LLU and WLR Charge Control - Further Consultation

Non-confidential version

Consultation

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Contents

Section 1

Executive Summary

1.1 The purpose of this consultation is to set out certain modifications to some of the Local Loop Unbundling (LLU) and Wholesale Line Rental (WLR) charge control recommendations set out in the document 'Charge controls for Wholesale Line Rental and Local Loop Unbundling services' dated 31 March 2011[1] (the "March 2011 Consultation"). This consultation also considers whether there has been a material change in the relevant market since the SMP determination was made. In addition, we propose to make a direction under the leased line charge control.

Background

1.2 On 31 March 2011, Ofcom consulted on a set of proposals for new charge controls for Local Loop Unbundling (LLU) and Wholesale Line Rental (WLR) services to replace the existing controls which expired on 31 March 2011.

1.3 The new controls were required as a result of our conclusions in the reviews of the Wholesale Local Access (WLA)[2] and Wholesale Fixed Analogue Exchange Line (WFAEL)[3] markets. In both markets, we identified that BT (Openreach)[4] has Significant Market Power (SMP) and that charge controls were necessary to remedy to address Openreach's ability to set excessive levels of charge for, or operate a margin squeeze in relation to, LLU and WLR services in the respective markets.

1.4 We received eleven responses to our consultation. Some of these responses identified issues relating to the structure of some of the controls, in particular regarding the charge controls for ancillary services. Having reviewed these issues we consider that it is appropriate to re-consult on some aspects of the charge controls. This is the purpose of this document.

1.5 Except for the changes proposed in this document, our proposals remain as set out in the March 2011 Consultation. We are still considering responses to the March 2011 Consultation and our corresponding decisions will be set out in a subsequent statement. For the avoidance of doubt, we are not, in this document, making any decisions on the any aspects of the LLU or WLR charge controls, including appropriate costs and cost allocations.

Proposed changes to ancillary charge control proposals

1.6 In response to the March 2011 Consultation, stakeholders raised a variety of points relating to both the commercial and economic consequences of our proposals on the ancillary charge controls, questions as to the basis of some of

[1] http://stakeholders.ofcom.org.uk/consultations/wlr-cc-2011/.
[2] http://stakeholders.ofcom.org.uk/consultations/wla/statement.
[3] http://stakeholders.ofcom.org.uk/consultations/review-wholesale-fixed-exchange/statement.
[4] Openreach is the access division of BT established by Undertakings in 2005. Whilst the proposed SMP services conditions in this document formally apply to British Telecommunications plc, Openreach is the division of BT which provides the LLU and WLR services which we are proposing to regulate. Therefore, throughout this document, we refer to Openreach as the supplier of wholesale LLU and WLR services.

the cost calculations relating to some services/baskets of services and concerns around the practical implementation of those controls.

1.7 We have reviewed these controls in light of the comments received and, as a consequence, consider that it is appropriate to modify some of our proposals contained in the March 2011 Consultation. We have also updated our consultation ranges to reflect our current understanding of RPI and a restating of the cost stacks in the light of Openreach confirmation that £100M of Information Service (IS) projected expenditure was attributed incorrectly.

1.8 The details of the proposed changes are set out in Section 2. A summary of the proposed changes is presented below.

1.9 We propose to:

- modify the proposed control for the co-mingling baskets as a consequence of:
  - adjusting our treatment of the aggregate Power and Ventilation cost to take account of the increased site utilisation; and
  - re-allocating the revenues contained in the “LLU Other” product category of the model which should have been allocated to the co-mingling services.
- adjust the core rental ranges to take account of a misallocation of £100m of IS and to adjust the ranges to reflect our current understanding of RPI;
- re-consult on our proposal to align MPF Single Migration[5] and SMPF Single Migration/Provide[6] services;
- re-consult on our proposal to set MPF Cease and SMPF Cease charges to zero and recover the costs in the rental charges;
- apply a sub-cap on MPF Stopped Line Provide at the level of the overall MPF basket control;
- align starting charges for MPF and SMPF Bulk Migration services;
- re-consult on our basket inertia clauses;
- re-consult on our proposal to keep MPF Expedite and SMPF Expedite connections unaligned; and
- make a one-off adjustment to reduce the starting charges of both MPF Singleton jumper removal and SMPF Single jumper removal.

1.10 The revised ranges are set out below:

[5] We referred to this service as ‘MPF Transfer/Connection’ in the March Consultation.
[6] We referred to this service as ‘SMPF connection’ in the March Consultation.

Basket/service	March 2011 range for charge controls	March 2011 Base case	Revised range for charge controls	Revised Base case
MPF rental	RPI-2.0% - RPI-5.0%	RPI- 3.5%	RPI-3.5% -RPI-6.5%	RPI-5.0%
SMPF rental	RPI-11.6% - RPI-14.6%	RPI-13.1%	RPI-13.4% - RPI-16.4%	RPI-14.9%
MPF ancillary services basket	RPI-6.0% - RPI-9.0%	RPI-7.5%	RPI-8.5% - RPI-11.5%	RPI-10.0%
SMPF ancillary services basket	RPI-9.4% - RPI-12.4%	RPI-10.9%	RPI-11.1% - RPI-14.1%	RPI-12.6%
Co-mingling ancillary services basket	RPI+6.0% - RPI+9.0%	RPI+7.5%	RPI-1.9% - RPI-4.9%	RPI-3.4%
MPF Single Migration/SMPF Single Migration/Provide	RPI-9.1% - RPI-12.1%	RPI-10.6%	RPI-9.8% - RPI-12.8%	RPI-11.3%
MPF New Provide	RPI-9.9% - RPI-12.9%	RPI-11.4%	RPI-12.3% - RPI-15.3%	RPI-13.8%
WLR Rental	RPI-3.0% - RPI-6.0%	RPI-4.5%	RPI-4.3% - RPI-7.3%	RPI-5.8%
WLR New Connection	RPI-4.6% - RPI-7.6%	RPI-6.1%	RPI-8.2% - RPI-11.2%	RPI-9.7%

1.11 As part of our March 2011 Consultation, we made available to stakeholders the RAV model and various non-confidential versions of the Cost Forecast model and the Cost Allocation model together with the extensive description and explanation of that charge control modelling provided in Section 7 of that Consultation and the supporting annexes. In our view, this provided the level of transparency necessary to allow those consulted to give both intelligent consideration and intelligent response.

1.12 In light of our revised proposals, we have considered what further information to make available having regard to the need to ensure appropriate transparency when set against the confidentiality of the underlying data. We have included additional information in this document, as with the March 2011 Consultation, we consider that it will allow stakeholders to respond fully to the questions raised.

1.13 We have also considered whether our revised proposals require us to make available revised versions of the RAV model, the Cost Forecast model and the Cost Allocation model made available alongside our March 2011 Consultation. We are satisfied that the structure of those models remains unchanged, but note that there is a need to update some of the model data. We will be providing a data update as soon as possible.

1.14 In accordance with section 86(1) of the Communications Act 2003 (the “Act”), we have reached provisional conclusions (as set out below) that there has no material change in either of the WFAEL or WLA markets since the last market reviews.

Impact assessment

1.15 The analysis presented in this document and that set out in our March 2011 Consultation represents an impact assessment, as defined in section 7 of the Act. In Section 2 of this consultation and Sections 3,4,5,7 and 8 of the March 2011 Consultation we discuss all of the relevant considerations and options that we have considered, including their impact.

1.16 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which requires Ofcom to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of its policy decisions. For further information about Ofcom's approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on the Ofcom website.7

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

Equality Impact Assessment

1.18 Ofcom is separately required by statute to assess the potential impact of all our functions, policies, projects and practices on race, disability and gender equality. Equality impact assessments (EIAs) also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity. Unless we otherwise state in this document, it is not apparent to us that the outcome of our review is likely to have any particular impact on race, disability and gender equality. Specifically, we do not envisage the impact of any outcome to be to the detriment of any group of society.

1.19 Nor are we envisaging any need to carry out separate EIAs in relation to race or gender equality or equality schemes under the Northern Ireland and Disability Equality Schemes. This is because we anticipate that our regulatory intervention will affect all industry stakeholders equally and will not have a differential impact in relation to people of different gender or ethnicity, on consumers in Northern Ireland or on disabled consumers compared to consumers in general. Similarly, we are not envisaging making a distinction between consumers in different parts of the UK or between consumers on low incomes. Again, we believe that our intervention will not have a particular effect on one group of consumers over another.

Consultation period

1.20 We invite comments, from interested parties, on the proposals in this document. The consultation period runs for one month, to 23 December 2011. Following consideration of responses to the consultation and the March 2011 Consultation we would expect to publish our conclusions by the end of February 2012.

[7] http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

Section 2

Further consultation on setting prices for LLU and WLR services

Introduction

2.1 In this Section we set out our revised proposals for LLU and WLR services on which we are consulting.

- We explain why we have reduced the 'X' on all charge control ranges to account for a correction to IS costs and more recent RPI statistic. We explain why we have made a further reduction to the 'X' on the Comingling basket to take account of better information on volume drivers and 'other LLU' products.

- We also set out, for further consultation, a number of issues relating to LLU ancillary services where stakeholders have raised concerns on the commercial or economic consequences of our control structure or the rationale for our proposals. In some cases we have modified our original proposal or presented an alternative option, and in other cases we have provided additional information in support of our original proposal.

Summary of our proposals

2.2 We are consulting on the following:

LLU and WLR prices

- We have adjusted the core rental ranges to take account of the removal of unsupported IS spend of £100m of IS spend in our 2010/11 base year costs which was identified post our March 2011 Consultation.

- We have further adjusted the ranges to reflect more recent RPI data.

- We are also consulting on changes to the proposed control for the co-mingling baskets as a consequence of:

  - adjusting our treatment of the aggregate Power and Ventilation cost to take account of the increased site utilisation.

  - re-allocating the revenues contained in the "LLU Other" product category of the model which should have been allocated to the co-mingling services.

LLU Key migration service design and structure

- We are re-consulting on our March 2011 proposal to align MPF Single Migration[8] and SMPF Single Migration/Provide[9] services. We are also considering an alternative option to allow these charges to move to their respective CCA FACs

[8] We referred to this service as 'MPF Transfer/Connection' in the March 2011 consultation
[9] We referred to this service as 'SMPF connection' in the March 2011 consultation

levels by 2013/14. We retain a preference for maintaining the March 2011 proposal.

- We maintain our proposal to set MPF Cease and SMPF Cease charges at zero and to recover the service costs from their respective line rental charges. However, we are consulting on whether to recover CCA FAC equally from the line rentals (as opposed to our March 2011 consultation proposal to recover on a proportional basis).

LLU Ancillary baskets design and structure

- We propose to apply a sub-cap on MPF Stopped Line Provide at the level of the overall MPF basket control.

- We propose to set starting charges of the LLU Bulk Migrations services[10] consistent with our treatment of MPF Single Migration and SMPF Single Migrations/Provides.

- We consult on a possible exception to the basket Inertia clause in the event in combination with a very high or very low RPI it does not given BT sufficient flexibility to leave a charge unchanged which is already at CCA FAC.

- We propose to keep MPF Expedite and SMPF Expedite connections unaligned and not to intervene to narrow the differential in charges for MPF and SMPF Expedite connections.

- We propose to make a one-off adjustment to reduce the starting charges of both MPF Singleton jumper removal and SMPF Single jumper removal to their own 2011/12 CCA FACs.

- We clarify our guidance on the remaining MPF and SMPF basket services.

<u>March 2011 Consultation proposals</u>

2.3 In the March 2011 Consultation we set out our proposal for the charge control ranges for the LLU baskets and services and for WLR services as set out in Figure 2.1 below.[11]

[10] SMPF Same Mass migration and MPF Bulk migration.
[11] These replicate Figure 1.1 and Figure 1.2 of the March 2011 Consultation.

Figure 2:1 March 2011 Consultation Charge Control Proposals

Basket/service	Range for charge controls	Base case	Ranges for charge ceilings for 1st period of the controls (from start date to 31 March 2012)	Base case
MPF rental	RPI-2.0% -RPI-5.0%	RPI -3.5%	£88.70 - £91.30	£90.00
SMPF rental	RPI-11.6% - RPI-14.6%	RPI-13.1%	£13.50 - £14.00	£13.70
MPF ancillary services basket	RPI-6.0% - RPI-9.0%	RPI-7.5%	N/A	N/A
SMPF ancillary services basket	RPI-9.4% - RPI-12.4%	RPI-10.9%	N/A	N/A
Co-mingling ancillary services basket	RPI+6.0% - RPI+9.0%	RPI+7.5%	N/A	N/A

Service	Range for charge controls	Base case	Ranges for charge ceilings for 1st period of the controls (from start date to 31 March 2012)	Base case
WLR Rental	RPI-3.0% - RPI-6.0%	RPI-4.5%	£102.10 - £105.20	£103.70
WLR New Connection	RPI-4.6% - RPI-7.6%	RPI-6.1%	£54.00 - £55.70	£54.90

2.4 These proposals were based on the modelling approach set out in section 7 of the March 2011 Consultation.

2.5 Annex 8 of the March 2011 Consultation explained our approach to the allocation of costs from BT Group to Openreach, referred to as 'Transfer Charges'.[12]

All Baskets and Core rental products – Impact of Information Systems (IS) Change

2.6 At paragraphs A8.48 to A8.53 of the March 2011 Consultation we set out details of IS spend allocated from BT Group to Openreach which amounted to £401m in 2009/10. Based on the information provided by BT, we forecast that this cost to fall to £370m in 2013/14 (Figure A8.9 of the Consultation).

