



Dispute between BT and TalkTalk
relating to
MPF to WLR + SMPF
simultaneous migration offer

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Glossary of terms

2003 Act: The Communications Act 2003.

2010 WLA Market Review: *Review of the wholesale local access market*, 7 October 2010. Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf

2012 Charge Control Statement: *Charge control review for LLU and WLR services*, 7 March 2012. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/statement/statementMarch12.pdf>

ACCN: Access Charge Change Notice. BT issues an ACCN whenever it changes the price for an existing service or offers a price for a new service in a market in which it has SMP (as required by SMP Condition FAA6).

BT: 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.

BT Retail: A BT group business that provides a variety of products of products and services through its four customer facing divisions: BT Consumer; BT Business; BT Ireland, and BT Enterprises.

CP: Communications Provider.

Condition FAA3: An SMP Condition set under the 2010 WLA Market Review requiring BT not to unduly discriminate in relation to matters connected with Network Access.

Cost Gap: The Simultaneous Migration Cost Premium minus the Simultaneous Migration Price Premium.

CPCG: Copper Process Commercial Group.

CWW: Cable and Wireless Worldwide plc.

DAM: BT's Detailed Attribution Methodology. Available at: <https://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2012/index.htm>

DLRIC: Distributed long run incremental cost. A cost measure that is equal to the LRIC of a service plus a share of the common costs.

DSLAM: Digital Subscriber Line Analogue Multiplexer, which is a network device, typically deployed by network operators in the local exchange, connecting multiple premises to a high-speed digital communications channel using Digital Subscriber Line (DSL) interfaces and multiplexing techniques.

EE: Everything Everywhere Limited.

Exchange-Side: Exchange side of the BT network, from the local exchange's Main Distribution Frame (MDF) towards the network operators' equipment.

FAC: Fully Allocated Cost.

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LLU: Local Loop Unbundling allows CPs to physically control (or share control) of BT's existing copper lines between the local telephone exchanges and the customer premises.

LRIC: Long run incremental cost.

Line-Side: The (distribution) Line Side of the BT network, from the Local Exchange's Main Distribution Frame (MDF) towards the premises.

MDF: Main Distribution Frame.

MPF: Metallic Path Facility is the provision of access to the copper wires from the customer's premises to a BT MDF that covers the full available frequency range including both narrowband and broadband channels, allowing a competing provider to provide the customer with both voice and/or data services over such copper wires.

MPF Single Migration: The migration charge for converting a WLR line (with or without SMPF) to an MPF connection.

MSAN: Multi Service Access Node. An MSAN is a network device, typically deployed by network operators in the Local Exchange, connecting multiple premises to high-speed digital communications channels, for the provision of multiple analogue and/or digital services such as Telephony services, Digital Subscriber Line (DSL) and Integrated Services Digital Network (ISDN) access services, using multiplexing techniques.

Openreach: A BT group business offering CPs products and services that are linked to BT's nationwide local access network.

The Parties: TalkTalk and BT.

Provisional Conclusions: This document.

RFS: BT's Regulatory Financial Statements. Available at:
<https://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2012/index.htm>

Simultaneous Migration Cost Premium: The LRIC of WLR Conversion purchased simultaneously with SMPF New Provide minus the LRIC of MPF Single Migration.

Simultaneous Migration Price Premium: The Special Offer price for WLR Conversion purchased simultaneously with SMPF New Provide minus the MPF Single Migration charge.

Sky: British Sky Broadcasting Limited.

SOR: Statement of Requirements – a process by which CPs make a request to the SMP operator for the provision of a service, as required by SMP Condition FAA2 (request for new network access condition).

SMP: Significant Market Power.

SMP conditions: Regulatory conditions imposed on a specific CP that has been found to have significant market power in a market review conducted by Ofcom.

SMPF: Shared metallic path facility is the provision of access to the copper wires from the customer's premises to a BT MDF that allows the provision of broadband (but not narrowband) services.

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SMPF New Provide: The provision of a single new SMPF connection.

Special Offer: Notified by Openreach on 12 September 2012 in ACCN: OR 301¹ the Special Offer consists of a discount for £17.50 where CPs order WLR Conversion and SMPF New Provide together.

TalkTalk: TalkTalk Telecom Group PLC whose registered company number is 7105891, 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.

Virgin Media: Virgin Media Limited.

WFAEL Market Review: *Review of the wholesale fixed analogue exchange lines markets*, 20 December 2010. Available at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/statement/statement.pdf>

WLR: Wholesale line rental. Used by CPs (including BT Retail) to provide narrowband telephony (but not broadband) using BT's network.

WLR Conversion: The conversion of an MPF line to a single wholesale access line.

WLA: Wholesale local access.

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<http://www.openreach.co.uk/org/home/products/pricing/notificationDetails.do?data=ThQLPOgdo8c%2FpcQINXj7BVoAzMfOClw%2B7d4ELMHNgDcHez%2FBB3AtHJBwVbs7OtAbImbMkfEwV9Hg%0AS5od5xPk5mMrG2JXeytL6pFJZpTLM42nMTEF%2BKjWmexJt5mYlgMVVCBTHUK%2FAkGGPXhiPyurwQ%3D%3D>

Section 1

Summary

- 1.1 This document (the “Provisional Conclusions”) sets out for comment the main elements of our provisional reasoning and assessment of the matters in dispute.
- 1.2 This dispute, brought by TalkTalk Telecom Group PLC (“TalkTalk”) against British Telecommunications PLC (“BT”) (collectively the “Parties”), is about BT’s charges to Communications Providers for WLR Conversion and SMPF New Provide under a special offer that started on 11 October 2012 and will run until 30 April 2013 (the “Dispute”).
- 1.3 The special offer was notified by Openreach on 12 September 2012 in ACCN: OR 301² (the “Special Offer”) and consists of a discount of £17.50 where CPs order WLR Conversion and SMPF New Provide together. The discount is applied to the WLR Conversion and delivered as a rebate on the CP’s next bill.
- 1.4 On 3 December 2012, TalkTalk referred a dispute to us that contends that the Special Offer, and Openreach’s failure to provide an equivalent reduction to the price of MPF Single Migration, is a breach of BT’s obligation under SMP Condition FAA3 (“Condition FAA3”) not to unduly discriminate.
- 1.5 BT considers that it is not in breach of Condition FAA3.

Ofcom’s provisional assessment of the matters in dispute

- 1.6 We have considered this dispute against the following scope:

“The scope of the Dispute is to consider whether BT, in refusing to provide a reduction to the [MPF Single Migration] price equivalent to that currently given (under a time-limited special offer) to the price of [MPF Conversion] when purchased with a simultaneous [SMPF New Provide], is compliant with its obligation under Condition FAA3 not to unduly discriminate”.

- 1.7 Based on the analysis set out in this document, our provisional assessment is that we should determine the Dispute on the basis that BT has not acted in breach of Condition FAA3, and that it is not appropriate to exercise our dispute resolution powers.

Structure of the remainder of this document

- 1.8 In line with Ofcom’s *Dispute Resolution Guidelines*,³ this document sets out for comment the main elements of our provisional reasoning and assessment in relation to the matters in dispute.

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<http://www.openreach.co.uk/orpg/home/products/pricing/notificationDetails.do?data=ThQLPOgdo8c%2FpcQINXj7BVoAzMfOCiw%2B7d4ELMHNgDcHez%2FBB3AtHJBwVbs7OtAbImbMkfEwV9Hg%0AS5od5xPk5mMrG2JXeytL6pFJZpTLM42nMTEF%2BKjWmexJt5mYlgMVVCBTHUK%2FAkGGPXhiPyrwQ%3D%3D>

³ *Dispute Resolution Guidelines*, 7 June 2011. See:

<http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

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- 1.9 The introduction and background to this Dispute are set out in **section 2** and the analysis underpinning our provisional reasoning and assessment is set out in **section 3**.

Next steps

- 1.10 Given the nature of the matters in dispute, we consider it appropriate to set a consultation period of 10 working days.⁴ Accordingly, the Parties and other interested parties have until **5pm on 19 March 2013** to comment on these Provisional Conclusions.
- 1.11 After considering any comments received, Ofcom will make a final determination. Details of how to respond to these Provisional Conclusions are set out in **Annexes 1 and 2**.

⁴ In line with the *Dispute Resolution Guidelines*, 7 June 2011, we have considered whether to set a consultation period of up to 15 working days. Given the nature of this Dispute, we consider 10 working days appropriate.

Section 2

Introduction and background

Issues in dispute

- 2.1 This Dispute was referred to Ofcom by TalkTalk and concerns a special offer notified by Openreach on 12 September 2012 in ACCN: OR 301 (the “Special Offer”) available to Communications Providers (“CPs”) buying “*transfer of MPF to WLR*” (which we refer to in this document as “WLR Conversion”) when “*ordered with simultaneous provision of SMPF*” (which we refer to as “SMPF New Provide”). The Special Offer applies to orders placed and completed between 11 October 2012 and 30 April 2013 and is applied as a discount to the price of WLR Conversion of £17.50 which is paid as a rebate on the CP’s next bill.
- 2.2 TalkTalk considers that the Special Offer, and Openreach’s failure to provide an equivalent reduction to the price of MPF Single Migration, is a breach of BT’s obligations to ensure that its charges are not unduly discriminatory.

