the SMP conditions referred to in paragraph 9 above, Ofcom considered it necessary to maintain the charge ceiling for the annual rental of a Wholesale Analogue Line Rental (business quality of service) referred to in paragraph 5 above for a transitional period.

Decision in this Notification

11. Ofcom hereby decides, in accordance with section 48(2) of the Act and in relation to the services market identified in paragraph 12(a)(i) of the September 2009 Notification, to set SMP condition AAA4(B) to apply to BT as set out in the Schedule to this Notification, which condition imposes a charge ceiling for the annual rental of a Wholesale Analogue Line Rental (business quality of service).

12. The effect of, and Ofcom’s reasons for setting, that SMP condition are contained in Section 3 of the document accompanying this Notification.

Ofcom’s duties and legal tests

13. In making the decision set out in this Notification, Ofcom considers that the setting of the SMP condition referred to above complies with the requirements of sections 45 to 47, 87 and 88 of the Act as appropriate and relevant.

³² <http://www.ofcom.org.uk/consult/condocs/wlrcc/wlrcc.pdf>

³³ http://www.ofcom.org.uk/consult/condocs/wnmr_statement_consultation/main.pdf

14. In making that decision, Ofcom has considered and acted in accordance with its general duties set out in section 3 of the Act and the six Community requirements in section 4 of the Act.

15. Copies of this Notification and the accompanying explanatory statement have been sent to the Secretary of State for Business Innovations and Skills in accordance with section 50(1)(a) of the Act, as well as the European Commission and to the regulatory authorities of every other member State in accordance with section 50(2) of the Act.

Interpretation

16. Except for references made to the identified services markets in this Notification and as otherwise defined in paragraphs set out above and paragraph 17 of this Notification, words or expressions used shall have the same meaning as they have been ascribed in the Act.

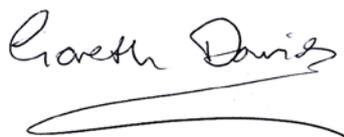
17. In this Notification—

(a) “**Act**” means the Communications Act 2003 (c. 21); and

(b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006.

18. The Schedule to this Notification shall form part of this Notification.

19. The decision set out in this Notification shall take effect on the publication of this Notification.



Gareth Davies

Competition Policy Director

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

23 February 2010

SCHEDULE

Setting of SMP services condition AAA4(B)

1. In Part 2 of Schedule 1 to the Notification published at Annex 7 of the statement entitled *Review of the fixed narrowband services wholesale markets* published on 15 September 2009 by Ofcom, there shall be set the following SMP services condition AAA4(B) by inserting it after Condition AAA4(WLR)—

Condition AAA4(B) - Charge ceiling for Analogue WLR (business quality)

AAA4(B).1 The Dominant Provider shall not charge more than the amount of £110.00 per annum for the annual rental of a Wholesale Analogue Line Rental (business quality of service).

AAA4(B).2 The following requirements shall not apply in respect of the requirement set out in paragraph AAA(B).1 above:

(a) the requirement of Condition AAA3.1 (Basis of charges) on the Dominant Provider to secure, and be able to demonstrate to the satisfaction of Ofcom, unless Ofcom directs otherwise from time to time, that each and every charge offered, payable or proposed for Network Access covered by Condition AAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed; and

(b) the requirement of Condition AAA10.2 (Requirement to provide Wholesale Line Rental etc.) on the Dominant Provider to ensure, unless Ofcom directs otherwise from time to time, that charges of providing WLR services in paragraph AAA10.1 are based on the forward looking long-run incremental cost, except where the Dominant Provider and Third Party have agreed another basis for the charges.

AAA4(B).3 This Condition, including the requirement set out in paragraph AAA(B).1 above, shall no longer apply with effect from (and including) the date on which a direction given by Ofcom, in accordance with section 49 and under Condition AAA(WLR).12(a), takes effect to include a requirement on the Dominant Provider to provide a business style listing, where the Dominant Provider provides to the Third Party a WLR3 service, as defined in the Dominant Provider's standard terms and conditions, as part of the Analogue Core WLR Rental.