2.7 At paragraph A8.53 we explained that we had requested further information from BT to support its IS cost estimates and that we would need to take this information into account before concluding whether our estimate of IS spend was appropriate. BT has now provided us with the necessary data. This data indicates that the BT forecast, from which we derived our estimate, overstated spend in 2010/11 by around £100m. If this information had been available when we set the charge control ranges in the March 2011 Consultation, the effect would have been to shift the ranges downwards.

[12] http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/wlr-cc-annexes.pdf

2.8 In light of this new information, we consider that it is appropriate to update the ranges set out in the March 2011 Consultation to take account of the new IS cost data. The result is to reduce the range by about 1%. The IS cost impact is included in the adjustment set out in Figure 2.5 below.

All Baskets and Core rental products – Revised RPI statistic

2.9 In the March 2011 Consultation, we explained that, in order to estimate the X required to deliver the annual change in price, we had assumed that the average RPI applicable to any RPI – X calculation in 2012/13 and 2013/14 would be 3%. Recently published RPI statistics and forecasts, suggest that an average RPI closer to 4% is more realistic. Although changes in inflation assumptions will also affect the underlying cost estimates (that provide the target for the glide path), increasing operating costs, this impact is reduced by higher in-year holding gains, which reduce depreciation costs. Updating our calculation of the Charge Control X's to account for the 5.4% September 2011 RPI statistic rather than the 4% we used in the March 2011 Consultation results in ranges around 0.5% lower on Core rental services than we indicated in March. The RPI adjustment is included in the adjustment set out in Figure 2.5 below.

Implementation of the charge controls

2.10 The new controls are now expected to apply from the start of the 2012/13 year and will therefore apply for only two years, rather than the slightly longer period envisaged in the March 2011 Consultation. Further, we may decide to define the 2012/13 charges by reference to an absolute amount (i.e. expressed as an amount in pounds) rather than based on an RPI-X calculation (the 2013/14 control is likely to remain in an RPI-X format). This approach has two potential advantages: it allows us the flexibility to set prices in 2012/13 that recognise the current volatility in RPI (e.g. a large reduction between this year and next) and is relatively easy to understand. This approach is similar to that adopted in the controls that were set in 2009 and is anticipated in the draft Conditions in Annex 5 to this Consultation.

2.11 As explained in the March 2011 Consultation, the price control will be set by reference to the prices in 2010/11 (which were subject to a price control) rather than the bridging arrangement prices that apply in 2011/12. Similarly, we expect to set prices in 2012/13 with reference to the price-controlled prices in 2010/11 and not the more recent bridging arrangement prices, recognising, particularly with respect to RPI, that we are two years into the three year charge control period.

2.12 On this basis, we expect that the effect of the new controls will be prices that are similar to those that would have been set in the second and third years of a three year glide path starting in 2010/11.

2.13 .

2.14 In the March 2011 Consultation we proposed the charge control range for the Co-mingling basket as set out in Figure 1.1 of that consultation. We proposed a base case control of RPI+7.5% based on the information we had at the time on Power and Ventilation costs.

2.15 The proposals were based on the identified costs within the basket, as set out in Figure 7.18 of the March 2011 Consultation and are reproduced in Figure 2.2 below.

Figure 2.2 Identified Co-mingling basket costs in the March 2011 Consultation

Comingling Basket	2009/10	2010/11	2011/12	2012/13	2013/14
	£'m	£'m	£'m	£'m	£'m
Current Pay	3	2	2	2	2
Other Operating Costs	1	1	0	0	0
Transfer Charges	18	14	13	13	12
Internal Cost of Sales	35	44	48	51	53
Other Operating Income	0	0	0	0	0
Internal Capitalisation	0	0	0	0	0
Depreciation inc holding gains	10	13	14	15	15
ROCE (@8.6%)	13	13	13	12	12
Total cost	**80**	**87**	**90**	**93**	**95**

Co-mingling basket - Power and ventilation

Consultation responses

2.16 In their response to the March 2011 Consultation, Cable and Wireless Worldwide ("C&WW") queried the relationship between basket costs and the volume of co-mingling services. They (page 2) said "The proposal to increase charges for Co-mingling services is counter to our expectations. We note in Annex 6 Figure 6.1 (of the March 2011 Consultation) that Ofcom shows Co-mingling rentals (inc 21CN) to have volumes of 10,000 (with 13,000 in 2009/10). It is not clear what makes up the 10,000 volume (numbers of CPs multiplied by BT exchange sites, numbers of racks sold, and how BTLoB is included beyond 21CN)."

2.17 In respect to the basket costs, C&WW, in view of the static volumes, also questioned why the Comingling element of Internal Cost of sales increased whilst at the same time, overall Internal Cost of sales decreased. They (page 4) noted that "'Internal costs of sale' is primarily driving the increase in baskets costs as it increases from £35m in 2009/10 to £53m in 2013/14. Overall WLA market internal costs of sale are falling £1,054m in 2009/10 to £866m in 2012/14 (down circa 18% over the period). Yet the amount of internal cost of sale allocated to the co-mingling basket instead of falling in line with the general trend for decreased cost of sale is instead increasing by 34%. Comingling follows the trend for all other costs but does not follow the trend for falling internal cost of sales."

Our response

2.18 In response to the points made by C&WW, we undertook further investigation of the basket costs and volumes. Following this review, it became apparent there was a disjoint between how costs and product volumes were being forecast.

2.19 In particular, Power and Ventilation costs were forecast forward as an aggregate amount with an additional (positive) dynamic regulatory adjustment to account for efficiency, inflation and increased utilisation at the Co-mingling sites. Volume forecasts on the other hand were (as C&WW noted), static because they were based on the number of Co-mingling sites (i.e. the 10,000 each year from 2010/11). Therefore while the cost forecast took account of the increased utilisation of Co-mingling sites (which increased aggregate costs), the volume driver, used to determine the 'X', did not.

2.20 It is clear, therefore, that the March 2011 Consultation control proposal is not appropriate. To set a more cost reflective control for individual services we need to make a further regulatory adjustment to the aggregate Power and Ventilation cost to take account of the increased site utilisation. The key products that purchase Co-mingling rentals are MPF, External SMPF, WES rentals (WES rentals are a leased line product see Leased Line Charge Control Statement[13]) and Ethernet Access Direct[14]. The combined volumes for these services are increasing. Therefore, in our cost forecast model we have made the following adjustment for each year from 2010/11:

*2009/10 Downward Regulatory Adjustment = 09/10 Aggregate power and cost * (aggregate increase in key product volumes between 09/10 and 10/11 / aggregate key product volumes in 09/10).*

2.21 The restated Internal Cost of Sales resulting from the application of this formula is set out in Figure 2.3.

Figure 2.3 Restated Internal Cost of Sales

	2009/10	2010/11	2011/12	2012/13	2013/14
	£'m	£'m	£'m	£'m	£'m
Internal Cost of Sales	35	44	44	44	45

2.22 The result of this adjustment is to move the base case Co-mingling 'X' down by 3.4%.

Question 2.1: Do you consider that our revised treatment of the Power and Ventilation costs taking account of changes in individual service volumes is appropriate? If not, please give your reasons.

Co-mingling baskets – LLU Other

2.23 Since the March 2011 Consultation, we received further information on the product and services contained in the "LLU Other" product, which is not charge controlled. A proportion of the "LLU Other" revenue related to co-mingling products which should have been included in the Co-mingling Ancillary Services baskets in order to be charge controlled. The Comingling revenue identified is set out in Figure 2.4.

Figure 2.4 Revenue from 'LLU Other' product set re-allocated to Co-mingling

2009/10	2010/11	2011/12	2012/13	2013/14
£'m	£'m	£'m	£'m	£'m
21	90	29	36	14

2.24 We therefore propose to include the revenue identified in Figure 2.4 from "LLU Other" within the Co-mingling basket. This reduces the 'X' on the basket by

[13] http://stakeholders.ofcom.org.uk/binaries/consultations/bcmr08/summary/bcmr08.pdf
[14] http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/eal_technicalre.pdf

around 6.7%. This is reflected in our revised Comingling base case X's and Charge Control ranges which are also affected by the other adjustments for LLU Other costs and changes in IS costs and RPI outlined in paragraphs 2.6 to 2.12.

Question 2.2: Do you have any views on our approach to the reallocation of LLU – other revenues?

Revised proposed charge controls

2.25 As a result of the changes to costs and revenues set out above we propose new charge control ranges as set out in Figure 2.5.

Figure 2.5 Revised Charge Control Proposals

(Note: for completeness this includes options discussed later in this section)

Basket/service	March 2011 range for charge controls	March 2011 Base case	Revised range for charge controls	Revised Base case
MPF rental	RPI-2.0% -RPI-5.0%	RPI- 3.5%	RPI-3.5% -RPI-6.5%	RPI-5.0%
SMPF rental	RPI-11.6% - RPI-14.6%	RPI-13.1%	RPI-13.4% - RPI-16.4%	RPI-14.9%
MPF ancillary services basket	RPI-6.0% - RPI-9.0%	RPI-7.5%	RPI-8.5% - RPI-11.5%	RPI-10.0%
SMPF ancillary services basket	RPI-9.4% - RPI-12.4%	RPI-10.9%	RPI-11.1% - RPI-14.1%	RPI-12.6%
Co-mingling ancillary services basket	RPI+6.0% - RPI+9.0%	RPI+7.5%	RPI-1.9% - RPI-4.9%	RPI-3.4%
MPF Single Migration/SMPF Migration/Provide	RPI-9.1% - RPI-12.1%	RPI-10.6%	RPI-9.8% - RPI-12.8%	RPI-11.3%
MPF New Provide	RPI-9.9% - RPI-12.9%	RPI-11.4%	RPI-12.3% - RPI-15.3%	RPI-13.8%
WLR Rental	RPI-3.0% - RPI-6.0%	RPI-4.5%	RPI-4.3% - RPI-7.3%	RPI-5.8%
WLR New Connection	RPI-4.6% - RPI-7.6%	RPI-6.1%	RPI-8.2% - RPI-11.2%	RPI-9.7%

LLU key migration ancillary service design and structure

MPF Single Migration, SMPF Single Migration/Provide

2.26 CPs can buy MPF Single Migration[15] and SMPF Single Migration/Provide[16] services where an end user with an existing BT line wants to switch to that CP or commence a broadband service.[17]

[15] We referred to this service as 'MPF Transfer/Connection' in the March 2011 Consultation.

2.27 These migration services have a direct impact on the cost of customer acquisition and their relative charge size affects the level of competition between CPs using MPF and those using SMPF or WLR+SMPF.

2.28 The higher the migration charge, the higher the cost of customer acquisition. This means such charges directly affect both the retail charge and the minimum contract terms CPs consider necessary (to recoup set-up costs).

2.29 The impact of any difference in the migration charge on competition between CPs using different access products is more complex. While an MPF CP only ever pays a Single Migration charge, a CP using WLR + SMPF migrating from an MPF provider will pay both the SMPF migration charge and a WLR connection charge (roughly twice the MPF cost). This situation may change in the future as we understand Openreach is considering a recent request for a combined migration product.

2.30 Given this complexity, it is does not follow that we must align these charges for competitive neutrality. However, given there is a risk of distorting the competition if the charges are not appropriate we need to consider the economic basis for any charge differential.

March 2011 Consultation proposals

2.31 As part of the March 2011 Consultation, in setting out our general approach to charge controlling key migration services (which include MPF Single Migration and SMPF Single Migration/Provide), we said that we would be concerned if high switching costs raised barriers to entry, distorted competition and raised prices for consumers.

2.32 We, therefore, considered whether such service charges should be aligned (i.e. set at the same level) where these services had similar underlying costs. As a result we proposed to align the charges for MPF Single Migration and SMPF Single Migration/Provide during the period of the charge control. Specifically, we proposed to keep service charges aligned during the charge control period, and bring charges for these services to a weighted average of the forecast CCA FAC 2013/14 cost stacks for the MPF Single Migrations and SMPF Single Migration/Provide (Figure 2.6 below).

[16] We referred to this service as ‘SMPF connection’ in the March 2011 Consultation.
[17] The product name in Openreach’s pricing list for MPF single migration is ‘MPF Connection charge - Singleton migrations (Transfer from WLR/SMPF or Change of CP migrations)’. The relevant products for SMPF single migration/provide in Openreach’s pricing list are Basic Provide on existing WLR, Simultaneous Provide of SMPF with WLR, Singleton Migration (Transfer or change of CP migrations) from WLR, MPF and SMPF.

Figure 2.6: CCA FAC 2013/14 information set out in March 2011 Consultation

		Ofcom estimate	
Service	**Current charge**	**2010/11 FAC costs**	**2013/14 FAC costs**
MPF transfer/connection	£38.64	£37.14	£37.03
SMPF Connection (New Provide and Single Migration)	£38.64	£30.58	£30.24
Weighted average			£32.35

2.33 Following on from our proposals, we asked stakeholders the following question: "(Question 4.11): Do you agree that charge controls control in the range RPI-7.7% - RPI-10.7% (base case RPI-9.2%) should be imposed on MPF transfer and SMPF connection to bring the charges into line with CCA FAC by the end of the charge control period?"