Legal framework for the consideration of disputes

- 2.3 Section 185(1)(a) of the Communications Act 2003 (the “2003 Act”) provides (in conjunction with section 185(3)) that in the case of a dispute relating to the provision of network access between different CPs, any one or more of the parties to such a dispute may refer it to Ofcom. Section 185(1A) of the 2003 Act provides (in conjunction with section 185(3)) that in the case of a dispute relating to the provision of network access between a CP and a person who is identified, or is a member of a class identified, in a condition imposed on the CP under section 45 of the 2003 Act, and where the dispute relates to entitlements to network access that the CP is required to provide to that person by or under that condition, any one or more of the parties may refer it to Ofcom.
- 2.4 Section 186(2) of the 2003 Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) provides that Ofcom must decide that it is appropriate for it to handle a dispute falling within section 185(1A) unless there are alternative means available for resolving the dispute. A resolution of the dispute by those means must be consistent with the Community requirements set out in section 4 of the 2003 Act, and those alternative means must be likely to result in a prompt and satisfactory resolution of the dispute.
- 2.5 Ofcom’s powers in relation to making a dispute determination are limited to those set out in section 190 of the 2003 Act. Except in relation to disputes relating to the management of the radio spectrum, Ofcom’s main power is to do one or more of the following:
- make a declaration setting out the rights and obligations of the parties to the dispute (section 190(2)(a));
 - give a direction fixing the terms or conditions of transactions between the parties to the dispute (section 190(2)(b));
 - give a direction imposing an obligation to enter into a transaction between themselves on the terms and conditions fixed by Ofcom (section 190(2)(c)); and

- give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment, in respect of charges for which amounts have been paid by one party to the dispute, to the other (section 190(2)(d)).
- 2.6 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute (section 190(8)).
- 2.7 When resolving a dispute under the provisions set out in sections 185 to 191 of the 2003 Act, Ofcom is exercising one of its functions. As a result, when Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties in section 3 of the 2003 Act, and (pursuant to section 4(1)(c) of the 2003 Act) the six Community requirements set out in section 4 of the 2003 Act, which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive.⁵
- 2.8 In considering this Dispute Ofcom has also had regard to the guidance issued on 15 November 2005 regarding investigation of potential contraventions of requirements not to unduly discriminate imposed on SMP providers.⁶

Regulatory requirement on BT to provide LLU and WLR

LLU

- 2.9 Ofcom's *Review of the wholesale local access market*, which was published on 7 October 2010 ("2010 WLA Market Review")⁷, found that BT has SMP in the WLA market in the UK excluding the Hull area.
- 2.10 The 2010 WLA Market Review imposed on BT a number of SMP Conditions including Condition FAA9 (Requirement to provide Local Loop Unbundling Services (LLU)), which requires BT to provide both MPF and SMPF, and Condition FAA3 (Requirement not to unduly discriminate).
- 2.11 Condition FAA3 (which as discussed below is relevant for our resolution of this dispute) is set out here:

FAA3 – Requirement not to unduly discriminate

FAA3.1 *The Dominant Provider [i.e. BT] shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with Network Access.*

FAA3.2 *In this Condition, the Dominant Provider may be deemed to have shown undue discrimination if it unfairly favours to a material extent an activity carried on by it so as to place at a competitive disadvantage persons competing with the Dominant Provider.*

FAA3.3 *This Condition shall not apply to the requirement on the Dominant Provider to provide Virtual Unbundled Local Access under Condition FAA11. For the avoidance of any doubt, Condition FAA11.3 contains a specific obligation of non-discrimination on the Dominant Provider in relation to such provision.*

⁵ Directive 2002/21/EC of 7 March 2002.

⁶ <http://stakeholders.ofcom.org.uk/consultations/undsmf/?a=0>

⁷ http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf

WLR

- 2.12 In Ofcom's *Review of the wholesale fixed analogue exchange lines markets* ("2010 WFAEL Review")⁸, BT was found to have SMP in the wholesale fixed analogue exchange lines market in the UK excluding the Hull area.
- 2.13 A number of remedies were imposed on BT as a result of the 2010 WFAEL Review, including SMP Conditions: AAAA10 (requirement to provide WLR), AAAA2 (requirement not to unduly discriminate) and AAAA3 (cost-orientation of charges).

Customer migrations between MPF and SMPF

- 2.14 This Dispute relates to various products supplied by Openreach that enable CPs to transfer consumers between services based on MPF and services based on SMPF and WLR.
- 2.15 MPF provides CPs with full access to the local loop so they can provide broadband and/or voice services direct to end consumers. SMPF allows CPs to provide broadband services over the line between the local exchange and the end consumer's premises, whilst voice services are provided using WLR over the same line.
- 2.16 Some CPs provide voice and broadband services using SMPF and WLR. CPs operating mainly on the basis of MPF may also use SMPF and WLR in areas that are not covered by their LLU network.⁹
- 2.17 When a consumer switches from a CP that uses SMPF and WLR to one that uses MPF, the acquiring CP buys one migration product, MPF Single Migration, for which the current charge is £33.54. When the consumer switches from a CP that uses MPF to one that uses WLR and SMPF, the acquiring CP currently has to purchase two products – WLR Conversion and SMPF New Provide, which absent the Special Offer, cost £68.40 in total. As shown in Table 1, this £68.40 charge is the sum of the charge of £34.86 for WLR Conversion and the charge of £33.54 for SMPF New Provide when purchased individually.¹⁰

The Special Offer

- 2.18 The Special Offer was notified on 12 September 2012 in ACCN: OR301 and applies to orders provisioned and completed between 11 October 2012 and 30 April 2013. The ACCN advises that when "*a transfer of MPF to WLR is ordered with simultaneous provision of SMPF, the combined special offer price of both orders will be £50.90*" - a reduction of £17.50. The prices are illustrated in Table 1.

⁸ *Review of the wholesale fixed analogue exchange lines markets*, 20 December 2010. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/statement/statement.pdf>

⁹ A further complication is that, rather than purchasing directly from Openreach, CPs may purchase some products from intermediaries such as BT Wholesale. For example, rather than purchasing SMPF from Openreach, a CP might purchase IPStream from BT Wholesale (CPs generally purchase WLR from Openreach). However, this distinction is not important for the purposes of this Dispute. As explained in paragraph 2.20 below, even where CPs do not directly purchase from Openreach, they nonetheless pay a price that reflects the Special Offer.

¹⁰

<http://www.openreach.co.uk/orpg/home/products/pricing/loadProductPriceDetails.do?data=totid5BwFmkf9vLcBITRyZF9loRxWlbiKK6V7YWmIYAIMnGHsqdC0vzO163bJmh34D91D7M0q8u%2F%0AllSgtlFAKw%3D%3D>

Table 1 – figures taken from ACCN: OR301

	WLR Conversion	SMPF New Provide	Total price when provisioned simultaneously
Normal price	£34.86	£33.54	£68.40
Special Offer price	£17.36	£33.54	£50.90

- 2.19 The discount is applied to the WLR Conversion charge. The £17.50 discount is delivered by way of a rebate and is paid at least one month in arrears from the order closing.
- 2.20 Although it is Openreach that provides the Special Offer, it is normally the case that CPs purchase SMPF New Provide from BT Wholesale (for example, IPStream Connect or Wholesale Broadband Connect services). Openreach then reconciles the simultaneous orders at the end of each month and applies the discount to the WLR account as a rebate. We thus understand that, even where CPs do not directly purchase from Openreach, they nonetheless pay a price that reflects the Special Offer.¹¹ For ease of exposition we refer to this below as the “Special Offer price”.
- 2.21 Openreach has provided data on the volume of transfers under the Special Offer for October 2012-January 2013. Over these four months, total Special Offer volumes were [redacted]. The main purchasers were [redacted].¹²

Dispute referred to Ofcom by TalkTalk

- 2.22 An initial dispute about the Special Offer was submitted by TalkTalk on 8 October 2012 (the “Rejected Dispute”). We rejected this on 29 October 2012 on the basis that the parties had not exhausted commercial negotiations. TalkTalk submitted the Dispute on 3 December 2012.

TalkTalk’s view that BT is in breach of its obligation not to unduly discriminate

- 2.23 TalkTalk submits that BT’s refusal to provide a reduction to the price of MPF Single Migration equivalent to that given to WLR Conversion under the Special Offer is a breach of its obligation under Condition FAA3 not to unduly discriminate. TalkTalk states that:

*“The special offer “favours an activity carried on by BT” because the main beneficiary of the special offer price would be BT Retail since they use WLR + IPStream (SMPF) to serve BT end-users”.*¹³

- 2.24 TalkTalk considers that the “benefit to BT Retail is “material” because the effect of the special offer price would be to make it significantly cheaper for BT Retail to gain

¹¹ BT Retail s191 response of 15 February 2013, answer to question 1. EE s191 response of 15 February 2013, answer to question 1.

¹² Openreach s191 response of 8 February 2013, answer to question 5.

¹³ TalkTalk dispute submission, 3 December 2012, page 4.

customers from TalkTalk's LLU MPF network during the period of 11 October 2012 and [sic] 30 April 2013.¹⁴

- 2.25 TalkTalk submits that the “*special offer price clearly places TalkTalk at a competitive disadvantage compared to BT Retail*” and that it gives “*BT Retail an unfair competitive edge over TalkTalk*”.¹⁵

Comments from Openreach on TalkTalk's submission

- 2.26 We provided a copy of TalkTalk's submission to Openreach on 4 December 2012. Openreach has made the following observations.¹⁶
- An SOR for a simultaneous transfer product was initially submitted in October 2011.¹⁷ This was submitted by BT Retail, and supported by EE and BT Wholesale.¹⁸
 - The possibility of Openreach creating a simultaneous transfer product was discussed in the 2012 Charge Control Statement.¹⁹
 - Openreach rejected the SOR in May 2012, following discussion at the Copper Products Process Group and the Copper Products Commercial Group (CPCG). Openreach considered that the volume forecasts did not support the case for a new product.²⁰
 - Openreach then considered the case for a special offer to “*test actual demand*”. Pricing was considered against volume forecasts provided by BT Retail and EE.²¹
 - Openreach kept Ofcom informed as to discussions on the SOR and the development of the Special Offer. For example, Ofcom was present at the May and July 2012 CPCG meetings at which the subject was discussed.²²
 - Openreach will assess the case for continuance of the Special Offer and for a new product at the end of the six month trial period.²³
- 2.27 Openreach therefore argues that the Special Offer has been provided in response to industry demand for a simultaneous migration product. Openreach asserts that the development of a product was “*was very sensitive to volumes and Openreach really needed to test actual demand*” and was “*a pragmatic solution to the SOR submitted by industry, aimed at addressing concerns raised by WLR providers about asymmetric migration processes without Openreach committing to the launch of a*

¹⁴ TalkTalk dispute submission, 3 December 2012, page 4.

¹⁵ TalkTalk dispute submission, 3 December 2012, page 5.

¹⁶ Openreach provided as an annex its response of 16 October 2012 to the Rejected Dispute submission.

¹⁷ SOR 8267 – review of the price for simultaneous transfers from MPF to WLR + SMPF.

¹⁸ Letter from Alan Lazarus, Openreach, to Francesco Savino, Ofcom on 16 October 2012, page 1.

¹⁹ *Charge control review for LLU and WLR services*, 7 March 2012 (the “2012 Charge Control Statement”). See in particular paragraphs 5.76 to 5.87. Available at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/statement/statementMarch12.pdf>

²⁰ Letter from Alan Lazarus, Openreach, to Francesco Savino, Ofcom on 16 October 2012, page 1.

²¹ Letter from Alan Lazarus, Openreach, to Francesco Savino, Ofcom on 16 October 2012, page 2.