PART II – DIRECTION REGARDING REMOVAL OF COST ORIENTATION OBLIGATION FOR ENHANCED SERVICE LEVEL CARE

Direction under section 49 of the Communications Act 2003 and SMP Conditions AAA3.1 and AAA10.2 imposed on British Telecommunications plc as a result of a market power determination made by Ofcom in the *Review of the wholesale fixed narrowband markets*, dated 15 September 2009, that British Telecommunications plc has significant market power in the markets for wholesale exchange line services in the United Kingdom excluding the Hull Area

Background

1. On 15 September 2009, Ofcom published its statement entitled *Review of the wholesale fixed narrowband markets* (the “**Wholesale Narrowband Review Statement**”).
2. In the Wholesale Narrowband Review Statement, Ofcom determined that BT held significant market power (SMP) in various markets in the United Kingdom excluding the Hull Area including the markets for:
 - a. wholesale analogue exchange line services; and
 - b. wholesale ISDN2 exchange line services.
3. As a result, Ofcom imposed a number of remedies on BT in order to address identified competition concerns. Those remedies included the following SMP services conditions: AAA3 and AAA10 applied to, amongst others, those markets set out at paragraph 2 above.
4. Both AAA3 and AAA10 impose a cost orientation obligation upon BT, as follows:

AAA3.1 *Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed;*

AAA10.2 *Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges of providing WLR services in paragraph AAA10.1 are based on the forward looking long-run incremental cost, except where the Dominant Provider and Third Party have agreed another basis for the charges.*
5. BT currently offers some services (‘Enhanced Service Level Care Services’), within the markets described at paragraph 2 above, that provide an enhanced level of service support to rented wholesale lines. Ofcom considers that different pricing constraints apply to these services within the market and that we should not continue to apply the cost orientation obligations to these services.

Direction

6. Ofcom hereby, in accordance with section 49 of the Act, directs that SMP service Conditions AAA3.1 and AAA10.2 shall not apply to Enhanced Service Level Care

Services provided by BT in support of the rental of wholesale lines for the markets set out in paragraphs 12(a)(i) and (ii) of the Notification to the Wholesale Narrowband Review Statement, that is to say:

wholesale analogue exchange line services;
wholesale ISDN2 exchange line services.

7. The effect of, and the reasons for making, this Direction is set out in the accompanying explanatory statement at Section 4.

Effective date

8. This Direction shall take effect on the publication of this Direction.

Ofcom's duties

9. In making this Direction, Ofcom has considered the test set out in section 49(2) of the Act and considers that it is:
 - a. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - b. not such as to discriminate unduly against particular persons or against a particular description of persons;
 - c. proportionate to what it is intended to achieve; and
 - d. in relation to what it is intended to achieve, transparent.
10. Ofcom also considers that, in making this Direction, it has acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
11. As set out in set out in Section 4 of the explanatory statement accompanying this Direction, Ofcom has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

Interpretation

12. Except for references made to the identified services market in this Notification and subject to paragraph 13 below, words or expressions used in this Notification shall have the same meaning as they have been ascribed in the Act.
13. In this Notification—
 - (a) “**Act**” means the Communications Act 2003 (c.21);
 - (b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
 - (c) “**Enhanced Service Level Care Services**” means any maintenance level above the Ordinary Maintenance that is provided as part of the Analogue Core WLR Rental and Wholesale ISDN2 Line Rental services;

(d) “**Hull Area**” means the area defined as the ‘Licensed Area’ in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;

(e) “**Ofcom**” means the Office of Communications;

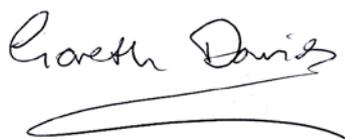
(f) “**United Kingdom**” has the meaning given to it in the Interpretation Act 1978 (c.30); and

(g) “**Wholesale Narrowband Review Statement**” has the meaning given to it in paragraph 1 of this Direction.

14. For the purpose of interpreting this Notification—

(a) headings and titles shall be disregarded; and

(b) the Interpretation Act 1978 (c. 30) shall apply as if this Notification were an Act of Parliament.

A handwritten signature in black ink, appearing to read 'Gareth Davies', with a long horizontal flourish underneath.