Consultation responses

2.34 Both Openreach and Everything Everywhere (EE) disagreed with the proposal to align MPF Single Migration and SMPF Single Migration/Provide during the charge control period.

2.35 Openreach noted that while the underlying activities are similar the proposals would result in MPF Single Migration and SMPF Single Migration (but not SMPF Provide) being priced below their individual 2013/14 CCA FACs.

2.36 Openreach also noted that the proposals would negatively affect its pricing hierarchy for other LLU ancillary services, thereby distorting its ability to make efficient use of its resources and preventing it from recovering efficiently incurred costs for certain other basket services.[18]

2.37 EE was concerned that our proposals could distort CPs incentives to invest in MPF Single Migrations, which is not justified by the underlying costs; and "*that this competitive distortion would be exacerbated by the gross asymmetry in much higher non-price controlled MPF to WLR and SMPF conversion charges as compared to the regulated Openreach WLR and SMPF conversion charges*". EE argued that our analysis set out in the March 2011 Consultation contradicted one of our key reasons for alignment - that the underlying costs of the services are similar.

2.38 Openreach and EE proposed that MPF Single Migration and SMPF Single Migration/Provide charges are brought in line with their own CCA FACs by the end of the charge control. However, EE went further and asked that we make a one-off adjustment to the SMPF Single Migration/Provide starting charge.

2.39 C&WW and TTG agreed with our proposals. TTG noted that there are competition benefits to aligning the charges of similar services which have similar activities.

[18] MPF and SMPF same CP Mass migration, MPF and SMPF Tie Pair Modification (3 day re-termination), MPF and SMPF Tie Pair Modification (Multiple re-termination), MPF Working Line Takeover (WLTO) and MPF Stopped Line Provide.

TTG felt that MPF Single Migration and SMPF Single Migration/Provide share broadly the same activities, although noted a lack of clear explanation of the cost differences[19] and further noted the link to their concerns about the jumpering configuration for MPF.[20]

2.40 TTG went on to propose that we align the starting charges of the two services at a weighted 2010/11 price, and then trend each service to the 2013/14 weighted average CCA FAC of both services.

2.41 Global Crossing noted that there is a large differential between the MPF Single Migration and SMPF Single Migration/Provide service charges and their CCA FACs and this should be addressed during the charge control period.

Our response

2.42 We have reviewed the arguments presented by stakeholders and we feel that it is appropriate to give stakeholders the opportunity to comment again on our proposals in light of additional information on the underlying costs of providing these services that has become available. We also present an alternative option to that set out in the March 2011 Consultation on which we are inviting comments.

2.43 Our starting point is that competition benefits are more likely to be realised where services reflect their underlying costs of provision (i.e. their LRICs). 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.

2.44 Therefore, in assessing the impact on potential competition in this charge control review, we are particularly concerned about distortions in the competitive position of MPF against WLR and SMPF, given that these are alternative wholesale inputs for providing voice and broadband retail services.

2.45 Since MPF Single Migration with SMPF Single Migration/Provide are not exactly the same services (e.g. MPF can involve a migration from WLR and SMPF at the same time, whereas SMPF involves an addition to either WLR or migration to SMPF, and not both at the same time), it is not currently clear that the alignment of the charges would offer strong competition benefits, unless the LRIC costs of providing the services are broadly similar.

2.46 Accordingly, an explanation of what the LRICs of the services are and their relative size between the MPF and SMPF variants is instructive in setting the charges for these services. While we do not have precise LRIC costs for these services, we have assessed what activities are required to provide the services and checked the CCA FAC costs against these.

Jumpering activity costs

2.47 We note that by far the largest component of the underlying cost of providing MPF Single Migration and SMPF Single Migration/Provide relates to jumpering activity. Although we consider that the underlying costs associated with this activity are broadly similar across the variants, the CCA FAC costs associated with jumpering

[19] TTG argued that "*MPF connection has a £7 higher order handling cost than SMPF connection*"
[20] "TTG argued that *"MPF and SMPF both involve double jumpering though in the case of MPF this is inefficient and unnecessary*".

activity[21] are currently slightly different as between SMPF and MPF. The differences in costs apparently reflect differences in the existing configuration of the line connections before migration (i.e. whether it is MPF, WLR and/or SMPF that is being migrated from).

2.48 Clearly, such differences in the average starting configuration before jumpering activity occurs will vary over time depending on the mix of services in the market (i.e. MPF, WLR only, WLR+SMPF) and will be influenced by the level of competition between SMPF and MPF (i.e. if competition between MPF and SMPF based operators was equal then you would expect that the starting conditions would be similar).

2.49 Initially for both MPF and SMPF most migration would have been very similar as existing MDF wiring would have reflected the wiring before LLU was introduced (i.e. a CP would be migrating from only WLR). As unbundling has grown this has changed the situation. The current differences are likely to reflect the nature of the customers SMPF and MPF are attracting. The different average starting configurations in the future will depend on the extent to which there is a level playing field in competition between SMPF and MPF – i.e. are they competing for the same set of customers. This is turn will be influenced by the charges set for migration. This would suggest that we need to be cautious in setting charges as this has the potential to influence such differences.

2.50 Accordingly, while there is evidence for a small difference in average incremental cost it is not clear that we would be confident that this represents an enduring LRIC differential.

Service Management Centre (SMC) costs

2.51 We note that the vast majority of the remainder of the CCA FAC difference between MPF Single Migration and SMPF Single Migration/Provide services is attributable to Service Management Centre activity costs. The MPF variant receives approximately over double the allocation of SMC CCA FAC cost[22] to the SMPF variants. However, we note that only a minority (below a third) of this CCA FAC is likely to be true marginal cost related directly to provision of the services. The marginal cost differential in this case is related to reported average SMC time against each service. Therefore, while there is evidence of a small incremental cost differential, the difference is subject to variation over time and is, in any event very low (approximately under £1) - i.e. the LRIC differential is very low).

Options and preferred proposal

2.52 In light of this information, we note Openreach's comments that alignment of charges would result in over-recovery of the SMPF variant CCA FACs, under-recovery of the MPF variant CCA FACs and could have a negative impact on its pricing hierarchy. While there may be a risk of over or under recovery for an individual service, provided our volume estimates are reasonable, there should not be a substantial net error.

[21] We also note that MPF Single Migration is likely to require a TAM test and Line test whereas SMPF Single Migration requires a Line test but not a Tam test. We consider that the marginal cost of a TAM test and Line Test is likely to be extremely low and close to negligible. These costs are included within Jumpering activity in the CCA FAC cost stacks.

[22] SMC activity costs in question refer to 'Service centres - provision for LLU' activity in the Ofcom Cost Allocation model. These CCA FACs are approximately around £1 per unit for SMPF variants and approximately between £2 and £3, for MPF variant, during the charge control period.

2.53 We also consider the risk of wider unintended consequences to Openreach's pricing structure as a result of our alignment proposals is likely to be extremely low. We propose below (see paragraphs 2.102 to 2.109) to adjust the relative prices of the bulk migrations. We have also examined the other services that Openreach has proposed may be affected by a change in the relative prices. Having done so, we consider that the remainder of the services identified by Openreach as being affected[23] are likely to have different service provision costs and/or the basis of their demand is different. For example, Tie Pair Modifications are used to re-jumper equipment at lines and not to migrate customers and their usage is also driven by CP needs and not retail consumers (in contrast to MPF Single Migration and SMPF Single Migration/Provide).

2.54 On balance, therefore, given the LRIC differential between the MPF Single Migration and SMPF Single Migration/Provide services is small and variable we favour maintaining our March 2011 Consultation proposal to align the charges for MPF Single Migration and SMPF Single Migration/Provide.

2.55 However, we accept that there is a marginal difference in LRICs between MPF and SMPF variants. We also accept that there is an argument that the relatively small difference in charges that would arise if each charge was set to its CCA FAC, would only have a minor impact on competition between MPF and SMPF/WLR. We therefore seek further views on two options:

- **Option 1** – the March 2011 Consultation proposal to align charges throughout the whole control period. Specifically, we would set aligned starting prices to glide to a volume weighted average of the 2013/14 CCA FAC cost stacks of the MPF and SMPF variants. We are proposing an indexation in the range of RPI-9.8% - RPI-12.8% (base case RPI-11.3%). Based on the indexation proposed our first years aligned charges are £36.40[24] (see Figure 2.7).

- **Option 2** – we would set separate charges for MPF and SMPF Single migration/provide to glide current prices down to their own 2013/14 CCA FACs. This would be an indexation in the range of RPI-6.1% - RPI-9.1% (base case RPI-7.6% (£37.80[25])) for MPF, and RPI-11.8% - RPI-14.8% (base case RPI-13.3% (£35.60[26]) for SMPF (see Figure 2.8).

[23] MPF and SMPF Tie Pair Modification (3 day re-termination), MPF and SMPF Tie Pair Modification (Multiple re-termination), MPF Working Line Takeover (WLTO) and MPF Stopped Line Provide.
[24] 5.4% RPI and deducted RPI-X from 2009/10 price
[25] 5.4% RPI and deducted RPI-X from 2009/10 price
[26] 5.4% RPI and deducted RPI-X from 2009/10 price

Figure 2.7: Option 1 prices

	Ofcom estimate	
Service	**Starting Charge 1 April 2012**	**2013/14 FAC costs**
MPF Single Migration	£36.40	£35.24
SMPF Single Migration/provide	£36.40	£28.97
Volume weighted average 2013/14 CCA FAC of MPF Single Migration and SMPF Single Migration/provide		**£30.92**

Figure 2.8: Option 2 prices

	Ofcom estimate	
Service	**Starting Charge 1 April 2012**	**2013/14 FAC costs**
MPF Single Migration	£37.80	£35.24
SMPF Single Migration/provide	£35.60	£28.97

2.56 In the event that we did implement Option 2, we would not, however, consider that there is a strong case for a one-off adjustment for SMPF Single migration/connection as proposed by EE, as there is not a significant difference between its current price and 2011/12 CCA FAC.

Question 2.3: Do you agree that Option 1 is a more effective remedy than Option 2 - if not please explain why - in particular, we welcome evidence on why you alignment would significantly negatively impact on competitive conditions.

MPF and SMPF Cease charges

2.57 MPF Cease and SMPF Cease charges are record keeping services which may be incurred when a CP terminates an LLU service (this is not always the case). In the March 2011 Consultation we noted that the vast majority (approximately 80%) of LLU termination services are Cease, while the remainder are Jumper Removal (record change and engineering activity).

2.58 Like migration charges cease charges can have a direct impact on competition for customers. The imposition of a retail cease charge can influence consumers appetite to switch providers. While such charges are rare, more commonly, retail CPs impose early termination charges (“ETC”) which can be based on any costs incurred in terminating the service – i.e. including a wholesale cease charge.

2.59 As we discuss further below, we are concerned that high ETCs impact on competition. Accordingly, unless it is economically inefficient to do so, we have a preference for charge structures which do not include Cease charges.

March 2011 Consultation proposals

2.60 We also noted that the CCA FAC information forecasts different costs for both LLU Cease services, but we felt that this was unlikely to reflect the underlying costs for these services, as both services effectively cover the same type of activity.

2.61 We also considered that the marginal or incremental costs involved in ceasing an LLU service are likely to be very low and close to zero.

2.62 Finally, we argued that, in this instance, there was a case for diverging from CCA FAC and setting these charge below CCA FAC (at zero), because setting prices of switching services below CCA FAC and instead recovering costs from rental products, would be likely to reduce switching costs for consumers and improve competitive conditions.

2.63 As a result, we proposed to set both MPF and SMPF Cease charges to zero, recovering the respective CCA FAC costs from MPF and SMPF line rentals. Specifically, we proposed to recover the CCA FAC costs of each MPF and SMPF Cease from their corresponding MPF and SMPF line rentals for each year of the charge control, on a cost per unit basis. We noted that for 2013/14 we proposed to recover £0.51 per unit from MPF line rentals, and £0.28 from SMPF line rentals.[27]

2.64 Further information provided in the March 2011 Consultation is set out in Figure 2.9 below.

Figure 2.9: March 2011 Consultation presentation of Cease charge volumes and costs

Service	Current charge	2013/14 forecast volumes	2013/14 FAC costs
MPF Cease	£5.22	810,000	£4.22
SMPF Cease	£5.22	1,120,000	£2.28
Weighted average			**£3.09**

2.65 We asked stakeholders the following question "*(Question 4.12): Do you agree that the charge for MPF and SMPF cease should be zero and costs recovered from rental charges?*"

Consultation responses

2.66 Of those stakeholders who responded, three (C&WW, Global Crossing and Openreach) agreed with our proposal to set LLU Cease charges to zero, whereas one (TTG) agreed with our proposal but only where DLRIC is very low. Of these

[27] See Figure 7.21, pg 114, of the March 2011 Consultation.

stakeholders, TTG disagreed with and C&WW questioned the level of the CCA FAC differential between MPF and SMPF Cease services to be recovered from the MPF and SMPF line rentals.