²² Letter from Alan Lazarus, Openreach, to Francesco Savino, Ofcom on 16 October 2012, page 2.

²³ Letter from Alan Lazarus, Openreach, to Francesco Savino, Ofcom on 16 October 2012, page 3.

*new migration product when there is unproven demand for the product that would justify development costs”.*²⁴

- 2.28 An internal Openreach document setting out the justification for the Special Offer stated that: [redacted].²⁵

Accepting the Dispute for resolution

- 2.29 Having considered submissions from TalkTalk and Openreach we were satisfied that this was a dispute between CPs within the meaning of section 185(1A) of the 2003 Act and that it was appropriate for Ofcom to handle the dispute.
- 2.30 TalkTalk argued in its submissions that the dispute covered BT’s compliance with the cost-orientation SMP conditions FAA4 and AAAA3 and the non-discrimination SMP conditions FAA3 and AAAA2. In our view there was only one element of the negotiations between TalkTalk and BT that could be considered as a dispute under s185: the issue of compliance with the non-discrimination obligation at Condition FAA3. That dispute relates to the provision of network access by BT to TalkTalk, a purchaser of network access products (e.g. MPF Single Migration) falling within the scope of Condition FAA3, and is therefore a dispute under s185(1A). In relation to the other SMP conditions there was no dispute between TalkTalk and BT as to terms of supply between them which was affected by the relevant SMP Condition. Section 185 was therefore not engaged in respect of the other SMP Conditions.
- 2.31 On 4 January 2013 we informed the Parties of our decision that it was appropriate for us to accept the Dispute for resolution in accordance with section 186(3) of the 2003 Act. On 7 January, we published details, including the scope of the Dispute, on our website. The scope of the Dispute is to:

“consider whether BT, in refusing to provide a reduction to the [MPF Single Migration] price equivalent to that currently given (under a time-limited special offer) to the price of [WLR Conversion] when purchased with a simultaneous [SMPF New Provide], is compliant with its obligation under Condition FAA3 not to unduly discriminate”.

The 2012 Charge Control Statement

- 2.32 In the 2012 Charge Control Statement Ofcom explained its view that:²⁶
- There was scope to simplify the processes for migrations from MPF to WLR (+ SMPF). Ofcom did not however want to adjust the individual charges for WLR and SMPF as this would distort individual charge levels, which would be inconsistent with the principal that charge differentials should be consistent with LRIC differentials (which is reflected in our approach at Step 1: see paragraphs 3.17 - 3.24 below). As these services are purchased on their own as well as simultaneously, we were concerned that adjusting the individual charges would be likely to result in a significant distortion.

²⁴ Letter from Alan Lazarus, Openreach, to Francesco Savino, Ofcom on 16 October 2012, page 4.

²⁵ Openreach pricing paper, 13 August 2012. This paper was submitted to the Openreach internal body with authority to approve price changes and special offers. Contained in Openreach’s s191 response of 8 February 2013, answer to question 1(b).

²⁶ See in particular paragraphs 5.76 to 5.84.

- There was scope to create a single migration service that allows CPs to migrate customers to WLR + SMPF from MPF simultaneously. This would reduce the overall cost to CPs of migration to WLR and SMPF services and provide a more seamless consumer experience.
- This would, however, require the creation of a new service by Openreach, and we could not therefore resolve this issue in the context of the charge control review. We noted the submission of the SoR (see paragraph 2.26) and explained that this had to be assessed before we could reach a view on the appropriate level of a charge for such a service. We considered that a new service of this type would address stakeholders' views that charges for migration to WLR and SMPF and migration to MPF should be more closely aligned.

2.33 Ofcom concluded that “a charge control and/or alignment with WLR to MPF conversion is not required at this time for MPF to WLR transfer”. We noted, however:²⁷

“We accept that the existing services available to WLR based CPs may put them at a disadvantage compared to MPF based providers. However, as discussed above adjusting this charge alone would not address the broader concern over WLR+SMPF versus MPF competition and to adjust the charge as suggested by FCS would risk substantial economic incentive distortion.

“Going forward, we consider that the SoR process will lead to an identification of the cost elements of the combined transfer services and result in a better consumer experience (to the advantage of WLR+SMPF based competitors). Furthermore, we would anticipate that the new service would be considered in the next WFAEL and WLA market reviews.”

Interested parties

2.34 Five stakeholders have registered their interest in the outcome of the Dispute:

- Virgin Media;
- Sky;
- EE;
- CWW; and
- BT Retail.

Information relied upon in resolving the Dispute

2.35 These Provisional Conclusions draw on information provided by the Parties.

2.36 This includes TalkTalk's submission and related correspondence provided by both Parties, including:

2.37 Openreach submissions:

²⁷ Paragraphs 5.85 to 5.87.

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- Openreach's response to TalkTalk's dispute submission, 10 December 2012, which includes its response to the Rejected Dispute of 16 October 2012.

2.38 TalkTalk's submissions:

- TalkTalk dispute submission of 3 December 2012.

2.39 Our analysis also refers to responses to a number of section 191 ("s191") Notices:

- Openreach's response of 8 February 2013 to s191 Notice of 1 February 2013.
- Emails of 15 February and 19 February responding to a number of questions related to the response of 8 February 2013, which we sent Openreach on 14 February 2013.
- TalkTalk's response of 12 February 2013 to s191 Notice of 6 February 2013.
- Virgin Media's response of 13 February 2013 to s191 Notice of 6 February 2013.
- BT Retail's response of 15 February 2013 to s191 Notice of 6 February 2013.
- EE's response of 15 February 2013 to s191 Notice of 6 February 2013.
- Sky's response of 11 February 2013 to s191 Notice of 6 February 2013.

2.40 Our analysis also refers to Openreach pricing information from the BT website.

2.41 This document references a letter from EE to Ofcom of 18 January 2013 in which it registers its interest in the outcome of the Dispute and provides background information.

Section 3

Analysis and provisional conclusions

Questions to be answered

- 3.1 This section sets out our assessment of the issues in dispute.
- 3.2 The Dispute concerns whether Openreach's charges unduly discriminate in favour of purchasers of WLR Conversion and SMPF New Provide, compared to purchasers of MPF Single Migration. In order to determine whether BT is compliant with its obligations under Condition FAA3 we have addressed the following key questions:
- **Step 1:** Does the Special Offer price favour purchasers of WLR Conversion and SMPF New Provide, compared to purchasers of MPF Single Migration, beyond what is warranted by differences in Openreach's costs?
 - **Step 2:** If so, is the Cost Gap material?²⁸
 - **Step 3:** If the Cost Gap is material are there any other factors affecting the determination of the Dispute?
- 3.3 Our approach to answering these questions is set out in the analytical framework described below. We then consider Steps 1-3 in turn. Finally we set out our provisional conclusions.

Theory of harm and the analytical framework

- 3.4 In order to explain our analytical framework, we first set out the theory of harm that we test in this document.

TalkTalk's views on the theory of harm

- 3.5 TalkTalk considers that the Special Offer places TalkTalk at an "*unfair*" competitive disadvantage relative to BT Retail. The Special Offer lowers the marginal cost to BT Retail of acquiring customers from TalkTalk (since the Special Offer reduces the cost to BT Retail associated with the simultaneous purchase of WLR Conversion and SMPF New Provide). TalkTalk considers that this is likely to result in lower charges for BT Retail's customers and thus an increase in the number of customers that switch from TalkTalk to BT Retail.²⁹
- 3.6 TalkTalk also considers that the Special Offer harms the competitive process since the Special Offer price is below what it infers is the DLRIC cost floor for simultaneous SMPF + WLR migration and thus BT Retail is able to gain customers in an "*inefficient manner*".³⁰

Ofcom's provisional view on the theory of harm

- 3.7 Charges for migrating to MPF and to SMPF + WLR represent input costs for firms providing voice and broadband services which affect:

²⁸ We define the Cost Gap below at paragraph 3.67 .

²⁹ TalkTalk dispute submission, 3 December 2012, page 4 point (ii) and page 5 point (iv).

³⁰ TalkTalk dispute submission, 3 December 2012, page 5 point (v).

- firms' choice of which products (MPF or SMPF + WLR) to use when supplying retail voice and broadband services; and
- consumers' choice between suppliers using MPF and suppliers using WLR + SMPF. This is because migration charges potentially affect the retail price of voice and broadband supplied using these different products.

3.8 In assessing the theory of harm we considered three different aspects of economic efficiency:

- **Allocative efficiency:** This is achieved when prices are close to cost. Allocative efficiency ensures that all consumers who value a product at more than its cost are able to purchase it.
- **Productive efficiency:** This means that the costs of production are minimised.
- **Dynamic efficiency:** This means that firms have the correct incentives to invest (e.g. in new infrastructure) and to innovate (e.g. to generate new products).

3.9 In order to assess whether the Special Offer results in discrimination we have considered the conditions under which the reduction in the relative cost of migration from MPF to SMPF + WLR that results from the Special Offer is likely to have harmful consequences. In principle, a reduction in the cost of migrating from MPF to SMPF + WLR relative to the cost of migrating to MPF could have two harmful effects:

- **Productive inefficiency:** If input prices are not related to the underlying costs then firms may not be incentivised to supply voice and broadband services in the most efficient way.³¹
- **Distortion of competition:** Competition may be skewed between firms that use WLR + SMPF and firms (such as TalkTalk) that predominantly use MPF. This distortion of competition may occur at the retail level or upstream.³² Such a distortion of competition may harm consumers e.g. if a loss of economies of scale weakens the constraint that firms such as TalkTalk exert on BT, thereby allowing BT to raise prices. Such higher prices potentially lead to all three types of inefficiency.³³

3.10 We also recognise that firms using SMPF + WLR benefit from the Special Offer and that a reduction in SMPF + WLR migration charges may feed into lower retail prices for CPs that use SMPF + WLR, which would be to the direct benefit of their customers.

3.11 We consider that if the difference between the prices for these two migration services reflects the difference in the costs of these migration services then the Special Offer is unlikely to result in the potential harmful effects discussed above. We have thus considered the difference between the price of simultaneous SMPF + WLR migration under the Special Offer and the price of MPF Single Migration. At Step 1 of our

³¹ A related point is that investment incentives may be distorted leading to dynamic inefficiency.

³² As well as competing at the retail level, TalkTalk and BT also compete to supply access to their networks to third party retailers.