Gareth Davies

Competition Policy Director

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

23 February 2010

PART III – DIRECTION REGARDING AMENDMENT OF THE DEFINITION OF ANALOGUE CORE WLR RENTAL

Direction under section 49 of the Communications Act 2003 and SMP Condition AAA4(WLR).12(a), imposed on British Telecommunications plc on in the Notification to *Charge controls for Wholesale Line Rental and related services* dated 26 October 2009 made as a result of a market power determination made by Ofcom in the *Review of the wholesale fixed narrowband markets*, dated 15 September 2009, that British Telecommunications plc has significant market power in the market for wholesale analogue exchange line services in the United Kingdom excluding the Hull Area

Background

1. On 15 September 2009, Ofcom published its statement entitled *Review of the wholesale fixed narrowband markets* (the “**Wholesale Narrowband Review Statement**”).
2. In the Wholesale Narrowband Review Statement, Ofcom determined that BT held significant market power (SMP) in various markets in the United Kingdom excluding the Hull Area including the market for wholesale analogue exchange line services.
3. As a result of that market analysis, Ofcom imposed a number of remedies on BT in order to address identified competition concerns. Additionally, Ofcom decided that a charge control should be imposed in relation to BTs supply of analogue wholesale line rental (‘WLR’), in order to address the identified competition concern that BT could set excessive prices within that market. The Wholesale Narrowband Review Statement confirmed that the SMP condition applying such a charge control should be set under a separate review entitled *Charge controls for Wholesale Line Rental and related services*.
4. On 26 October 2009, Ofcom published *Charge controls for Wholesale Line Rental and related services statement and further consultation* (‘the WLR Charge Controls Statement’).
5. The WLR Charge Controls Statement set SMP condition AAA4(WLR) as the appropriate charge control on analogue WLR services following the market analysis published in the Wholesale Narrowband Review Statement.
6. AAA4(WLR) requires BT to provide an Analogue Core Rental service at a price not exceeding a specified amount. AAA4(WLR).12(a) defined Analogue Core WLR Rental as follows:

“Analogue Core WLR Rental” means, subject to such direction as Ofcom may from time to time give under this paragraph (a), such services, as the Dominant Provider is required to provide under SMP services condition AAA10.1(a) comprising as a minimum, the following:

- i. the rental of an analogue exchange line for control and billing purposes;*
- ii. maintenance which is part of the service provided by the Dominant Provider in consideration of the charge for an Exchange Line and includes a maintenance service level with a fault repair time of no more than provided for Level 1 service care level for Basic lines, as defined in the Dominant Provider’s standard terms and conditions; and*

iii. one residential style main directory listing per telephone number .

7. The requirement to provide one residential style main directory listing per telephone number reflected BTs ability to provide a residential listing but not a business listing at the time condition AAA4(WLR) became effective.
8. BT confirmed that they would need to upgrade their systems to offer a business listing on their WLR3 platform as part of an Analogue Core WLR Rental service. This upgrade would be available as part of their "Release 1400" update, currently scheduled for July 2010.
9. Once BT is in a position to offer a business listing, the definition of Analogue Core WLR Rental will be updated, by this direction, to include the provision of a WLR3 business listing, where required, as part of the minimum level of service to be provided by BT.
10. Ofcom considers that it would be inappropriate to oblige BT to supply Analogue Core WLR rental with a business listing on BT's WLR2 platform as this is due to be phased out.

Direction

11. Ofcom hereby, pursuant to section 49 of the Act and under Condition AAA4(WLR).12(a), directs that for the expression "Analogue Core WLR Rental" there shall be substituted the following new expression in that Condition and the Condition shall read accordingly:

"(a) "Analogue Core WLR Rental" means, unless Ofcom directs otherwise from time to time for the purpose of the meaning of this expression, such services as the Dominant Provider is required to provide under SMP services condition AAA10.1(a) and which on the date this Condition takes effect include:

- i. the rental of an analogue exchange line for control and billing purposes;
- ii. maintenance which is part of the service provided by the Dominant Provider in consideration of the charge for an Exchange Line and includes a maintenance service level with a fault repair time of no more than provided for Level 1 service care level for *Basic* lines, as defined in the Dominant Provider's standard terms and conditions; and
- iii. one main directory listing per telephone number, comprising of either:
 - a. a residential style listing; or
 - b. a business style listing, where the Dominant Provider provides to the Third Party a WLR3 service, as defined in the Dominant Provider's standard terms and conditions;"

12. The effect of, and the reasons for making, this Direction is set out in the accompanying explanatory statement at Section 3.