2.67 EE argued that until we have "*reliable cost information*" from BT, our proposed approach is not justifiable, and asked that we re-consult once we have such information.

2.68 C&WW agreed with our proposal to reduce LLU Cease charges to zero, but noted that most consumers use LLU migration services when switching instead of using Cease services. TTG also agreed with our proposal to reduce the charges to zero, but only where the DLRIC is less than £1, as unintended consequences such as inefficient consumer switching and costs over/under recovery may otherwise result.

2.69 In terms of our proposal to recover the CCA FAC Cease costs from the respective line rentals, TTG argued that the LLU cease costs should be recovered equally across the MPF and SMPF line rentals, because, as we noted in the March 2011 Consultation, the CCA FAC information forecasts for MPF Cease and SMPF Cease are unlikely to reflect the true underlying costs of these services. C&WW argued that it was unlikely that the difference in the amount of cost being recovered from the line rentals was appropriate given that there is only a limited difference in activity between the Cease services (one tie cable removal).

Our response and proposals for further consultation

2.70 We note Stakeholder comments about the underlying costs. In light of these comments we have undertaken a more detailed review.

2.71 Having done so, we still propose to retain our March 2011 Consultation proposal to set the prices to zero and recover the costs from the MPF and SMPF line rentals. However, we have revisited our original proposal regarding recovery of the corresponding CCA FAC costs from MPF and SMPF line rentals and set out two alternative proposals.

LLU Cease charge structure

2.72 We note that the CCA FAC costs are largely driven by SMC activity costs. The MPF variants receive approximately over double the amount of SMC CCA FAC[28] cost that SMPF variants receive. In addition, we note that only a only a minority (below a third) of the SMC CCA FAC costs are likely to be true marginal cost related directly to provision of the services. The CCA FAC differential is much larger than the marginal cost differential (which is approximately under £1), between the MPF and SMPF Cease variants, because the MPF and SMPF Cease CCA FAC cost stacks largely comprise of fixed and common costs, and these are large relative to the marginal costs.

2.73 We note TTG's comment that reducing charges below their LRIC may lead to inefficient switching. However, we consider this risk is extremely low given the amount of LRIC cost associated with each of these services.

[28] [28] SMC activity costs in question refer to 'Service centres - provision for LLU' activity in the Ofcom Cost Allocation model. These CCA FACs are approximately around £1 per unit for SMPF variants and approximately between £2 and £3 for MPF variant, during the charge control period.

2.74 We consider that, as set out in the March 2011 Consultation, the impact of our proposals on competition is of particular importance.

2.75 Cease charges represent a termination cost to CPs. While such costs do not get passed on to consumers as a separate charge if a contract term is fully completed, such charges can and do form part of early termination charges. As set out in our 'Strategic review of consumer switching'[29] review and underlining our work with CPs on ETC[30] we are concerned about charges which can act as a barrier to consumers switching. Where a service charge does not include a significant incremental cost, there is, therefore, a strong consumer benefit from the reduction/removal of such a charge, if this were to enhance competition.

2.76 We note C&WW's comment that, while in favour of our proposal to reduce the Cease charges to zero, consumers predominantly use other BT services to migrate. While this is true, we note that evidence suggests that consumer usage of LLU Cease services is not insignificant (see volumes in Figure 2.9 above). We also understand that LLU Ceases are more likely to be purchased where certain migration services are used (i.e. LLU Provide), but not for others. Therefore, their existence also creates divisions in the cost of a service which, to the consumer, are otherwise substitutes.

2.77 We consider, therefore, that the removal of these charges would act to encourage competition and would be to the benefit of consumers.

2.78 Therefore, in light of the evidence and reasoning above, we propose to retain our March 2011 Consultation proposal to reduce LLU Cease services to zero. However, we are inviting stakeholder comments on this again in light of the further information on costs that has become available.

Recovery of LLU Cease CCA FACs

2.79 We now turn to our proposal on recovering costs from the LLU line rental services.

2.80 Given that we consider that it is appropriate to recover the CCA FAC costs from the respective MPF and SMPF line rentals to allow the appropriate recovery of incurred costs, this then raises the question as to what proportion of the total annual CCA FAC costs for both variants should be recovered from the line rentals, for each year of the charge control period.

2.81 As discussed above, in our further review of the LLU Cease CCA FAC costs, we explain that approximately twice as much cost is allocated to MPF compared to the SMPF variant, but that very little of this cost is marginal cost associated with provision of the services.

2.82 We therefore consider that given that the rental charge differential should reflect the LRIC differential (which is small) it would be appropriate to recover the CCA FAC costs equally from the respective MPF and SMPF line rentals.

2.83 Our preference, on the evidence available, is to recover the CCA FAC costs associated with each of the MPF and SMPF Cease services equally from their respective line rental services, during the period of the charge control. Specifically,

[29] http://stakeholders.ofcom.org.uk/consultations/consumer-switching/summary.
[30] http://consumers.ofcom.org.uk/2010/06/cheaper-charges-for-uk-consumers-to-end-phone-contracts/.

we propose to use a volume weighted average of the MPF and SMPF Cease annual CCA FACs to allocate costs to respective line rentals for each year of charge control. However, we welcome evidence as to why we should retain our March 2011 Consultation proposal, that is, to recover more of the CCA FAC from MPF than SMPF line rental on cost per unit basis.

Question 2.4: Do you agree that the charge for MPF and SMPF Cease should be set to zero and CCA FAC costs recovered from rental charges? If not please, please set out your reasoning.

Question 2.5: Do you agree that we should recover the CCA FAC Cease costs equally from the MPF and WLR rentals, or do you consider that we should retain the March 2011 Consultation proposal to recover LLU Cease CCA FAC proportionately from the line rentals. Please set out your reasons for your preference.

LLU ancillary basket service design and structure

MPF Stopped Line Provide and LLU Bulk migrations (MPF Bulk Migrations services and SMPF Same CP Mass Migration)

2.84 MPF Stopped Line Provide is used by CPs to provide an MPF service to premises that have an existing but inactive line. We understand that this is predominantly used by CPs to provide service when a consumer moves home (the line in the new property having been disconnected).

2.85 This service charge directly affects the set up costs for a new service provision and can directly influence consumer contract terms. We understand that some CPs are forecasting a rise in the number of such services. This raises a gaming concern as potentially BT could structure charges to exploit this rise. We consider this below.

2.86 SMPF Same CP Mass Migration and MPF Bulk Migrations services are mass migration variants of the MPF and SMPF Single Migration services. They allow a CP to migrate multiple customers at a time to an LLU service.

2.87 These services are of particular concern to those CPs who are migrating their customer base to a new set of access products, either due to change in the product used (i.e. from SMPF to MPF) or rationalisation of provision to use a common set of equipment (for example due to acquisition of another CP).

2.88 We are concerned to ensure that the charges for bulk migration are consistent with the charge for single migration.

March 2011 Consultation proposals

2.89 In our March 2011 Consultation, we proposed that MPF Stopped Line Provide, MPF Bulk Migrations services and SMPF Same CP Mass Migration should continue to be regulated within the MPF and SMPF ancillary services baskets.[31]

[31] See March 2011 Consultation, Annex 13, Annex to condition FAA4(A), Parts 1 and 2.

Stakeholder responses

2.90 In its response to the March 2011 Consultation, Sky asked that we individually charge control the MPF Stopped Line Provide and MPF Bulk Migration services.

2.91 In doing so Sky argued that it is "*dependent*" on these migration services and will continue to be so during the period of the charge control, given its plans to continue roll-out of LLU services.

2.92 Sky said it spends approximately [✂] respectively on MPF Stopped Line provide and MPF bulk migration services and, between these services, they account for nearly [✂] % of Sky's forecast charges for the MPF basket. To put this in perspective, Sky spends between [✂] on each of the key migration services (other than WLR Transfer).

2.93 Sky noted that we had said in the March 2011 Consultation that low revenue services are better placed in baskets, and then went on to say that given that this is not a low revenue service it should be individually charge controlled. It also argued that BT could potentially gain excessive returns.

Our response and proposals for further consultation

MPF Stopped Line Provide

2.94 We recognise that since we commenced this charge control review Sky's spend on this migration service has become more material, and is forecast to be so over the duration of the charge control. The charges for this service can have an impact on the cost of migrating customers.

2.95 We consider that this level of activity questions our assessment of the materiality of this service and the potential for the service to be priced in a manner which could have a significant consequence for consumers and the competitive environment.

2.96 Although we recognise that a particular advantage in setting individual controls can be that the price set would reflect the service's expected cost over the charge control period, we consider that there are practical limitations in setting an individual control on this service. This is specifically because there is currently no CCA FAC information for this service, given its relatively recent growth trajectory.

2.97 However, in recognition of the emerging importance of the service, we recognise that there may be merit in implementing a measure that ensures its price does not move substantially out of alignment with other migration service prices. Accordingly, we consider that application of a sub-cap on MPF Stopped Line Provide at the level of the overall MPF basket control would achieve this.

2.98 This measure would limit the charge's potential movement to the overall limit of the basket control.

2.99 Given that we would only be applying the sub-cap to one service, which is not likely to dominate the basket, we consider that there is still sufficient flexibility for Openreach to recover efficiently incurred costs for all services in the basket.

2.100 On balance, we consider that a sub-cap on MPF Stopped Line Provide set at the controlling percentage of the MPF basket would be the most proportionate and appropriate measure to promote effective and sustainable competition.

2.101 However, we note that if our proposal resulted in material unintended consequences or unduly constrained the MPF basket we would consider no intervention (i.e. no sub-cap on MPF Stopped Line Provide as proposed).

2.102 Therefore, we welcome views on whether a sub-cap on MPF Stopped Line Provide set at the controlling percentage of the MPF basket is appropriate and evidence on whether this would unduly constrain the MPF basket and/or have any other unintended consequences.

Question 2.6: Do you agree with the imposition of a sub-cap on MPF Stopped Line Provide set at the controlling percentage of the MPF basket? If not please give your reasons.

SMPF Same CP Mass Migration and MPF Bulk migrations services

2.103 The major LLU providers at times rely heavily on bulk migrations. The levels of such charges clearly have an impact on the cost of migrating customers and a direct impact, therefore, on the competitive environment.

2.104 We do not consider that individual charge controls are necessary for the LLU bulk variants as the charge levels of bulk migration are by necessity set in reference to Single Migrations where individual charge controls apply. However, we do consider that it is appropriate to ensure that the starting charges for bulk migrations at the beginning of the charge control period are consistent with any changes we make in the respective Single Migration charges. We also consider it is appropriate to provide guidance on the desirable relationship between bulk and single migration charges.

2.105 Bulk migration charges are intended to reflect the economies of scale achieved by multiple simultaneous engineering changes. Therefore, we consider it necessary to set an appropriate differential between the starting charges of single and bulk migration services.

2.106 In doing so, we note that we have a preference to align (i.e. to set charges at the same level) the singleton variants charges (see Option 1 of our approach to MPF Single Migration and SMPF Single Migration/provide). If we decide to do this we also consider that for consistency we should align the starting charges of the LLU Bulk migration variants.

2.107 To that end, we propose to set an aligned starting charge for the LLU Bulk Migration services which is equal to the aligned starting charge for the MPF Single Migration/SMPF Single Migration/Provide services less the difference between the MPF Single Migration/SMPF Single Migration/Provide and LLU Bulk Migration average 2011/12 CCA FACs costs (see Figure 2.10 below). This will ensure that the difference in charges remain consistent with incremental cost differentials.

2.108 We note that if we were to decide not to align the starting charges of the Singleton variants (see Option 2 of our approach to MPF Single Migration and SMPF Single Migration/Provide), we would instead create an appropriate price differential by setting the charge of each of the LLU Bulk migration variants equal to separate

MPF Single Migration and separate SMPF Single Migration/Provide services charge less their respective difference in separate MPF Single migration and SMPF Single Migration/Provide services, and separate LLU Bulk Migration 2011/12 CCA FACs (see Figure 2.11 below).

Figure 2.10: Aligned LLU Bulk Migration service prices where we align MPF Single Migration and SMPF Single Migration/Provide prices

	Ofcom estimate
Service	**1 April 2012 Starting Charge**
SMPF Same CP Mass Migration	£28.21
MPF Bulk Migration	£28.21

Figure 2.11: LLU Bulk Migration prices where we do not align MPF Single Migration and SMPF Single Migration/Provide prices

	Ofcom estimate
Service	**1 April 2012 Starting Charge**
SMPF Same CP Mass Migration	£28.56
MPF Bulk Migration	£26.09

2.109 We would also expect that Openreach, when setting charges in the future, maintains an appropriate differential between the single and bulk migration charges, as long as this would not unduly constrain the basket flexibility.

2.110 Indeed, we note that Openreach considers, as part of its response to this review, that a price differential between single and bulk migration services is necessary to incentivise purchasing of bulk products.[32] However, as a backstop, we would consider intervening if the differentials in question narrowed by an inappropriate amount as a result of Bulk Migration charges being raised excessively. Accordingly, we will monitor the differentials during the review period. While we consider that appropriate differentials would allow Openreach to maintain sufficiently flexibility to re-balance all charges within the respective MPF and SMPF baskets, we would particularly welcome views and evidence on whether this would be the case.