³³ For example, higher retail prices may lead to allocative inefficiency (since consumers do not purchase voice and broadband services, even though their willingness to pay exceeds the underlying costs) and exit by BT's rivals may lead to dynamic inefficiency (e.g. loss of variety, since suppliers may differ in terms of quality of service etc).

analysis we consider whether this price difference reflects a difference in the costs of these two services.³⁴

- 3.12 If there is a difference in favour of migration to SMPF + WLR that is not warranted by a difference between the cost of migrating to SMPF + WLR and the cost of migrating to MPF then, at Step 2 of our analysis, we would consider whether that divergence between prices and costs is material. In this context, we consider that the materiality of any divergence between prices and costs should be assessed by reference to the potential harm that might arise as a consequence of this gap (see paragraph 3.69).
- 3.13 Our conclusions in relation to Steps 1 and 2 will enable us to reach a view on whether BT has acted in breach of Condition FAA3. We have not considered the position of BT Retail separately from other purchasers. We consider that if we are satisfied, pursuant to Steps 1 and 2, that there is no undue discrimination in favour of any purchaser, then BT is compliant with Condition FAA3.1: it is then unnecessary for us to consider separately the position of BT under the sub-set of circumstances envisaged under Condition FAA3.2.
- 3.14 The scope of the Dispute considers BT's compliance with Condition FAA3. Steps 1 and 2 set out our analysis of that issue. The purpose of Step 3 would be to consider, if we found a compliance concern, whether there might be other relevant factors that we should take into account in resolving the Dispute.
- 3.15 Our analysis under Steps 1-3 is set out below.

Step 1: Does the Special Offer price favour purchasers of WLR Conversion and SMPF New Provide, compared to purchasers of MPF Single Migration, beyond what is warranted by differences in Openreach's costs?

Ofcom's proposed approach for assessing Step 1

- 3.16 We now discuss the approach for assessing Step 1. We first explain our approach. We then briefly explain why we did not compare various other measures of price and cost. Finally we summarise our proposed approach diagrammatically.

Comparison between the price differential and the LRIC differential

- 3.17 As explained above, this dispute relates to whether BT has unduly discriminated between migration to MPF and simultaneous migration to SMPF + WLR. We have thus focused on the relative migration charges.
- 3.18 We have considered what weight should be attached to the three different aspects of efficiency set out in paragraph 3.8 above. MPF and SMPF + WLR are alternative wholesale inputs for the same broadband and voice retail markets. In our view, the main efficiency consideration is to induce an efficient choice of wholesale inputs, so as to minimise overall costs. These productive efficiency considerations point to price differentials between products that reflect the absolute differences in LRIC. In contrast, allocative efficiency considerations at the retail level are far less relevant

³⁴ We discuss at paragraphs 3.18-3.22 below precisely what we mean by 'costs' in this context.

because MPF and SMPF + WLR are used to supply the same downstream retail markets.³⁵

- 3.19 Consider the case where the difference between the price of input X and the price of input Y reflects the difference between the LRIC for input X and the LRIC for input Y. In this case, when choosing between X and Y, firms face price signals that reflect the difference in incremental resource costs. Thus, if a firm chooses the more expensive input (X, say) then the premium they pay for that input (over and above Y) reflects the extra resources involved in X's production.
- 3.20 In contrast, consider the case where the difference in the price of X and Y does not reflect the difference between their respective LRICs. For example, if the premium for X (over and above the price of Y) does not fully reflect the higher LRIC of X (relative to Y) then firms will not take into account the extra resources associated with using input X. Firms will thus be more likely to use input X.
- 3.21 We define the "Simultaneous Migration Price Premium" as the Special Offer price for WLR Conversion ordered simultaneously with SMPF New Provide (£50.90) minus the MPF Single Migration price (£33.54). The Simultaneous Migration Price Premium thus equals £17.36.
- 3.22 We have compared the Simultaneous Migration Price Premium against the difference in the LRICs for simultaneous migration to SMPF + WLR and to MPF. Specifically, we define the "Simultaneous Migration Cost Premium" as the LRIC of WLR Conversion provided simultaneously with SMPF New Provide minus the LRIC of MPF Single Migration.
- If the Simultaneous Migration Cost Premium is greater than £17.36 (i.e. the Simultaneous Migration Price Premium) then the difference between the migration charges is insufficient to cover the extra incremental costs associated with simultaneous SMPF + WLR migration, relative to migration to MPF. In these circumstances, the choice between SMPF + WLR simultaneous migration and migration to MPF might be skewed in favour of SMPF + WLR in a way that does not reflect the differences in Openreach's costs. We would need to consider under Step 2 whether the difference was material.
 - If the Simultaneous Migration Cost Premium is equal to £17.36 then the Simultaneous Migration Price Premium reflects differences in underlying costs.
 - Finally, if the Simultaneous Migration Cost Premium is less than £17.36 then the choice between SMPF + WLR simultaneous migration and migration to MPF might be skewed in favour of MPF in a way that does not reflect the differences in Openreach's costs. However, consideration of any issues this raises lies outside the scope of this dispute, which relates to potential discrimination against purchasers of MPF Single Migration.³⁶

³⁵ Attempting to recover more common costs from one set of wholesale inputs over the other would, to a considerable extent, be undermined by arbitrage, especially in the longer term. This approach is consistent with the position adopted in the paragraph 7.59 of the 2012 Charge Control Statement.

³⁶ We note here that the Dispute is framed by reference to a particular set of facts involving TalkTalk and BT. The analysis in this document is limited to those facts. To the extent that any future issues are raised regarding the position of purchasers of SMPF products, these would need to be considered on their own facts. In particular we note that BT is not currently under a specific obligation to offer a combined WLR Conversion and SMPF New Provide product.

- 3.23 In summary, at Step 1 we have considered whether the Simultaneous Migration Cost Premium is greater than £17.36 (i.e. the Simultaneous Migration Price Premium).
- 3.24 Comparing the difference in prices with the difference in LRICs is consistent with the approach in the 2012 Charge Control Statement. In that statement:
- We considered the charges for “MPF Single Migration” and “SMPF Single Migration/Provide”. We stated that “Where there is a differential in the charges, this should be broadly reflective of the LRIC differentials, as this ensures that the price differential does not lead to a distortion of consumer choice between services.”³⁷ We then considered whether the available cost data indicated that there was an enduring LRIC differential.³⁸
 - We also considered the LRIC differential in relation to the charge for rental of these services. We stated that “...MPF vs. WLR/WLR+SMPF rental services are alternative wholesale inputs for the same broadband and voice retail markets. Because of this ... the main efficiency consideration is to induce an efficient choice of wholesale inputs, so as to minimise overall costs. ... these productive efficiency considerations point to differentials between products that reflect the absolute differences in LRIC.”³⁹ In terms of dynamic efficiency, we stated that “...efficient future investment choices between different wholesale inputs would require the price differentials to be based on the absolute LRIC differentials.”⁴⁰

TalkTalk’s alternative cost metrics

- 3.25 In support of its argument that BT is in breach of its non-discrimination obligation, TalkTalk’s view is:
- First, that the Special Offer price unfairly favours BT Retail over TalkTalk “because there is no corresponding reduction in cost to Openreach”; and
 - Second, that the Special Offer price is below TalkTalk’s estimate of Openreach’s DLRIC of simultaneously supplying WLR Conversion and SMPF New Provide.⁴¹
- 3.26 In terms of TalkTalk’s first observation, TalkTalk appears to be comparing the reduction in price under the Special Offer against Openreach’s cost savings from simultaneous provision. The Special Offer price represents a £17.50 reduction, relative to the price of purchasing WLR Conversion and SMPF New Provide separately. We have not considered whether the cost savings from providing these products simultaneously, compared to providing them separately, are more or less than £17.50. Such an assessment would not consider the Special Offer price relative to the price of migration to MPF. It would thus be poorly suited to considering whether BT was discriminating against migration to MPF.
- 3.27 Moreover, we also note that the sum of the price of WLR Conversion and the price of SMPF New Provide may not be the same as the cost of separately carrying out these activities. This means that it is likely to be inappropriate to compare the difference

³⁷ 2012 Charge Control Statement, paragraph 4.46.

³⁸ 2012 Charge Control Statement, paragraphs 4.25-4.87 in particular paragraphs 4.50-4.51.

³⁹ 2012 Charge Control Statement, paragraph 7.10. See also paragraph 7.60.

⁴⁰ 2012 Charge Control Statement, paragraph 7.51. Note that an important additional factor was providing a stable and predictable regulatory framework (see paragraphs 7.52-7.58 and 7.61-7.62).

⁴¹ TalkTalk dispute submission, page 4 point (iii).

between the sum of these two prices and the Special Offer price (£17.50) against the estimated cost savings from carrying out these activities simultaneously.

- We illustrate this point with an example concerning WLR Conversion. This example shows that, where the price of WLR Conversion reflects the average cost of carrying out WLR Conversion, making comparisons using that price can be inappropriate. The same logic applies to making comparisons involving the sum of the price of WLR Conversion and the price of SMPF New Provide.
- Suppose that the cost of just carrying out a WLR Conversion is £10. Since there are economies of scope from carrying out a simultaneous WLR Conversion and SMPF New Provide, assume that the costs apportioned to WLR Conversion are £6 when these services are carried out simultaneously. Given an even split between WLR Conversion with and without SMPF New Provide means the average overall cost of a WLR Conversion is £8.⁴²
- Suppose the price of WLR Conversion reflects that average cost (£8) and that there is a special offer price for simultaneous WLR Conversion that equals the cost of carrying out this activity simultaneously with SMPF New Provide (£6). This means that the difference between the WLR Conversion price and the special offer price (£8-£6=£2 in this example) will understate the true cost savings from simultaneously carrying out WLR Conversion and SMPF New Provide (£10-£6=£4 in this example).

3.28 In terms of TalkTalk's second observation, we have not compared the Special Offer price (£50.90) against an estimate of the cost of simultaneously providing WLR Conversion and SMPF New Provide. Such an assessment would not consider the Special Offer price relative to the price of MPF Single Migration. It would thus be poorly suited to considering whether BT was discriminating against migration to MPF.

EE's costs comparison

3.29 EE highlights the contrast between the pre-Special Offer prices of WLR Conversion and SMPF New Provide (a total of £68.40) and the price of MPF Single Migration (£33.54). EE considers that these prices distorted competition in favour of MPF-based operators. EE believes that the Special Offer price does not go far enough in reducing the charge for simultaneous migration from MPF to WLR + SMPF.⁴³

3.30 In terms of EE's comment, this relates to distortion in favour of purchasers of MPF. As discussed in paragraph 3.22 above, this lies outside the scope of this dispute, which relates to potential discrimination against purchasers of MPF Single Migration.