Effective Date

13. This Direction shall take effect on the WLR Business Implementation Date.

Ofcom's duties

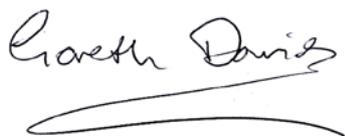
14. In making this Direction, Ofcom has considered the test set out in section 49(2) of the Act and considers that it is:
 - a. objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - b. not such as to discriminate unduly against particular persons or against a particular description of persons;
 - c. proportionate to what it is intended to achieve; and
 - d. in relation to what it is intended to achieve, transparent.
15. Ofcom also considers that, in making this Direction, it has acted in accordance with its general duties in section 3 of the Act and the six Community requirements in section 4 of the Act.
16. As set out in set out in Section 3 of the explanatory statement accompanying this Direction, Ofcom has considered every representation about the proposed Direction duly made to it and the Secretary of State has not notified Ofcom of any international obligation of the United Kingdom for this purpose.

Interpretation

17. Except for references made to the identified services market in this Notification and subject to paragraph 18 below, words or expressions used in this Notification shall have the same meaning as they have been ascribed in the Act.
18. In this Notification—
 - (a) “**Act**” means the Communications Act 2003 (c.21);
 - (b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1156 of the Companies Act 2006;
 - (c) “**Hull Area**” means the area defined as the ‘Licensed Area’ in the licence granted on 30 November 1987 by the Secretary of State under section 7 of the Telecommunications Act 1984 to Kingston upon Hull City Council and Kingston Communications (Hull) plc;
 - (d) “**Ofcom**” means the Office of Communications;
 - (e) “**United Kingdom**” has the meaning given to it in the Interpretation Act 1978 (c.30);
 - (f) “**Wholesale Narrowband Review Statement**” has the meaning given to it in paragraph 1 of this Direction; and
 - (g) “**WLR Business Implementation Date**” means either:
 - (i) the date on which BT has published in a written notice on its website that the Release 1400 upgrade will be available for provision by BT to a person providing a Public Electronic Communications Network or a person providing a Public Electronic Communications Service; or
 - (ii) the back stop date of 31 July 2010,

whichever is the earlier.

19. For the purpose of interpreting this Notification—
- (a) headings and titles shall be disregarded; and
 - (b) the Interpretation Act 1978 (c. 30) shall apply as if this Notification were an Act of Parliament.

A handwritten signature in black ink, reading "Gareth Davies". The signature is written in a cursive style and is underlined with a long, horizontal stroke.

Gareth Davies

Competition Policy Director

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

23 February 2010

Annex 2

Openreach Voluntary Commitment

The voluntary commitment from Openreach on the setting of WLR Premium rental charges for the duration of this charge control is attached below.

Mr Markham Sivak
Competition Policy Director
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

15 February 2010

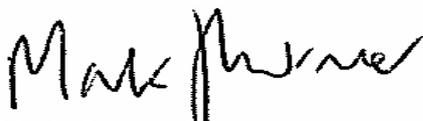
Dear Markham,

Further our recent discussions and with respect to the Wholesale Line Rental Charge Control, Openreach is prepared, on a voluntary basis, to make the following commitments:

1. Openreach commits to not charging a different or higher rental, transfer or new connection price for the WLR2 Premium product versus the WLR3 Premium product. To note this commitment does not forgo Openreach from introducing WLR Premium "special offer" arrangements during the period of the commitment provided they are available to consumers of both WLR2 and WLR3 products. This commitment will remain in place until the scheduled withdrawal of WLR2 on June 30 2011.
2. Openreach commits not to increase the difference in rental prices between the Core rental service (being made available for consumption on WLR3 from Release 1400 in July 2010) and Premium service (for WLR2 or WLR3) versus the difference that exists today between Basic and Premium rental charges. To confirm that at time of writing the differential in price is £9.32 per annum (based on annual rental price of £100.68 for WLR Basic and £110 per annum for WLR Premium). This commitment will remain in place until the end of the charge control period i.e. 31 March 2011.

I understand that you may want to refer to these voluntary commitments in your Final Statement and I have no objection to this.

I trust this is clear but please get back to me if you have any questions.



Mark Shurmer
Director of Regulatory Affairs, Openreach