Question 2.7 Do you agree with our proposal to set an aligned starting charges of both the LLU Bulk Migration variants by creating a volume weighted average of both their 2011/12 CCA FACs, where we choose to align the MPF Singleton Migration and SMPF Singleton Migration/provide variants. If you do not agree please give you reasons.

Question 2.8: Do you agree that, in the event of an aligned single migration charge, we should set the starting charges of MPF and SMPF Bulk migration to set an

[32] See Openreach response (28 July 2011), Figure 9, pg 56, 'Pricing Hierarchy for key MPF volume products' to LLU and WLR charge controls consultation.

aligned starting charge for both the LLU bulk migration charges which is equal to the starting charge for the single migration services less the difference between the single and bulk migration average 2011/12 CCA FACs costs. Or in the event that single migration charges are not aligned set starting charges equal to the single migration charge less their respective difference in single and bulk migration 2011/12 CCA FACs. If not please give your reasons.

Inertia clause

2.111 An inertia clause is a safeguard which limits BT's ability to make a wholesale realignment to basket service prices. The purpose of this is to ensure that BT does not adjust prices in a manner that might exploit their understanding of temporary changes in demand for a product by a given CP or group of CPs.

2.112 More specifically, it limits the movement of prices of individual services within the basket, relative to the overall controlling percentage (RPI-X) of that particular basket. Thus in any given year, charges cannot move radically in response to temporary circumstances.

2.113 While the Competition Commission endorsed this control, we are examining here whether there are circumstances where its existence would have unintended consequences.

March 2011 Consultation proposals

2.114 In the March 2011 Consultation, we sought views on whether we should tighten the inertia clause from the current level of 10%.

2.115 We proposed that the level of inertia clause should sit between 2% and 7.5%, across all three baskets. We noted that we preferred a level of 7.5%.

2.116 In coming to our proposal, we noted that an inertia clause is easy to understand and implement, and that a tighter inertia clause could mitigate the potential risk of any gaming of the control, but would also allow BT sufficient pricing flexibility.

2.117 We asked stakeholders the following question *"(Question 4.5): Do you agree that inertia clauses applied to the ancillary services baskets should be tightened from their current level of 10%? Please give views on the appropriate level of inertia clauses in the range 2% to 7.5%".*

Consultation responses

2.118 As part of its response, Openreach noted that it was concerned that the proposed inertia clause range and proposed level could unduly reduce its pricing flexibility within the baskets.

2.119 Specifically, it was concerned that where RPI- X is greater than the inertia clause level:

- this may not allow it to maintain the prices of products at their current levels even where they currently reflect cost;
- this may not allow it to ensure that the prices of products which are not at cost, to be aligned with cost over the charge control period; and

- o this may not allow it to achieve alignment of certain services which have a "similar cost or function", during the control period.

2.120 Openreach argued that, if we retained the inertia clause, it should "*either not be lower than 10% or the largest absolute value of RPI-X on any basket (whichever is greater)*".

Our response and proposals for further consultation

2.121 The inertia clause limits the movement of prices of services within a basket relative to the level of RPI and the controlling percentage (the 'X') of the particular basket. Its purpose is to prevent individual basket prices from changing significantly on a yearly basis.

2.122 We recognise that there could be grounds for concern where the proposed inertia clause level forced the downward adjustment of all service charges even where certain charges may be already set equal to their CCA FAC cost. We therefore consider it appropriate to consider this issue further.

2.123 The above concern arises when the absolute value of RPI-X for that basket is larger than the absolute value of the inertia clause.

2.124 We have discussed this with Openreach, but we have only identified two basket services that are at risk of being moved below CCA FAC in such circumstances. These are:

- o MPF Singleton jumper removal service; and;
- o SMPF Singleton jumper removal service.

2.125 In order to avoid this forced reduction of a charge at CCA FAC it would be necessary to remove the inertia clause from the basket when the the absolute value of RPI-X is greater then the absolute value of the inertia clause percentage so that BT has increased flexibility to adjust charges without changing the price of those services at CCA FAC. We have drafted Condition FAA4(A).6A to provide for this in Annex 5

2.126 We would also only apply this exception if those services we have identified, as being currently priced at close to CCA FAC, are not adjusted upward.

2.127 However, we note that this would give greater freedom for BT to adjust all the other charges in the manner the inertia clause was intended to prevent in those circumstances in which the exception applied; i.e. significant relative charge movement to reflect short term expectations of demand. We note that there is therefore a risk that Openreach may be able to manipulate prices on growing volume products and decrease prices on declining volume products to achieve higher average price increases than the controlling percentage basket allows. We also note that the Competition Commission found Ofcom to have been correct in setting an inertia clause but to have erred in the level of flexibility BT was allowed – hence our proposal to tighten the inertia clause percentage.

2.128 In light of these significant drawbacks, on balance, we consider that the risk of removing the inertia clause, even in these circumstances is greater than the risk of negative consequence these services being forced below CCA FAC (given that they are unlikely to be forced below LRIC).

2.129 Therefore, we are minded to retain our March 2011 Consultation proposal, however, we welcome stakeholder comment on the alternative exemption set out in the Legal Conditions FAA4(A).6A (see Annex 5)

Question 2.9: Do you agree that we should not modify the inertia clause set out in the March 2011 consultation? If not. Do you agree with our proposed alternative set out in the draft legal instrument at Annex 5?

Approach to aligning MPF and SMPF basket services

Expedite connections

2.130 LLU Expedite connection services allow CPs to expedite LLU Provide services. This allows CPs to respond more flexibly to their customer needs. While being presented under a common banner, there are differences in engineering effort in the standard SMPF and MPF Provide services available for expediting, and as with services which require re-prioritising of work there are also differences in the opportunity cost of providing such a service.

March 2011 Consultation proposals

2.131 In the March 2011 Consultation we proposed not to align (i.e. not to set at the same level) the charges of MPF and SMPF Expedite connection variants over the course of the charge controls or to narrow their price differential (by the amount of the differential in price between standard connection MPF and SMPF) in the first year of the charge controls.

2.132 We noted that while there was a large differential in prices between MPF (£158.40 at 1 April 2011) and SMPF (£103.20 at 1 April 2011) variants, volumes for this service are low, particularly for MPF.

2.133 In reaching our proposal not to align, we explained in the March 2011 Consultation that we had been unable to estimate the LRIC costs, but noted that there is likely to be some difference in activity between the expedite variants (both MPF and an SMPF Expedite connection require the provision of two jumpers, but SMPF require requires the removal of an additional jumper and a line test and MPF requires a TAM test). We noted that as the standard LLU Provide charges are not aligned we did not consider it necessary to align the expedite connection variants.

2.134 In respect of our proposal set out in the March 2011 Consultation not to narrow the differential of the expedite variants to the same differential between the standard variations, we said that we were not confident that a competitive distortion existed, in light of the different activities involved in the provision of LLU Expedite connection and standard LLU Provide services, the fact that SMPF Single Migration and Provide service charges are blended, and that expedite volumes are low.

2.135 In light of this, we asked stakeholders the following question "*(Question 4.6): Do you agree that we should not align or intervene to narrow the differential in charges for MPF and SMPF expedite?"*

Stakeholder responses

2.136 Both Openreach and C&WW agreed that we should not align LLU Expedite connection variants or narrow the differential between these services.

2.137 Global Crossing said that the installation of SMPF facilities is inherently more complex and hence should be more expensive to supply than the MPF variant.

2.138 On the other hand, TTG considered that we should align the two LLU Expedite connection variants and that the price should be based on an average of both MPF and SMPF variants. TTG argued that our approach was incorrect as we had assumed that an MPF Expedite Connection is based on an MPF Provide activity, when in fact it should be based on an “MPF Connection”. It went on to say that because we should be comparing MPF Expedite connection to an “MPF Connection” (and not an MPF Provide), and given that the “MPF and SMPF Connection” prices are currently aligned, we should similarly align the Expedite connection variants on a similar basis.

Our response and proposals for further consultation

2.139 Having reviewed Stakeholder responses, we consider that our March 2011 Consultation proposal is appropriate and proportionate. However, since we are consulting further on the remaining aspects of our approach to alignment of services in the MPF and SMPF baskets (i.e. on LLU Singleton Jumper removals and the alignment of charges in the baskets more generally) we consider that it is appropriate to seek further comments on our March 2011 Consultation proposals in respect of LLU Expedite connections.

2.140 In particular, we note TTG’s comments that because the standard variants are in fact aligned we should, therefore, align the expedite variants. However, we maintain our position on this as set out in the March 2011 Consultation, that the correct comparison against the LLU Expedite connection variants is LLU Provide services. This is because an LLU Expedite connection service is carried out to progress an LLU Provide service and not an LLU Single Migration.

2.141 In addition, as noted in the March 2011 Consultation, volumes for this service are low, and we have not found or been presented with any further evidence or views that indicate an actual or potential market failure which needs to be addressed through further intervention.

2.142 We therefore propose to maintain our proposals not to align or narrow the differential between these services. However, we invite further comments on this.

Question 2.10: Do you agree that we should not align or intervene to narrow the differential in charges for MPF and SMPF Expedite connections?

LLU Singleton Jumper removal services

2.143 LLU Singleton Jumper removal services are used by CPs when they require Openreach to physically disconnect cabling they used to connect a line to their equipment. This is normally done when they need space for other services or BT requires them to rationalise the frame space they use. When there are no such requirements they would normally only use a Cease service (i.e. a record only transaction).

2.144 We required Openreach to separate the paper and physical (i.e. Jumper removal) Cease services to allow CPs to optimise their use of physical cease i.e. only incur the cost when there was a need to do so and to encourage the use of bulk jumper removal when possible.

March 2011 Consultation proposals

2.145 In the March 2011 Consultation, we noted that these charges are passed onto consumers and, therefore, any differential in the prices for MPF and SMPF would potentially have an impact on the competitive position between those services. We also said that we would be concerned if SMPF customers faced higher barriers to switching (which do not relate to the underlying costs of the service) than MPF customers.

2.146 We noted that the physical difference between SMPF and MPF Single Jumper removal is that SMPF requires one jumper provision whereas MPF does not.

2.147 We proposed to align the starting charges for MPF and SMPF Singleton Jumper removal services on a weighted average of current prices of the two variants. The cost and price information which we set out in the March 2011 Consultation is reproduced in Figure 2.12 below:

Figure 2.12: Jumper removal information from March 2011 consultation

	Jumper removal	
	MPF	**SMPF**
Current price	£16.80	£29.89
Volume	77,000	415,000
FAC (2010/11)	£26.85	£29.22
Weighted average price	£27.85	
Weighted average FAC	£28.85	

2.148 We asked stakeholders the following questions "(*Question 4.7): Do you agree that we should align the price jumper removals?*" and "*(Question 4.8): Do you agree that we should use the weighted average of current prices to estimate the 2010 price of the service for jumper removals?*".

Stakeholder responses

2.149 Six stakeholders responded to these questions. TTG, C&WW and Openreach were in favour of aligning the services, but TTG and C&WW disagreed with how we proposed to implement the alignment. Global Crossing and EE disagreed with our proposals.

2.150 Openreach agreed with our proposals for LLU Singleton Jumper removals in full.

2.151 TTG said there were benefits to alignment even where costs are dissimilar, and felt we should retain alignment throughout the duration of the control (and not just align the starting charges).

2.152 C&WW also agreed that we should align the MPF and SMPF Singleton Jumper Removal variants, arguing that the difference in the current price between the two services is not reflective of the difference in activity between the two variants (i.e. one jumper provision).

2.153 However, C&WW disagreed with a weighted average approach to implementing the alignment, noting that the SMPF Single Migration charge was too high. C&WW argued that the MPF Singleton Jumper removal price should not increase, as we have not suggested it is being provided below cost, and suggested that we should either align the SMPF price to the MPF price, or we should moderately increase the SMPF price to account for additional activity.

2.154 In contrast, both Global Crossing and EE disagreed with our approach. Global Crossing said we should not align the jumper variants arguing that "*the situation is inherently more complex for SMPF*". Similarly, EE argued that we had identified more activity being required for SMPF than an MPF jumper removal and that "*from a cost causation perspective, it would seem that some difference in price is objectively justified*". EE also noted that this may encourage inefficient switching from SMPF to MPF providers.

Our response and proposals for further consultation

2.155 In light of responses we have carried out further analysis. In particular, we have considered in more detail whether, in the March 2011 Consultation, we attached too little weight to the physical differences between the MPF and SMPF variants and also re-considered the CCA FAC information provided for these variants.

2.156 In the March 2011 Consultation, while we were unable to establish LRIC costs for these services, we identified the differences in activity required to deliver these services. We noted that the main physical difference between the variants is that SMPF Singleton Jumper removal requires more jumpering activity (one jumper provision) than MPF Singleton Jumper removal.

2.157 We consider that in order to ensure that the price differential between the variants does not lead to a distortion in consumer choice, the difference in the prices we set should be associated with the relevant LRIC cost of providing the service.

2.158 While we do not have precise LRIC costs for these services, we have assessed what activities are required to provide the LLU Jumper Removal services and checked the CCA FAC costs against these.

2.159 Further analysis of the CCA FAC information indicates that the difference in CCA FAC allocated between the MPF and SMPF variants is due to more jumpering work being required for the SMPF variant, than the MPF variant. Given that we identified that the difference in underlying activity required between the services is also due to jumpering we consider that the CCA FACs provide a reasonable estimate of the difference in the underlying costs of providing these services.