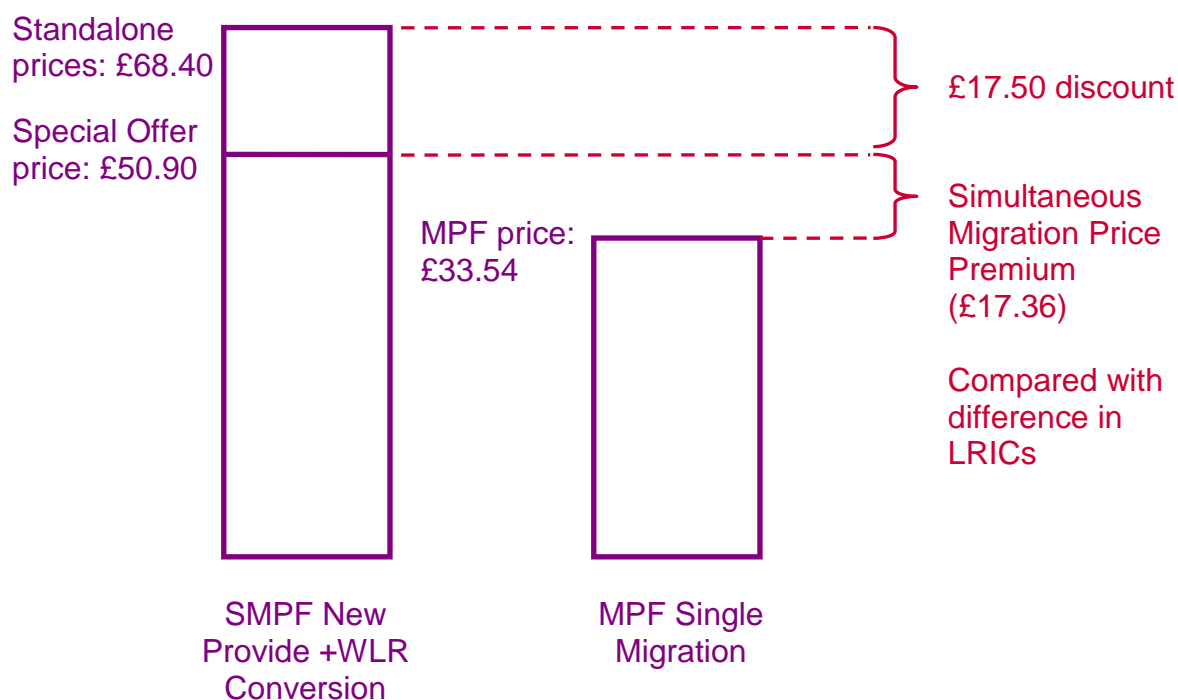
⁴² Even before the launch of the Special Offer, where Openreach needed to carry out WLR Conversion and SMPF New Provide on the same line, the necessary engineering activities were sometimes carried out at the same time. For example, rather than an engineer travelling to the exchange twice (first to carry out the WLR Conversion and then later to carry out the SMPF New Provide) he/she sometimes only made one trip. Similarly the engineer only dealt with four jumpers (rather than six) by combining these activities. See below for further details. This is confirmed by internal Openreach documents. "... the WLR and SMPF products already take account of the fact that the products are delivered simultaneously on some occasions ..." Openreach Pricing paper, 13 August 2012. Contained in Openreach's 191 response of 15 February 2013, answer to question 1(b).

⁴³ Letter to Catherine Warhurst of 18 January 2013, pages 4 to 5.

Summary of Ofcom’s proposed approach for assessing Step 1

3.31 Our proposed approach for assessing Step 1 is set out diagrammatically in Figure 1 below. The vertical blocks in this diagram represent the price of different migration services. As explained above, we have focused on the difference between the Special Offer price and the price of migration to MPF (i.e. the Simultaneous Migration Price Premium of £17.36). This is compared against the difference in the LRICs for these products (i.e. the Simultaneous Migration Cost Premium).

Figure 1: Ofcom’s proposed approach to Step 1



Estimation of the Simultaneous Migration Cost Premium

3.32 We now set out our comparison between the Simultaneous Migration Price Premium and the Simultaneous Migration Cost Premium.

3.33 To estimate the Simultaneous Migration Cost Premium, we only need to consider activities that are different between MPF Single Migration as compared to simultaneous WLR Conversion and SMPF New Provide. Where the same activity is performed in both cases, there will be no difference in the LRIC associated with that particular activity, so it can thus be disregarded for the purposes of calculating the Simultaneous Migration Cost Premium. The analysis below thus focuses on the differences between activities (and thus the LRICs) for MPF Single Migration as compared to simultaneous WLR Conversion and SMPF New Provide.

3.34 We asked Openreach to provide a breakdown comparing the activities that need to be undertaken to provide MPF Single Migration and simultaneous WLR Conversion and SMPF New Provide. This is given in Table 2 below.

Table 2 – Comparison of activities for provision of MPF and the Special Offer

MPF Single Migration	Special Offer (WLR Conversion plus simultaneous SMPF New Provide)
Validate order	Validate order
Analyse and build order - Issue NP proforma	Analyse and build order - Issue NP proforma
Allocate route	Allocate route
	Allocate and configure network services
Allocate engineer - Perform engineering visit (forced appointment)	Allocate engineer
Execute exchange activity	Execute exchange activity
Prove service and confirm complete	Prove service and confirm complete
Billing	Billing

Source: Openreach Email of 15 February 2013, answer to question 2.

3.35 Care needs to be taken when using Table 2 to identify the differences in activities required to provide the two services.

- “Execute exchange activity” appears in both columns. However, although similar, for example in terms of jumpering, the two services are not exactly the same. This is discussed in further detail in paragraphs 3.42 and 3.43 below.
- There are only two differences between the columns. First, the “Allocate engineer” task for an MPF Single Migration may involve a “forced appointment” (an engineering site visit to a customer’s premises that a CP can request) that is not required for the Special Offer. Second, the Special Offer may require the allocation and configuration of network services that is not required for an MPF Single Migration. Openreach has told us that “Allocate and configure network services” applies only to the WLR Conversion element of the Special Offer, i.e. is not relevant for SMPF New Provide. It is an automated activity that makes available the specific network and calling features that the end user has requested. We discuss this further in paragraphs 3.45 and 3.53 below.

3.36 We have used the list of activities shown in Table 2 to help inform our cost analysis. First we will discuss the cost data that is available from BT’s regulatory accounting systems. This allows us to identify the key cost components involved in providing both MPF Single Migration and simultaneous provision of WLR Conversion and SMPF New Provide. We then discuss each of those cost components in turn before finally setting out our provisional conclusions.

Cost data from BT’s regulatory accounting systems

3.37 We understand that 2012/13 cost data (LRIC and FAC) for BT services will not be available until summer 2013.⁴⁴ BT has 2011/12 unit cost data for MPF Single Migration but not for WLR Conversion (when provided on its own or in combination with SMPF New Provide). 2011/12 unit cost data by cost component for the MPF Single Migration service is given below in Table 3 with equivalent data for SMPF New Provide in Table 4:

⁴⁴ Openreach s191 response of 8 February 2013, answer to question 15.

Table 3: MPF Single Migration 2011/12⁴⁵

MPF Single Migration Cost Components	FAC	LRIC
MDF Hardware Jumpering	£30.83	£[X]
Service Centres – Provision	£3.04	£[X]
Sales product management	£0.26	£[X]
LLU systems development	£0.16	£[X]
Subtotal	£34.29	£33.19

Table 4: SMPF New Provide 2011/12⁴⁶

SMPF New Provide Cost Components	FAC	LRIC
MDF Hardware Jumpering	£25.45	£[X]
Service Centres – Provision	£3.07	£[X]
Sales product management	£0.16	£[X]
LLU systems development	£0.16	£[X]
Subtotal	£28.84	£27.83

3.38 As shown in Tables 3 and 4, “MDF Hardware Jumpering” and “Service Centres – Provision” activities account for over 98% of the costs for both MPF Single Migration and SMPF New Provide and LRIC and FAC are very similar for these services. Jumpering activity (the key engineering task, which we explain in more detail from paragraph 3.41 below), is very similar for the two services. Openreach does not have data available at a more granular level,⁴⁷ so in what follows we use other information provided by Openreach to explore how differences in costs may arise between the two services. We consider each of the components in turn:

- MDF Hardware Jumpering costs (paragraphs 3.41 – 3.51);
- Service Centres – Provision costs (paragraphs 3.52 – 3.55);
- Local Loop Unbundling Systems Development and Sales Product Management costs (paragraphs 3.56 – 3.60).

3.39 Based on the information available, we have assumed that MDF Hardware Jumpering covers the allocation of the engineer and the execution of the exchange activity. Service Centres - Provision costs cover the “analyse and build order”, and “Prove service and confirm complete” stages. Sales Product Management costs will cover the order validation and billing.

3.40 We are interested in costs in 2012/13 (as the Special Offer will run during this period). Efficiency assumptions in the 2012 Charge Control Statement were 4.5% in

⁴⁵ FAC data from p101 of BT’s 2012 RFS, total LRIC costs from p55. Breakdown of LRIC data from Openreach s191 response of 8 February 2013, answer to question 12.

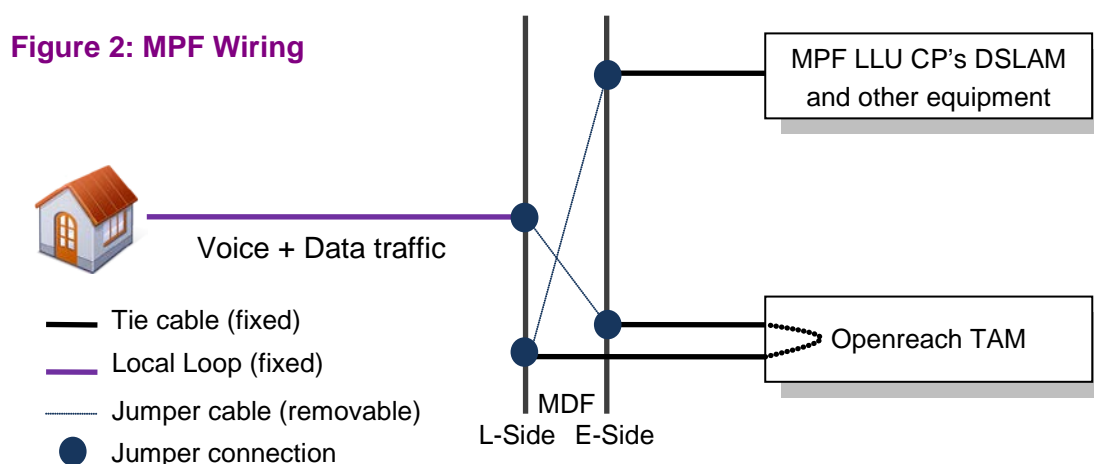
⁴⁶ FAC data from p101 of BT’s 2012 RFS, total LRIC costs from p55. Breakdown of LRIC data from Openreach s191 response of 8 February 2013, answer to question 12.