2.160 We note C&WW comments that the current price differential between the MPF and SMPF variants cannot be reflective of the differences in activity. We also note C&WW's comment that we should align current prices of the variants, or increase the current price of the SMPF variant. We consider that the CCA FACs for these services, and not current prices, better represent the underlying costs in providing these services, and in turn the prices which we set. In doing so, we note that the current basket prices can diverge from the costs of provision during the control period, and so current prices of these do not necessarily represent cost.

2.161 We note TTG's comment that the benefits of alignment outweigh the costs, even where prices may not reflect the costs of providing the service. We disagree with this. We note that LLU Singleton jumper removals represent a termination cost to CPs and can act as a barrier to entry when passed through to consumers downstream (e.g. BT Retail currently charges consumers for this). We consider that the proposed alignment of these services could result in some consumers being charged inappropriately more, and others inappropriately less, than the underlying cost of provision. We consider that consumer incentives, to choose between MPF and SMPF Singleton Jumper removal services, are better provided for by ensuring that the prices we set for these services represent the cost of their provision.

2.162 Therefore, on the basis of the evidence available, we agree with Global Crossing's and EE's comments that the difference in activity required for SMPF and MPF Singleton Jumper services, implies that there should be some difference in the prices that we set for the MPF and SMPF variants.

2.163 In light of the above, we are minded to set the starting charges of both MPF and SMPF Singleton Jumper removals to their respective 2011/12 CCA FACs as set out in Figure 2.13 below:

Figure 2.13: LLU Jumper removal proposed starting charges

	Jumper removal	
	MPF	SMPF
1 April 2012 Starting Charges (2011/12 CCA FACs)	£25.40	£27.70

Question 2.11: Do you agree that we should set the starting charges of both MPF and SMPF Singleton Jumper removals to their respective 2011/12 CCA FACs.

Options for aligning MPF and SMPF basket service charges during the control

2.164 There are a number of other services in the MPF and SMPF basket which have equivalent description (e.g. there is a Standard Line Test service in both MPF and SMPF baskets). However, as noted sometimes above, such descriptions can often mask significant differences in activity. We consider that we may have been unclear as to our intentions with regard to aligning such changes and we seek to clarify our position below.

March 2011 Consultation proposals

2.165 In the March 2011 Consultation we considered options for aligning other basket services (that we considered were equivalent), in addition to Jumper removal and Expedite connections.[33]

2.166 We specifically considered alignment of Singleton Jumper removal and Expedite connections because we considered these services may have an impact on competition and the prices were unaligned. We explained that we were not concerned about the difference in Tie-pair modifications as the impact on competition from these services is low (see paragraph 4.80 and 4.81 of March 2011 Consultation).

2.167 We also explained in the March 2011 Consultation that we wanted to prevent competitive distortions and ensure price transparency. In doing so we noted that, as a consequence, we would not want to increase the complexity of the baskets or reduce Openreach's flexibility to adjust prices efficiently.

2.168 In the March 2011 Consultation, we then set out the following options for aligning all MPF and SMPF basket services on which we invited comments (see paragraphs 4.93 to 4.95):

- 'Option 1' - to align equivalent services at the beginning of the charge control (but not impose further alignment throughout the controls);

- 'Option 2' - Ensure that similar charges are aligned for the duration (including the start) of the charge controls using sub-caps or an alignment obligation; and

- 'Option 3' - Merge each pair of similar charges into a single service and put each merged single service into a single basket.

2.169 In the March 2011 Consultation, we indicated that we were minded to pursue Option 1 as we considered that this would reduce any distortion at the start of the control, would be simple to implement and would not unnecessarily limit Openreach's flexibility to set prices. Although we proposed to reject Option 2 largely on the basis that it would add complexity to the controls and Option 3 largely on the basis that it could introduce the risk of gaming by Openreach, we invited Stakeholder comments on all three options: "*(Question 4.9): Do you agree that option 1, that is ensuring the alignment of similar charges at the beginning of the charge control period but not imposing any further obligation on Openreach to keep charges aligned, is the most appropriate and proportionate way to avoid competitive distortion caused by the misalignment of prices?*":

Stakeholder responses

2.170 Stakeholders who responded were broadly in favour of some form of alignment, but had different views on how we should implement this and at what stage of the charge control we should align the services.

2.171 EE was uncertain as to what other basket services (beyond jumper removals and expedite connections) were in the scope of this proposal. EE referred to services in Figure 4.2 (page 54) of the March 2011 Consultation as those which EE thought

[33] See condoc question 4.9 pg 59 of March 2011 Consultation

we were considering and noted that where there are no relevant differences in the activities between the LLU variants, EE was content that we align the services which are not already aligned.

2.172 Openreach agreed with aligning similar services, in principle, and agreed with Option 1. However, Openreach wanted us to align the "*bulk variants of the MPF and SMPF jumper removal order products*" and noted a concern that because the baskets have different Xs and the inertia clause range which we proposed does not provide sufficient flexibility, it would not be able to maintain alignment of similar products during the charge control period (i.e. rejected, amended or changed orders; or standard line tests).

2.173 TTG disagreed with our proposal (Option 1). TTG argued that we should retain alignment for the duration of the control, if we are proposing to align at the start of the control. TTG proposed that we could, either:

- introduce individual charge controls on similar services and then create an aligned starting charge for these services that would glide to an average FAC CCA in 2013/13 (It considered *"no specific alignment obligation is required"*); or

- for services that are not charge controlled, we could create an obligation that aligns the services throughout the control, but which allows Openreach flexibility to set the prices of the services within the basket constraints.

2.174 C&WW wanted "a simple obligation to keep charges aligned within a percentage range".

2.175 Global Crossing supported Option 2.

Our response and proposals for further consultation

2.176 When considering alignment of charges in the March 2011 Consultation we noted that we were specifically concerned with those services which may have a material impact on competition (i.e. LLU Singleton Jumper Order removal and LLU Expedite connection services). As already discussed, we have proposed not to align LLU Singleton Jumpers or LLU Expedite connections, mainly because we consider that there is a difference in the LRIC costs of provision between the variants. We have also discussed our approach to alignment for LLU Bulk migrations in this document.

2.177 In light of these revised proposals we have revisited our proposals on aligning the remaining MPF and SMPF basket services (which have an equivalent description across the baskets) and having done so we consider it is necessary to revise our March 2011 Consultation proposal. Specifically, we propose that no alignment obligation is necessary for these services given that we consider that they either, do not have a material impact on competition and/or, are likely to be aligned when we start the charge control and/or, there is no CCA FAC information available, and so any meaningful alignment obligation would not be practical.

2.178 The following services have MPF and SMPF variants which fall within in each of the proposed MPF and SMPF baskets, as noted in Annex 5, Part 1, Schedule 1. These services are:

- o Tie Pair Modification (3 working day lead time Re-termination);

- Tie Pair Modification (Multiple Re-termination);
- Bulk Jumper removal order charge;
- Order rejected at initial validation & 'Order rejected at detailed validation' Order returned for Amendment';
- Cancellation of orders for Migration, Modification or Amend;
- Amend Orders;
- Standard line test; and
- Network RWT.

2.179 As we are not aligning LLU Singleton jumper removal order services there is no basis for aligning bulk Jumper removals. Further, since the rest of the services listed in paragraph 2.177 above do not have particular characteristics or functions which are likely to materially affect the competition conditions of the market, we do not consider that alignment is necessary.

Question 2.12: Do you agree that we should not align (at any point of the charge control) the SMPF and MPF services set out in paragraph 2.177?

Section 3

Charge control implementation and legal tests

Charge control implementation

3.1 At paragraphs 9.1 to 9.25 of the March 2011 Consultation we explained how the proposed charge controls for LLU services and WLR services were structured and how the proposed conditions will work in practice. In particular we discussed the following:

- How the proposed conditions would work alongside other regulation;
- The effects of the proposed conditions and the structure of the “baskets” of services;
- How we calculate whether Openreach is complying with the proposed charge ceilings created by the proposed RPI-X style of controls, including;
  - how we determine what the overall change of prices has been for each service or group of services; and
  - what information we require from Openreach to enable us to monitor their compliance with the controls;
- How the proposed conditions allow for corrections where there has been over or under recovery.

3.2 While we do not seek to repeat this explanation here, it remains relevant to the revised conditions set out in Parts I and II of Annex 5 of this consultation since the drafting and effect of the proposed conditions remains largely the same.

3.3 As a consequence of the delay caused by this reconsultation and reflecting that both the LLU charge control condition (FAA4(A)) and the WLR charge control condition (AAAA4(WLR)) will apply until 31 March 2014, both draft conditions have been amended to reflect that controls will not be in place for the period 1 April 2011 to 31 March 2012.

3.4 The main revision to the LLU charge control condition set out in the March 2011 Consultation that we are consulting on as an option in this document, is the insertion of a new provision (SMP services condition FAA4(A).6A) which provides an exception to the inertia clause which otherwise operates to restrict the changes that can be made to the charges levied for individual services in the LLU ancillary services baskets. Specifically, we are consulting on an option to provide for an exception to the inertia clause to deal with the possibility of the charges for the MPF Singleton jumper removal service and the SMPF Singleton jumper removal being required to move away from CCA FAC in the event that the absolute value of RPI+/-X for that basket is larger than the proposed inertia clause for that year of the control. Although our preference is not to introduce this exception, we are consulting on a draft SMP condition should we decide to adopt this approach in light of consultation responses (see Section 2 of this document).

3.5 Other than indicated above, we are not proposing any specific revisions to the text of the WLR charge control condition. However, we are re-consulting on this in light of the changes to the charge control ranges proposed in this document.

Legal tests

3.6 At paragraphs 2.28 to 2.38 to the March 2011 Consultation we explained the legal framework for setting the LLU and WLR charge controls. We do not seek to replicate that discussion here but provide a brief summary.

3.7 With reference to Annex 5 to the WLA market review consultation of 23 March 2010 and Annex 6 to the WFEAL market review consultation of 15 October 2010, we set out an overview of the market review process, including the imposition of remedies, to provide appropriate context and understanding to the matters discussed in that review.

3.8 We explained that before imposing an SMP condition imposing a charge control we are required to satisfy certain legal tests set out in the Act, specifically:

- section 88 which prohibits the setting of SMP conditions under section 87(9) of the Act except where it appears, from the market analysis, that there is a relevant risk of adverse effects arising from price distortion; and it appears that the setting of the condition is appropriate for the purposes of promoting efficiency, promoting sustainable competition and conferring the greatest possible benefits on end users. We are also required to take into account the extent of BT's investment in wholesale local access and wholesale fixed analogue exchange lines.
- section 47 which requires that any SMP condition must not be imposed unless it is:
  - Objectively justifiable in relation to the services to which it relates;
  - Not such as to discriminate unduly against particular persons;
  - Proportionate to what the condition is intended to achieve;
  - In relation to what it is intended to achieve, transparent.
- we need to ensure that the conditions proposed remain consistent with our general duties under section 3 of the Act and our duties for the purpose of fulfilling our Community obligations as set out under section 4 of the Act.

3.9 We went on at paragraphs 9.26 to 9.125 to explain why we considered our proposed charge control conditions meets each of the relevant tests set out in the Act.

3.10 To give regulatory effect to the proposals set out in this document, we are proposing modified versions of the Condition FAA4(A) (in respect of LLU) and Condition AAAA4(WLR) (in respect of WLR) which we set out in the March 2011 Consultation. The revised text of those conditions is set out respectively in schedule 1 to the statutory notifications published under sections 48(A) and 86 of the Act in Part I and Part II of Annex 5.

3.11 We are also continuing to propose making an amendment to SMP condition AAAA10 to make clear that the obligation on Openreach to provide wholesale line rental includes an obligation to provide such ancillary services as may be reasonably necessary for the use of wholesale line rental. The proposed amendment is set out in schedule 2 to the statutory notification published in Part II of Annex 5.

3.12 We also proposed in the March 2011 Consultation to make directions disapplying certain cost orientation requirements (see Part II and V of Annex 13 to the March 2011 Consultation) and to consent to certain notification requirements being reduced (see Part III and VI of Annex 13 to the March 2011 Consultation). These proposed directions remain unaffected by our revised proposals and we will make these directions in our final statement should we decide that it is appropriate to do so in light of consultation responses.

3.13 We are satisfied that the proposed legal instruments meet our duties and the tests under the Act. Our reasoning for this view is set out below making reference to the analysis set out in the March 2010 Consultation where appropriate.

Part I of Annex 5: proposed Condition FAA4(A)

Schedule 1 to the notification

Aims and effects

3.14 As we explained in the March 2011 Consultation, the new proposed SMP condition FAA4(A) requires Openreach to ensure that its charges for the LLU rental services and associated ancillary services do not increase by more than RPI minus/plus a value of ‘X’ that varies according to each relevant basket and individually controlled service. The baskets and services with their respective values for ‘X’ are set out in this document.

3.15 Ofcom’s reasons for proposing to impose this particular form of control and the values for ‘X’ are set out in the March 2011 Consultation and this document.