⁴⁷ Openreach s191 response of 8 February 2013, answer to question 16.

real terms.⁴⁸ With inflation at September 2012 running at 2.6% we have assumed in our analysis that 2012/13 costs are lower than those in 2011/12 by just under 2%.⁴⁹

MDF Hardware Jumpering costs

3.41 This component captures the pay, stores and other non pay, depreciation and capital costs associated with jumpering activities on the MDF. An MDF jumper is a copper connection that provides a flexible connection between two terminal ends, commonly used to connect the Line-Side to the Exchange-Side of the MDF.⁵⁰ On the Exchange side the jumper can connect to various pieces of equipment: for example, a PSTN Switch, a Test Access Matrix (TAM) or a DSLAM or MSAN. Typical jumper and tie cable layouts are given below in Figure 2 for MPF, Figure 3 for WLR and Figure 4 for WLR with an SMPF connection.



⁴⁸ Paragraph A3.5 of Annex 3, 2012 Charge Control Statement.

⁴⁹ RPI for September 2012 from ONS Website, <http://www.ons.gov.uk/ons/rel/cpi/consumer-price-indices/january-2013/stb---consumer-price-indices---january-2013.html#tab-Other-measures-of-Retail-Prices-Index--RPI--Inflation->

⁵⁰ BT DAM 2012, page 170.

Figure 3: WLR Wiring

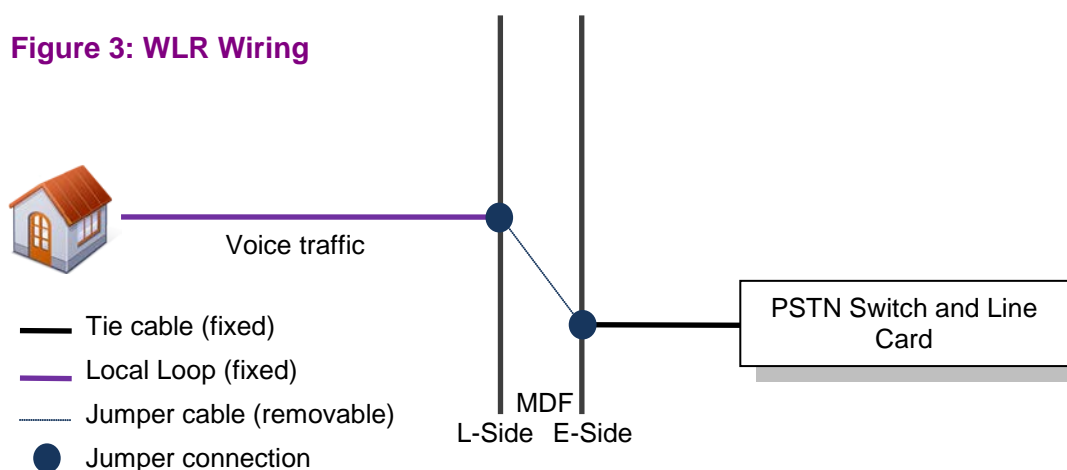
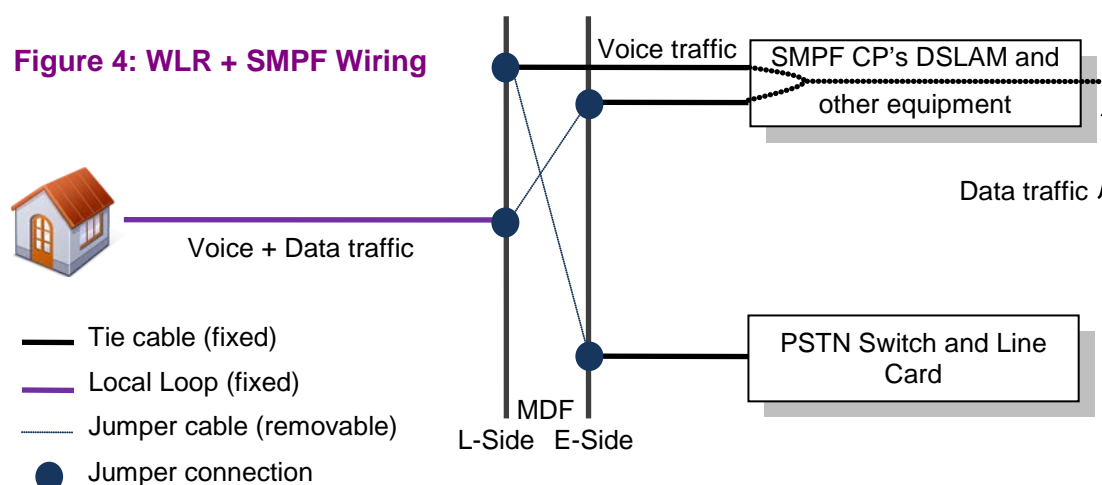


Figure 4: WLR + SMPF Wiring



- 3.42 An MPF Single Migration can occur either when a WLR line is migrated to MPF (MPF Single Migration without SMPF) or when a WLR line with SMPF is migrated to MPF (MPF Single Migration with SMPF). For a “without SMPF” migration the existing WLR jumper needs to be removed and two new MPF jumpers provided, resulting in a total of three jumper movements. For a “with SMPF” migration the existing WLR and SMPF jumpers need to be removed and two new MPF jumpers provided, resulting in a total of four jumper movements. Openreach has confirmed⁵¹ that for both with and without SMPF migrations the systems generate one jumpering task for an engineer. Given the high penetration of broadband in the UK (72% in Q1 2012)⁵² it seems likely that a high proportion of MPF Single Migrations will be with SMPF. Openreach has told us that data over the last nine months indicates that [x] % of MPF Single Migrations are migrations with SMPF and [y] % are migrations from WLR only.⁵³ This suggests the average number of jumper movements for an MPF Single Migration being [z] [3.5–4].
- 3.43 Openreach has indicated that for a WLR Conversion with simultaneous provision of SMPF (the Special Offer), its systems create a single jumpering task.⁵⁴ This task is to remove the two existing MPF jumpers and provide two new WLR with SMPF jumpers. So the MDF Hardware Jumpering activity for the Special Offer involves a

⁵¹ Openreach email of 15 February 2013, answer to question 3.

⁵² Ofcom Communications Market Report 2012, 18 July 2012.

⁵³ Openreach email of 15 February 2013, answer to question 5a.

⁵⁴ Openreach email of 15 February 2013, answer to question 3.

total of four jumper movements, which is on average [3] [0-0.5] jumper movements more than for an MPF Single Migration.

3.44 Openreach has told us⁵⁵ that for an MPF Single Migration the MDF Hardware Jumpering recovers costs associated with the following activities:

a) The jumpering task is allocated to an engineer.

As noted above in paragraphs 3.42 and 3.43 both a MPF Single Migration and the Special Offer result in the allocation of a single jumpering task. The task for the Special Offer is carried out by the engineer in exactly the same way as the jumpering task for an MPF Single Migration. There is therefore no difference in the allocation task between the two services.

b) The engineer picks up the job. The engineer may then need to travel to the exchange though that is only required if the job is at an unmanned exchange. On the occasions when an engineer needs to travel Openreach has said that the average travel time is [3] minutes.

As explained in a) above both services require a single jumpering task, carried out by a single engineer. So there will be no differences in average travelling times between the two services.

c) Once on site, the engineer downloads the job details. On average this takes [3] minutes. For both services the engineer only downloads one job.

d) The engineer carries out the jumpering. The discussion in paragraphs 3.42 and 3.43 above notes that the average number of jumper movements is slightly different for the two services. How that difference translates into differences in costs is discussed below in paragraphs 3.47 – 3.51.

e) On completion of the task, the engineer closes the job and systems then automatically update the routing records. On average this takes [3] minutes. As this is an automated task with a similar number of jumpering movements any differences in cost are likely to be minimal.

3.45 We noted in 3.35 above that one of the potential differences between the two services was “Allocate and configure network services activity”. We note that this activity does not form part of the work stack above. We will consider this activity further when discussing Service Centres - Provision costs below.

3.46 Any differences in MDF Hardware Jumpering costs between the two services are therefore likely to be solely due to the number of jumpering movements. We have estimated this difference by comparing MDF Hardware Jumpering costs for various services.

3.47 MDF Hardware Jumpering activity for a WLR connection contains only one jumpering movement and thus provides a good reference point to look at differences in jumpering activity. BT's 2012 RFS show that the MDF Hardware Jumpering unit cost for a WLR connection was £21.34⁵⁶ on an FAC CCA basis in 2011/12. For an MPF Single Migration, with an average of [3] [3.5-4] jumpering movements, the equivalent unit cost was £30.83. This implies the cost of adding or removing a jumper

⁵⁵ Openreach email of 15 February 2013, answer to question 3.

⁵⁶ BT RFS 2012, page 101.

in 2011/12 was £[redacted] [£3.16 - £3.80] on an FAC CCA basis⁵⁷. Similar calculations can be done on a LRIC basis using data provided by Openreach. These calculations are summarised in Table 5 below. Calculations on other pairs of services produce similar estimates.

3.48 [redacted]⁵⁸.

Table 5: MDF Hardware Jumpering costs

MDF Hardware Jumpering Unit Costs	CCA FAC 10/11	CCA FAC 11/12	LRIC 10/11	LRIC 11/12
WLR New Provide	£24.22	£21.34	£[redacted]	£[redacted]
No. of Jumper movements	1	1	1	1
MPF Single Migration	£34.97	£30.83	£[redacted]	£[redacted]
No. of Jumper movements	[redacted] [3.5-4]	[redacted] [3.5-4]	[redacted] [3.5-4]	[redacted] [3.5-4]
Implied cost/jumper movement	[redacted] [£3.58-£4.30]	[redacted] [£3.16-£3.80]	[redacted]	[redacted]

3.49 The contribution to the Simultaneous Migration Cost Premium from the difference in MDF Hardware Jumpering activity can therefore be estimated at £[redacted] on a 2012/13 LRIC basis [£0-£1.86] on a 2012/13 CCA FAC basis. This is the number of extra jumper movements, [redacted] [0-0.5], multiplied by the cost per jumper movement, £[redacted] on a 2011/12 LRIC basis [£3.16-£3.80] on a 2011/12 CCA FAC basis, reduced by just under 2% to convert to a 2012/13 LRIC (CCA FAC) cost difference.