Our duties and policy objectives

3.16 We discuss our duties and objectives specific for this review in detail in Section 2 of the March 2011 Consultation and we explain our duties and policy objectives at paragraphs 9.34 to 9.38 of the March 2011 Consultation. For the reasons set out there and in this document, our opinion of the likely impact of implementing the proposals is that the performance of our general and specific duties under section 3 and 4 of the Act continues to be secured or furthered by our proposal to adopt the revised charge controls.

Powers under sections 87 and 88

3.17 Section 87(1) of the Act provides that, where Ofcom has made a determination that a person (here, BT) has SMP in an identified services market (here, the wholesale local access services within the UK, but not including the Hull Area), Ofcom shall set such SMP conditions authorised by that section as Ofcom considers it appropriate to apply to that dominant provider in respect of the relevant network or relevant facilities and apply those conditions to that person.

3.18 As indicated in Section 9 of the March 2011 Consultation, Section 87(9) authorises the setting of SMP service conditions, including price controls and the setting of rules in relation to recovery of costs and cost orientation. Further, where Ofcom seek to set an SMP condition falling within section 87(9) Ofcom is also required to comply with the requirements of section 88.

3.19 In our opinion, for the reasons set out at paragraphs 9.39 to 9.53 of the March 2011 Consultation, the proposed revised Condition FAA4(A) continues to satisfy section 88.

The section 47 tests

3.20 In addition to above-mentioned matters, Ofcom must be satisfied that Condition FAA4(A) satisfies the test in section 47(2) of the Act, namely: objectively justifiable; not unduly discriminatory; proportionate; and transparent.

3.21 We continue to be satisfied that this test is met in relation to the proposed revised condition FAA4(A).

The proposed controls are objectively justifiable

3.22 We explain at paragraphs 9.56 to 9.58 of the March 2011 Consultation why we consider that the proposed charge controls are objectively justified. In our view, none of the revisions to the proposed charge control conditions undermine that objective justification since:

- BT's SMP in the access markets allows it to set charges unilaterally and, in the absence of any controls, Openreach would have the ability to set prices above the competitive level.
- The structure if our charge controls continues to aim to deliver the lowest possible charges to competitors for the wholesale services, while ensuring that Openreach is able to recover costs, including a reasonable return on investment.
- We have reviewed each service within the market so that we have proposed an appropriate level of control for individual services where appropriate.
- The structure of the controls continue to place an incentive on Openreach to continue to seek efficiency gains and it is able to benefit from efficiency achieved that are in excess of that anticipated in the review.
- The proposed revised controls continue to be objectively justifiable in that the benefits of RPI-X price controls are widely acknowledged as an effective mechanism to reduce prices in a situation where competition does not act to do so.

The proposed controls do not discriminate unduly

3.23 We explain at paragraph 9.59 of the March 2011 Consultation why we consider that the proposed charge controls do not discriminate unduly. None of the changes we are proposing change the fact that any CP (including BT itself) can access the services at the charge levels fixed. Further, Ofcom is still proposing only to impose the charge control on BT, the only CP to hold SMP in this market (for the UK excluding the Hull Area).

The proposed controls are proportionate

3.24 We explain at paragraphs 9.60 to 9.61 of the March 2011 Consultation why we consider that the proposed charge controls to be proportionate and we continue to hold that view for the reasons set out.

The proposed controls are transparent

3.25 We explain at paragraph 9.62 of the March 2011 Consultation why we consider that the proposed charge controls are transparent. We are consulting again in light of revisions to our March 2011 Consultation proposals and the proposed text of the revised condition has also been published with this consultation. Its intended operation is also aided by our explanations in this consultation and our March 2011 Consultation. Our final statement will set out our analysis of any responses and the basis for our final decision.

We have considered sections 3 and 4 of the Act

3.26 We also consider that the proposed charge control condition continues to fit with our duties under sections 3 and 4 of the Act for the reasons set out at paragraphs 9.63 to 9.65 of the March 2011 Consultation. In particular:

- we consider that the proposed charge control will, in particular, further the interests of citizens and of consumers in relevant markets by the promotion of competition in line with section 3 of the Act.

- we consider that, in line with section 4 of the Act, the charge control will, in particular, promote competition in relation to the provision of electronic communications networks and will encourage the provision of Network Access for the purpose of securing efficiency and sustainable competition in downstream markets for electronic communications networks and services, resulting in the maximum benefit for retail consumers.

Part II of Annex 5: proposed Condition AAAA4(WLR)

Schedule 1 to the notification

Aims and Effects

3.27 Again, as we explained in the March 2011 Consultation, the new proposed SMP condition AAAA4(WLR) requires Openreach to ensure that its charges for WLR rental services and ancillary services do not increase by more than RPI -/+ X that varies according to each individually controlled service. The range of proposed values of X are set out in this document.

3.28 Ofcom’s reasons for imposing this particular form of control and the values of X are set out in the March 2011 Consultation and this document.

Our duties and policy objectives

3.29 As indicated above, we discuss our duties and objectives specific for this review in detail in Section 2 of the March 2011 Consultation and we explain our duties and policy objectives at paragraphs 9.82 to 9.86 of that consultation. For the reasons set out there and in this document, our opinion of the likely impact of implementing the proposals (as discussed throughout this consultation) is that the performance of our general and specific duties under section 3 and 4 of the Act is secured or furthered by our proposal to adopt the charge controls.

Powers under sections 87 and 88

3.30 Section 87(1) of the Act provides that, where Ofcom has made a determination that a person (here, BT) has SMP in an identified services market (here, wholesale fixed analogue exchange lines services within the UK, but not including the Hull Area), Ofcom shall set such SMP conditions authorised by that section as Ofcom considers it appropriate to apply to that dominant provider in respect of the relevant network or relevant facilities and apply those conditions to that person.

3.31 As indicated in Section 9 of the March 2011 Consultation, Section 87(9) authorises the setting of SMP service conditions, including price controls and the setting of rules in relation to recovery of costs and cost orientation. Further, where Ofcom seek to set an SMP condition falling within section 87(9) Ofcom is also required to comply with the requirements of section 88.

3.32 In our opinion, for the reasons set out at paragraphs 9.92 to 9.98 of the March 2011 Consultation, the proposed revised Condition AAAA4(WLR) continues to satisfy section 88.

The section 47 test

3.33 In addition to above-mentioned matters, Ofcom must be satisfied that Condition AAAA4(WLR) satisfies the test in section 47(2) of the Act, namely: objectively justifiable; not unduly discriminatory; proportionate; and transparent.

3.34 We continue to be satisfied that this test is met in relation to the proposed revised condition AAAA4(WLR).

The proposed controls are objectively justifiable

3.35 We explain at paragraphs 9.101 to 9.103 of the March 2011 Consultation why we consider that the proposed charge controls are objectively justified. In our view, none of the revisions to the proposed charge control conditions undermine that objective justification since:

- BT's SMP in the access markets allows it to set charges unilaterally and, in the absence of any controls, Openreach would have the ability to set prices above the competitive level.

- The structure if our charge controls continues to aim to deliver the lowest possible charges to competitors for the wholesale services, while ensuring that Openreach is able to recover costs, including a reasonable return on investment.

- We have reviewed each service within the market so that we have proposed an appropriate level of control for individual services where appropriate.

- The structure of the controls continue to place an incentive on Openreach to continue to seek efficiency gains and it is able to benefit from efficiency achieved that are in excess of that anticipated in the review.

- The proposed revised controls continue to be objectively justifiable in that the benefits of RPI-X price controls are widely acknowledged as an effective mechanism to reduce prices in a situation where competition does not act to do so.

The proposed controls do not discriminate unduly

3.36 We explain at paragraph 9.104 of the March 2011 Consultation why we consider that the proposed charge controls do not discriminate unduly. None of the changes we are proposing change the fact that any CP (including BT itself) can access the services at the charge levels fixed. Further, Ofcom is still proposing only to impose the charge control on BT, the only CP to hold SMP in this market (for the UK excluding the Hull Area).

The proposed controls are proportionate

3.37 We explain at paragraphs 9.105 to 9.106 of the March 2011 Consultation why we consider that the proposed charge controls to be proportionate and we continue to hold that view for the reasons set out.

The proposed controls are transparent

3.38 We explain at paragraph 9.107 of the March 2011 Consultation why we consider that the proposed charge controls are transparent. We are consulting again in light of revisions to our March 2011 Consultation proposals and the proposed text of the revised condition has also been published with this consultation. Its intended operation is also aided by our explanations in this consultation and our March 2011 Consultation. Our final statement will set out our analysis of any responses and the basis for our final decision.

We have considered sections 3 and 4 of the Act

3.39 We also consider that the proposed charge control condition continues to fit with our duties under sections 3 and 4 of the Act for the reasons set out at paragraphs 9.108 to 9.110 of the March 2011 Consultation. In particular:

- we consider that the proposed charge control will, in particular, further the interests of citizens and of consumers in relevant markets by the promotion of competition in line with section 3 of the Act.

- we consider that, in line with section 4 of the Act, the charge control will, in particular, promote competition in relation to the provision of electronic communications networks and will encourage the provision of Network Access for the purpose of securing efficiency and sustainable competition in downstream markets for electronic communications networks and services, resulting in the maximum benefit for retail consumers.

Schedule 2 to the notification

3.40 In Schedule 2 to the notification we propose amending SMP condition AAAA10 to make clear that the obligation imposed on BT by paragraph AAAA10.1 to provide wholesale line rental includes, where also requested by a third party, such ancillary services as may be reasonably necessary for the use of wholesale line rental. We also propose a further consequential amendment to make clear that such ancillary services are to be cost orientated.

3.41 We have made no revisions to our proposals on this set out in the March 2011 Consultation. We consider that that proposed modification meet our duties and the tests under the Act for the reasons set out at paragraphs 9.111 to 9.118 of the March 2011 Consultation.

Conclusion

3.42 As this consultation is an extension of the March 2011 Consultation, we are specifically seeking stakeholder comments on the specific revisions to proposed SMP conditions FAA4(A) and SMP condition AAAA4(WLR). Given the limited changes and the March 2011 Consultation, we consider that a consultation period of four weeks is sufficient and appropriate. We are therefore seeking responses to this consultation by 23 December 2011.

3.43 Following our consideration of the responses to this consultation we will notify our proposals (after making any modifications to them that we consider are appropriate) to the European Commission, BEREC and the regulators in other Member States for EU consultation under section 48B of the Act. In that notification, we will address the responses we have received during this consultation, as well as all other stakeholder comments made in response to our March 2011 Consultation which we have not addressed in this document. We hope to give effect to our proposals (with any appropriate modifications to address any comments we may receive by those EU bodies) by a final decision which we expect to publish by the end of February 2012.

Section 4

No material change assessment

Introduction

4.1 Section 86 of the Act restricts Ofcom from setting an SMP condition other when also making a market power determination unless the condition is set by reference to a market power determination:

a. which has been reviewed and, as a consequence of that review, is reconfirmed in the notification setting the condition; or
b. in a market where Ofcom is satisfied that there has been no material change since the determination was made.

4.2 For the reasons set out below, and in light of the specific characteristics of the WFAEL and WLA market, our provisional conclusion is that condition there has been no material change in either the WLA market or the WFAEL market since Ofcom's market powers determinations in relation to those markets.

WFAEL

4.3 We consider that there is no evidence that the market has changed since our 20 December 2010 review of the WFAEL market (the "WFAEL 2010 Market Review"). In that market review we found BT to have SMP in the wholesale fixed analogue exchange line services market in the UK, excluding the Hull Area. We imposed both general and product specific remedies (i.e. analogue WLR and the need for an associated charge control) so that other communications providers ("CPs") are able to gain access to services that allow them to provide retail products in competition with BT.

Retail market

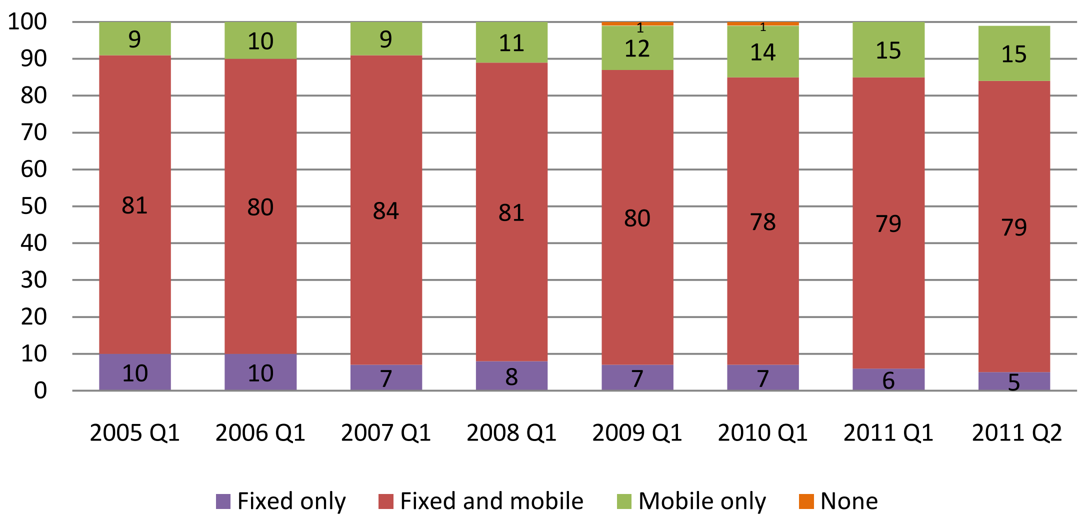
4.4 In the WFAEL 2010 Market Review, we drew on the analysis carried out for the September 2009 Review of the fixed narrowband services wholesale markets ("September 2009 Wholesale Review")[34] and the September 2009 fixed narrowband retail services markets review ("the September 2009 Retail Review")[35]. In the WFAEL 2010 Market Review, we noted that while these market assessments were derived in the September 2009 Retail Review, we did not find evidence that the retail markets had materially changed, or were likely to do so, in the period to April 2014. We therefore, concluded that that the retail markets for fixed narrowband analogue access remained the same as those defined in the September 2009 Retail Review - specifically that there are separate retail markets for: residential fixed narrowband analogue access; business fixed narrowband analogue access; and there are two separate geographic markets: the UK, excluding the Hull Area, and the Hull Area.