3.50 We have used the task times provided by Openreach⁵⁹ to check the above estimates are reasonable. Downloading the task and records management activity at the end of a job takes [redacted] minutes each: we estimate [redacted] minutes in total. The time taken for an engineer to undertake the jumpering for an MPF Single Migration with SMPF (four jumpers) is around [redacted]⁶⁰ minutes, whilst for an MPF Single Migration without SMPF (three jumpers) is [redacted]⁶¹ minutes. We also know that an engineer may need to travel to the job and he/she does the average travel time is [redacted]⁶² minutes. As it is the larger exchanges that have been unbundled and as larger exchanges are likely to be manned the proportion of jobs requiring travel time is likely to be low. We will assume in what follows that no travel is required. In this case the total job time for a Single Migration without SMPF (three jumpers) is [redacted] minutes ([redacted] minutes for the jumpering plus [redacted] minutes for downloading the job and records management). So the [redacted] extra minutes to provide an extra jumper associated with an MPF Single migration with SMPF is around [redacted]% of the average job time.

⁵⁷ For example for the case where an MPF Single Migration requires 3.5 jumpering movements the calculation on a CCA FAC basis is £30.83 less £21.34 (£9.49) divided by 2.5. The 2.5 is the difference in required jumpering movements between an MPF Single Migration and a WLR New Provide.

⁵⁸ Openreach's s191 response of 8 February 2013, slide 4 of presentation included as answer to question 3.

⁵⁹ Openreach email of 15 February 2013, answer to question 3.

⁶⁰ Openreach email of 15 February 2013, answer to question 3.

⁶¹ Openreach email of 15 February 2013, answer to question 3.

⁶² Openreach email of 15 February 2013, answer to question 3.

- 3.51 Assuming most MDF Hardware Jumping costs are driven by engineering time then we would expect the incremental cost of [x] extra jumpers required to provide the Special Offer compared to an MPF Single Migration (from paragraph 3.43 above) to be about [x]% ([x] times [x]%) of the MPF Single Migration unit costs. Table 5 above shows that this LRIC unit cost in 2011/12 was £[x]. So this approach would estimate the contribution from MDF Hardware Jumping to the Simultaneous Migration Cost Premium at around £[x]-[x]. This range is slightly lower than the estimate provided in paragraph 3.49 above but provides some comfort that that estimate is not unreasonable.

Service Centres – Provision costs

- 3.52 Service Centres - Provision costs cover activities within the service division of Openreach. The teams that incur these costs are primarily call centre staff supporting the provisioning and repair of Openreach services.⁶³
- 3.53 We asked Openreach to explain what differences there were between Service Centres - Provision activities associated with an MPF Single Migration compared to providing the Special Offer. Openreach did not identify any differences in Service Centres - Provision activities between the two services.⁶⁴ However in 3.35 we noted that the provision of the Special Offer may result in an incremental “Allocate and configure network services activity” associated with WLR Conversion. We have thus considered what costs might be associated with this activity. Openreach states that this is an automated activity and as such [x]⁶⁵. Analysis of the process diagrams⁶⁶ Openreach provided leads us to believe the costs of this activity are likely to be recovered under Service Centres - Provision costs as opposed to any of the other cost components.
- 3.54 We used the WLR new provide MDF Hardware Jumping costs in paragraph 3.47 to estimate the costs of adding and removing jumpers. Service Centre Management (“SMC”) and “Routeing & Records” costs are much higher for WLR connections than for the migration products we are considering so we asked Openreach to explain why this was the case. Openreach stated that for new provisions roughly [x]% of orders have a line plant shortage – i.e. there are no spare pairs. Rectifying this requires additional planning and engineering effort but these activities do not occur when migrating to or from WLR and MPF as the line plant already exists.⁶⁷
- 3.55 Our conclusion from paragraph 3.53 is that there is likely to be some contribution to the Simultaneous Migration Cost Premium from Service Centres - Provision costs but that it is likely to be small.

Local Loop Unbundling Systems Development & Sales Product Management costs

- 3.56 Local Loop Unbundling Systems Development captures the cost of research and development projects, undertaken on behalf of Openreach, that are specific to products including LLU. Development projects can range from high-level strategy, down to operational and logistical development.⁶⁸

⁶³ BT DAM 2012, pages 224-226.

⁶⁴ Openreach’s s191 response of 8 February 2013, answer to question 9b.

⁶⁵ Openreach email of 19 February 2013 in response to a further question of clarification.

⁶⁶ Openreach’s s191 response of 8 February 2013, answer to question 7.

⁶⁷ Openreach email of 15 February 2013, answer to question 5b.

⁶⁸ Openreach s191 response of 8 February 2013, answer to question 10.

- 3.57 The RFS show that Local Loop Unbundling Systems Development costs are recovered across services within the Wholesale Local Access (WLA) market⁶⁹, i.e. MPF and SMPF rental, migration and connection services.
- 3.58 The Special Offer is the simultaneous provision of SMPF New Provide, which is a WLA service and will attract some LLU systems development costs, and WLR Conversion, which is not a WLA market service, and so should not attract any LLU systems development costs. Table 4 shows that an SMPF New Provide has a Local Loop Unbundling Systems Development unit cost on a CCA FAC basis of 16p (LRIC [x]p). This is the same as that for an MPF Single Migration – see Table 3. We therefore consider that the contribution to the Simultaneous Migration Cost Premium from LLU systems development is likely to be minimal.
- 3.59 Sales product management costs cover non engineering costs incurred within the Sales and Product Management division of Openreach.⁷⁰ There may be a small contribution from these to the Simultaneous Migration Cost Premium as a result of initially processing two orders rather than one. However the Sales product management LRIC unit cost for SMPF New Provide is 16p on an FAC basis ([x]p LRIC) compared to 26p ([x]p LRIC) for an MPF Single Migration. The RFS does not publish any sales and product management costs for a WLR Conversion but there are costs for WLR Connections services, which are likely to cover similar activities and for which the unit costs are around 10p.⁷¹ So assuming the sales and product management costs of the WLR Conversion element of the Special Offer are at most the same as those for an MPF Single Migration, the contribution to the Simultaneous Migration Cost Premium from Sales Product Management costs is likely to be at most [x]p [0–20p] on a LRIC basis or 16p on an FAC basis but probably less. (SMPF new provide unit cost of 16p on an FAC basis, [x]p LRIC basis, plus WLR Conversion unit costs estimated at maximum of 26p on an FAC basis, [x]p LRIC, less MPF Single Migration unit cost of 26p on an FAC basis, [x]p on a LRIC basis).
- 3.60 During the Special Offer, rebates are being processed manually.⁷² The supporting Openreach business plan estimates these costs at £[x] over the six months of the trial.⁷³ This translates into an annual unit cost of [x]p [0–50p] based on the annual forecast for simultaneous provisions within the business plan.

Provisional conclusion on the comparison between the Simultaneous Migration Price Premium and the Simultaneous Migration Cost Premium

- 3.61 Totalling up the costs discussed above indicates that the Simultaneous Migration Cost Premium is therefore likely be at most £[x] [£0 -£2.56] and probably less. This is made up as shown in Table 6 below:

⁶⁹ BT RFS 2012, pages 101-107.

⁷⁰ BT DAM 2012, page 67.

⁷¹ BT RFS 2012, page 101.

⁷² See paragraph 2.19 above.

⁷³ Openreach pricing paper, 13 August 2012. Contained in Openreach's s191 response of 8 February 2013, answer to question 1(b).

Table 6: Simultaneous Migration Cost Premium

	Contribution
MDF Hardware Jumpering	£[X] [£0 - £1.86]
Service Centres - Provision	Negligible
LLU Systems Development	-
Current manual billing	£[X] [£0-£0.50]
Sales Product Management	£[X] [£0-£0.20]
Total	£[X] [£0-£2.56]

3.62 While there is some uncertainty about some of the above costs our provisional conclusion is that the Simultaneous Migration Cost Premium is well below the Simultaneous Migration Price Premium of £17.36. Indeed the Simultaneous Migration Cost Premium would need to be several hundred percent higher than the costs that we have estimated for that not to be true. As noted in paragraph 3.38, “MDF Hardware Jumpering Costs” is the most significant cost component. Hence it appears that the only way that the Simultaneous Migration Cost Premium could be considerably higher than our estimate is if there were significant differences in MDF Hardware Jumpering costs. Based on the information available to us, we are not aware of any differences in activities that would lead to major differences in these costs.

3.63 Our provisional view is therefore that BT is not in breach of its obligation under Condition FAA3 not to unduly discriminate by failing to provide a reduction to the MPF Single Migration charge equivalent to that given under Special Offer from the combined price of WLR Conversion and SMPF New Provide.

Step 2: Is the Cost Gap material?

TalkTalk’s arguments

3.64 In the Dispute submission, TalkTalk comments that the lack of corresponding reduction to the price of MPF Single Migration “places TalkTalk at a competitive disadvantage compared to BT Retail. The latter will save£[X] over the period concerned which it can use to lower its charges to end-users”⁷⁴.

3.65 TalkTalk also argues that “given the competitive nature of the retail markets(s) for fixed telephony and broadband (because no provider holds SMP), it is reasonable to expect that the special offer price will at least to some extent translate into lower charges for BT Retail’s customers. As a result, the introduction of the special offer price ... will actually increase the rate at which TalkTalk ... loses customers to BT Retail ...”⁷⁵

⁷⁴ TalkTalk dispute submission, 3 December 2012, page 5 point (iv); see also page 4 point (ii).

⁷⁵ TalkTalk dispute submission, 3 December 2012, page 4 point (ii).

Ofcom's provisional view on the impact on competition

- 3.66 TalkTalk refers to the magnitude of the difference between the Special Offer price and the price of purchasing WLR Conversion and SMPF New Provide separately (£17.50). However, as explained in paragraphs 3.26-3.27, we do not consider that this is the appropriate cost metric for the purposes of assessing whether BT's pricing is discriminatory.
- 3.67 In carrying out a Step 2 assessment, we would consider the size of the difference between the Simultaneous Migration Price Premium and the Simultaneous Migration Cost Premium. For brevity, we refer to this difference as the "Cost Gap". The Cost Gap would show the extent to which the Simultaneous Migration Price Premium is not justified by higher incremental costs.
- 3.68 As explained above, our provisional view is that the Simultaneous Migration Price Premium (£17.36) is greater than the Simultaneous Migration Cost Premium, so there is no Cost Gap. Accordingly we do not consider that it is necessary to carry out Step 2. We have nevertheless considered what factors we would take into account if we needed to carry out Step 2. Below we provide a brief overview of these factors and summarise further evidence provided by stakeholders on this point.
- 3.69 The analysis carried out under Step 2 would consider whether the Cost Gap were material by reference to the potential harm that might result from that gap. As set out in paragraph 3.9 above, discriminatory migration charges can potentially lead to productive inefficiencies and a distortion of competition (both at the retail level and upstream).
- 3.70 We would normally expect firms and consumers to respond to the price signals that they face.⁷⁶ Moreover we recognise that conclusively demonstrating that harm is occurring, or is likely to occur, is difficult.⁷⁷ We would therefore likely start from the view that we should be concerned about any Cost Gap which was not obviously trivial.
- 3.71 We have identified evidence that would help inform an assessment of whether we should be concerned about the impact of a non-trivial Cost Gap.⁷⁸
- 3.72 First, it might be informative to place migration charges in the context of the other charges for using SMPF + WLR or MPF, such as Openreach's monthly rental charges for these services.
- For example, the current charge for MPF rental is £87.41 per annum. The charge for SMPF rental is £11.92 per annum plus a further £98.81 per annum for WLR.⁷⁹

⁷⁶ This is consistent with the position in the 2012 Charge Control Statement, where we stated that "*These migration services [MPF Single Migration and SMPF Single Migration/Provide] have a direct impact on the cost of acquiring a customer for a CP, and their relative charge size affects the level of competition between CPs using MPF and those using WLR+SMPF.*" 2012 Charge Control Statement, paragraph 4.29.

⁷⁷ For example, when looking at changes in retail prices it may be difficult to disentangle the impact of the Cost Gap from changes in other factors.

⁷⁸ The Special Offer only applies for a six month period. At first blush this might appear to mitigate the potential harm that flows from any Cost Gap. However given the potential for the Special Offer price to be extended we would likely place limited weight on its apparently limited duration.

⁷⁹ Openreach charges for "MPF Rental", "SMPF Rental" and (in the case of WLR) "Basic Line Rental terminating on: Old type socket, master socket or Linebox". All prices exclude VAT and apply until 31

- Consumers typically subscribe to a particular CP's voice and broadband service for several years. As a result, the impact of the Cost Gap on monthly prices may be spread over a period of approximately [redacted] years.⁸⁰ However, insofar as migration charges feed into any up-front fees paid by consumers (e.g. a connection charge for new subscribers) then the effect may be more apparent and may thus be more likely to prompt a reaction by consumers.

3.73 Second, it might be informative to consider evidence on the behaviour of firms and consumers in response to the Special Offer.⁸¹ In terms of the latter factor, we asked stakeholders whether they have altered their commercial behaviour as a result of the launch of the Special Offer. We asked them to provide details of any changes in retail prices, marketing activity and/or the customers or areas that the company targets.

- [redacted].⁸²
- [redacted].⁸³
- [redacted].⁸⁴
- [redacted].⁸⁵
- [redacted].⁸⁶

3.74 In summary, we received mixed responses on the impact of the Special Offer to date, [redacted]. In the event that the Step 2 analysis were necessary we would need to consider the extent to which this behaviour was driven by the Cost Gap, as opposed to the portion of the Simultaneous Migration Price Premium that reflects differences in incremental costs.

Step 3. If the Cost Gap is material are there any other factors affecting the determination of the Dispute?

3.75 The purpose of Step 3 would be to identify any issues that would affect our determination in the event that we identified a breach of Condition FAA3. However, as explained above, our provisional view is that BT is compliant with its obligation under Condition FAA3. Accordingly we do not consider that it is necessary to carry out Step 3. We have nevertheless considered whether there are any factors that it would be relevant for us to consider if a Cost Gap had been identified.

March 2013. Relevant pricing documents linked from:

<http://www.openreach.co.uk/orpg/home/products/pricing/loadPricing.do>

⁸⁰ We asked firms about average customer lifetimes (i.e. the duration that they take the product) for voice and broadband subscribers, including the lifetime they use for business planning purposes. Respondents did not all give the same answer. Responses to questions 2 and 3 of our formal information request dated 6 February 2013 from TalkTalk (12 February 2013) and Sky (11 February 2013). Responses to questions 3 and 4 of our formal information request dated 6 February 2013 from BT (15 February 2013) and EE (15 February 2013).

⁸¹ This could include data on migration volumes before and after the introduction of the Special Offer. However, if we were to carry out this analysis (and we have not done so to date), we would need to be mindful of the fact that migration volumes will be influenced by other factors e.g. seasonality.

⁸² [redacted].

⁸³ [redacted].

⁸⁴ [redacted].

⁸⁵ [redacted].

⁸⁶ [redacted].

3.76 In relation to the wider regulatory context we note the comments made in the 2012 Charge Control Statement at paragraphs 2.32 and 2.33. The Special Offer seems to be consistent with Ofcom's identification of the scope for a single migration service. This supportive position is reflected in BT's internal documents at paragraph 2.28. We note however that our support for a single migration service did not extend to indicating what level of prices would be suitable.

Provisional conclusions

3.77 As explained above at paragraph 2.5, Ofcom's powers in resolving a dispute are limited by s190 of the 2003 Act. TalkTalk requested that Ofcom determine the dispute by ordering that:

“Openreach withdraw the LLU MPF to WLR + LLU SMPF simultaneous migration special offer price with immediate effect; and

Require Openreach to:

- *Claw back the discount granted to communications providers who have benefitted from the special offer price; or*
- *Increase the WLR connection price by £17.50 for a period equal to the period during which the special offer price would have been available; or*
- *Offer an equivalent reduction to the MPF transfer price over a period equivalent to the special offer price ”*

3.78 Given the nature of the Dispute and the powers available to us under section 190(2), we do not consider it is open to Ofcom to give a direction having the effect of increasing the price of products supplied by BT to third parties, or to claw back any amounts from third parties. We have therefore considered the issues raised against the possible remedies of: making a direction under section 190(2)(a) as to the compliance of the Special Offer with Condition FAA3; or giving a direction fixing the price charged by BT to TalkTalk in respect of MPF Single Migration.

3.79 In light of our provisional conclusion under Step 1 above, and having regard to our statutory duties, we consider that it would not be appropriate for us to make either:

- a declaration under section 190(2)(a) to require the termination of the Special Offer; or
- a direction under section 190(2)(b) to amend the price charged by BT to TalkTalk for MPF Single Migration.⁸⁷

3.80 As part of our analysis, we have considered our general duties in section 3 of the 2003 Act and also the six “Community requirements” set out in section 4 of the 2003 Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive, In particular, we have had regard to:

⁸⁷ EE argued that reducing the price of MPF Single Migration (as advocated by TalkTalk) would create a number of difficulties, including driving the price below various cost measures (source: letter from EE to Catherine Warhurst of 18 January 2013, page 3). However, given our provisional conclusion under Step 1, we have not had to consider whether there may be an issue as to cost orientation in the event of a reduction of the MPF Single Migration charge.

- the duty to further the interests of citizens (i.e. all members of the public in the United Kingdom) in relation to communication and to further the interests of consumers in the relevant markets, where appropriate by promoting competition (section 3(1));
- the duty to secure the availability throughout the United Kingdom of a wide range of electronic communications services (section 3(2)(b));
- the duty to 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 any other principles appearing to Ofcom to represent the best regulatory practice (section 3(3));
- the duty to promote competition (section 4(3)) and to take account of the desirability of carrying out functions in a way which does not favour one form of electronic communications network, electronic communications service or associated facility; or one means of providing or making available such a network, service or facility, over another (section 4(6)); and
- the duty to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets and the maximum benefit for the customers of communications network and services providers (sections 4(7) and 4(8)).

3.81 We consider that our provisional assessment is consistent with these duties, because:

- The dispute concerns compliance with Condition FAA3, set by Ofcom having regard to the above duties.
- Under the above framework we have considered whether BT has discriminated against TalkTalk by refusing to provide a discount for MPF Single Migration equal to the discount provided in the provision of the Special Offer. Under Step 1 above our provisional view is that the Simultaneous Migration Price Premium (£17.36) is greater than the Simultaneous Migration Cost Premium. Our provisional view is therefore that the failure to offer the discount to TalkTalk does not constitute a breach of the requirement under Condition FAA3 that BT should not unduly discriminate against particular persons in relation to matters connected with Network Access.
- Given that BT's behaviour appears to be in compliance with the relevant SMP Condition we do not consider, under the scope of the Dispute and the factual background set out in this document, that there is any basis to take remedial action under s190.

Summary of provisional assessment

3.82 Based on the analysis set out in this section, our provisional assessment is that we should determine the Dispute on the basis that BT has not acted in breach of Condition FAA3, and that it is not appropriate to exercise our dispute resolution powers.

Annex 1

Responding to the provisional conclusions

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 19 March 2013**.
- A1.2 We would be grateful if you could assist us by completing a response cover sheet (see Annex 2), to indicate whether or not there are confidentiality issues.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email catherine.warhurst@ofcom.org.uk attaching your response in Microsoft Word format, together with a response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below:
- Catherine Warhurst
4th Floor
Competition Group
Riverside House
2A Southwark Bridge Road
London
SE1 9HA
- Note that we do not need a hard copy in addition to an electronic version.
- A1.5 It would be helpful if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.6 If you want to discuss the issues raised in this document, or need advice on the appropriate form of response, please contact Catherine Warhurst on 020 7981 3382.

Confidentiality

- A1.7 In line with our Dispute Resolution Guidelines⁸⁸, as part of publishing a final determination, Ofcom may publish non-confidential versions of responses. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.8 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. For the avoidance of doubt, Ofcom does not regard submissions on legal or regulatory policy to be confidential and any such submissions will normally be disclosed publicly. Further, Ofcom will

⁸⁸ *Dispute Resolution Guidelines - Ofcom's guidelines for the handling of regulatory disputes*

June 2011. See: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

sometimes be required to publish/disclose information marked as confidential in order to meet legal obligations.

- A1.9 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>.

Next steps

- A1.10 Ofcom intends to publish a determination by 3 May 2013.
- A1.11 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Annex 2

Response cover sheet

- A2.12 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A2.13 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)