[34] http://stakeholders.ofcom.org.uk/consultations/wnmr_statement_consultation/
[35] *Fixed Narrowband Retail Services Markets: Identification of markets and determination of market power*, Statement, 15 September 2009, at http://stakeholders.ofcom.org.uk/binaries/consultations/retail_markets/statement/statement.pdf

4.5 Mobile and fixed access: our original finding that mobile access and fixed access were separate markets in the 2010 WFAEL Market Review was based on the fact that the available evidence indicated that both consumers and business customers considered mobile and fixed line access to be complements and not substitutes. For consumers, our assessment was based on the research showing that around 78% of households had both mobile and fixed line access. We also observed that most businesses in the UK rely on a mix of different communication services; the majority use landline and internet services (88% and 72% respectively); slightly fewer use mobile services (65%) and in a few cases where only a single service is used, business consumers are more likely to be solely reliant on landline phones (17%) than they are on mobile phones (6%).[36] On the basis of this evidence, we concluded that mobile was primarily a complement to fixed services.

4.6 Evidence available since 2010 indicates that the situation has not changed. Consumers still do not appear to consider fixed and mobile as substitutes, insofar as the evidence of take-up shows that the proportion of households having both mobile and fixed line access is slightly higher than in 2010, at 79%, as shown in Figure 4.1. For businesses, there is no evidence to suggest that the position in relation to fixed line access has changed.

Figure 4.1: Household penetration of fixed and mobile telephony (per cent)



Source: Ofcom/operators

4.7 Digital and analogue access: our original conclusion on digital and analogue access being in separate markets was based on evidence that most consumers largely considering that the two forms of access offer different functional capabilities at distinct price points and, therefore, separate markets. The path of substitution considered in 2010 was between the analogue access and ISDN2. It was clear, that if ISDN2 was not in the same market as the analogue lines, this would equally apply to the larger, more functionally diverse and more expensive ISDN30 lines whose use requires substantial upfront investment not required for analogue lines or ISDN2.

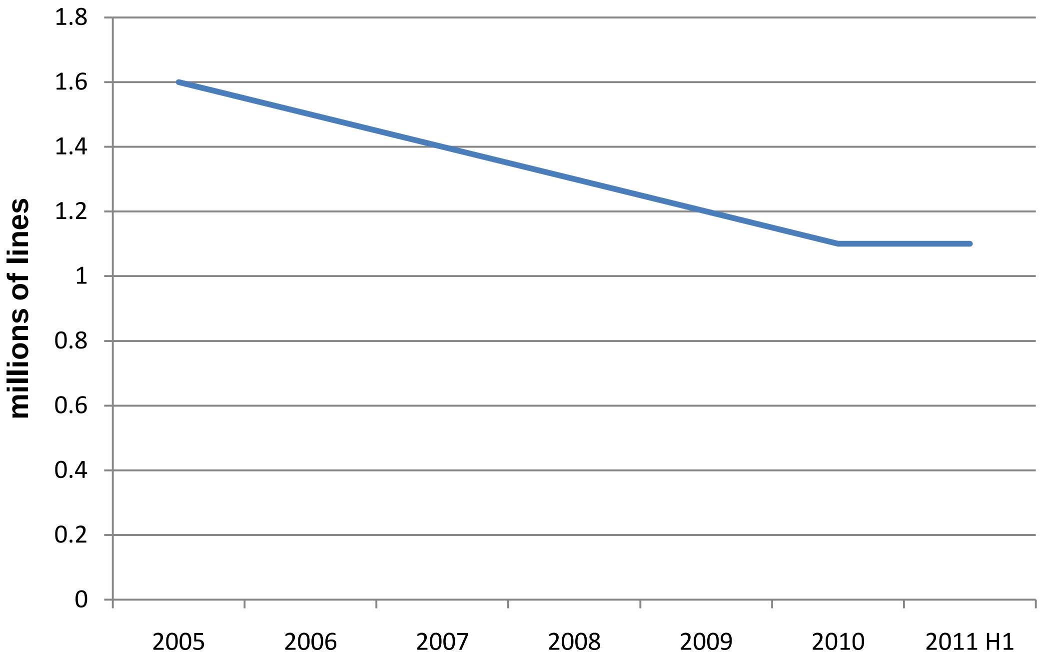
[36] *Business Consumer Experience: Research Document,* 7 December 2010 at http://stakeholders.ofcom.org.uk/binaries/research/consumer-experience/tce-10/business-consumer-experience.pdf

4.8 In the 2010 WFAEL Market Review, we noted the functional differences between the analogue lines and ISDN2 and the substantially higher charges for ISDN2. The review argued that there was no clear substitution path between these services for the majority of analogue users.

4.9 Figure 4.2 below shows that the number of ISDN2 lines has fallen from above 1.6 million connections in 2005 to just below 1.2 million in 2011. There is no evidence of a corresponding increase in analogue lines, over that period. The implication is that ISDN2 users are moving to other services (for example, alternative broadband based services) (see Figures 4.2 and 4.3).

4.10 The difference in price between BT's ISDN2 product and BT's analogue line rental also remains high. For example BT's ISDN2e product starts at £96.54 per quarter[37], whereas line rental of BTs analogue line is significantly less (between £10 and £13.90 per month[38]). Further, ISDN2 continues to provide the same functional advantages over BT's analogue product as in 2010.

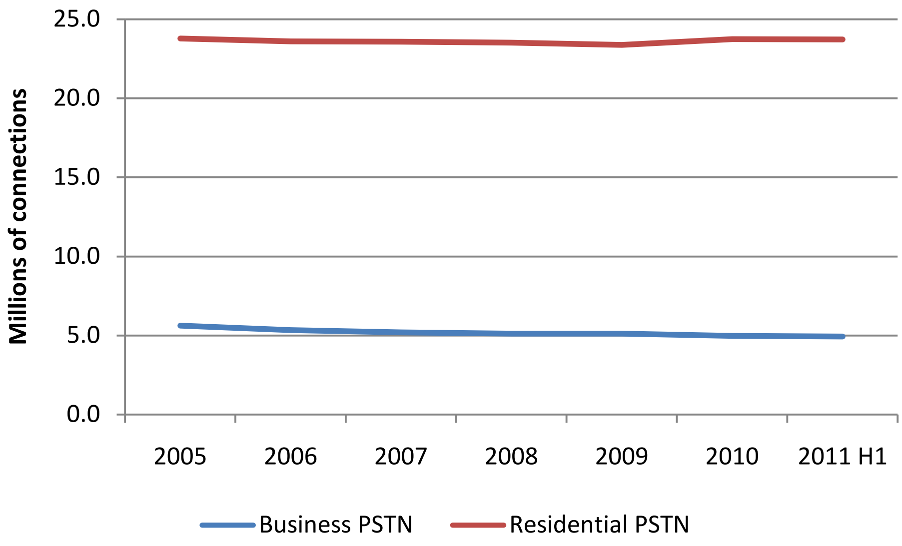
Figure 4.2: Number of ISDN2 lines



Source: Ofcom/operators

[37] BT's business website, 26 October 2011
[38] BT Retail website, 18 November 2011

Figure 4.3 Number of Fixed line connections



Source: Ofcom/operators

4.11 Fixed access and fixed calls: In the 2010 WFAEL Market Review we concluded that fixed access and fixed calls were in separate markets. Our assessment was based on our 2008 Communications Market Report residential survey, that indicated that in the most cases (88%) access and calls were purchased together. However, a significant minority (38%) of customers who buy access or calls from BT, and 24% of customers who buy both access and calls from rival suppliers to BT, consider the two to be separate purchases. These views were also reflected in consumer responses to the question of how they would behave in response to a hypothesised 10% price rise in BT's access pricing. Similarly, our 2009 Retail Review survey evidence indicated that while SME businesses chose their supplier by assessing the total cost of access and calls, the majority regard access and calls as separate products and are prepared to switch either access or calls products or both in response to changes in price.

4.12 The evidence of separate markets was further supported by the evidence that the demand for fixed access remained relatively constant while the use of fixed calls was diminishing.

4.13 The evidence we have considered in this assessment does not suggest that the situation has changed since 2010. As Table 4.1 shows, fixed calls continue to decline in absolute and relative (to mobile) terms while demand for fixed access remains relatively constant as shown in Figure 4.3.

Table 4.1 Volumes of Fixed and Mobile Calls (millions of minutes)

	Fixed	Mobile
2010 Q1	34399	31637
2011 Q1	30924	31016

Source: Ofcom/operators

4.14 Alternative forms of network infrastructure used to offer fixed narrowband analogue access are in the same market. The 2010 review based its conclusion on consumer research[39] which suggested that consumers considered alternative forms of fixed access provision such as the services provided using a cable network or LLU to be in the same market.

4.15 While we have not undertaken further research, the available evidence of the maintenance of cable market share and the continued growth in LLU (see Figure 4.4) suggests that consumers are continuing to substitute between the alternative services.

4.16 Residential and business access. Figure 4.3 above shows that the residential and business markets have remained relatively stable since 2010. The main distinction between the markets is in the provision of the services bundled with the narrowband access line (for example support for business call management and the level of service reliability demanded by average business consumer compared to average residential consumer. Basic business lines are between 15-50% more expensive (BT's entry charge is £15.50 per month[40]) than residential but, at a minimum, come with quicker fault response and technical support for additional business services.

4.17 Therefore, we do not see any evidence that there has been a material change that would lead us to change our conclusion of 2010 that the retail residential and business markets are separate.

4.18 There is a single UK geographic market (excluding the Hull Area) and a separate geographic market in the Hull Area. In the WFAEL 2010 Market Review, we concluded that there was a separate geographic market for business and residential analogue access in the Hull Area.

[39] *Consumer Preferences in Narrowband Communications: Research Report*, Research Document, 19 March 2009, at http://stakeholders.ofcom.org.uk/binaries/consultations/retail_markets/annexes/consprefs.pdf and *SME Preferences in Narrowband Communications: Research Report*, Research Document, 19 March 2009, at http://stakeholders.ofcom.org.uk/binaries/consultations/retail_markets/annexes/smeprefs.pdf
[40] BT website 18 November 2011

4.19 Since 2010, there has been no further entry in the Hull Area by CPs offering national services. Therefore, we consider that there has been no material change since the last review.

Wholesale market

4.20 The WFAEL 2010 Market Review concluded that the relevant wholesale markets are: wholesale fixed analogue exchange line services in the UK, excluding the Hull Area; and wholesale fixed analogue exchange line services in the Hull Area.

4.21 Mobile and Fixed access are in separate markets: In the WFAEL 2010 Market Review, we did not consider mobile and fixed line access to be either direct or indirect substitutes at the wholesale level based on the evidence of consumer perception referred to in our discussion of the retail market above.

4.22 As we also set out above in our retail discussion, the available evidence on 'mobile-only' households and evidence of the behaviour of businesses suggests that there has been no material change that would affect our conclusion that most customers continue to consider mobile and fixed access as complementary rather than substitute services.

4.23 Alternative forms of fixed networks are in the same market: In the September 2009 Retail Review we found that a 10% increase in the retail price for line rental would result in 22% of consumers switching their landline provider.[41] Thus, a substantial increase in wholesale WLR charges would lead to a migration to alternative fixed networks. Therefore, we concluded in 2009 and in 2010, that cable access and full LLU-based access provided sufficient constraints on the hypothetical monopolist such that we should broaden the market to include the supply of wholesale exchange lines using LLU and cable.

4.24 The available evidence suggests that there has been no material change to our finding that cable, full LLU and WLR-based providers compete. Set out below, in Table 4.2, is the market share (in lines served) between these three access technologies since 2009.[42] The growth in the share of full LLU lines continues at the rate observed in the WFAEL 2010 Market Review; which in part reflects a number of CPs shifting their demand from WLR to LLU. This suggests that consumers continue to see services based on LLU, and services based on WLR, as retail substitutes. Cable is more stable but evidence from marketing material and retail prices suggests that cable services are likely to compete with both LLU and WLR providers for access lines (standard line rental BT £13.90, TalkTalk £13.80, Sky £12.25, Virginmedia £13.90)[43].

[41] While this number is likely to overstate actual switching activity in the hypothesised case where there is no SMP regulation requiring the provision of WLR, we consider that it provides us with a useful proxy for switching in that notional world. Specifically, consumers stated preferences relate to the exchange line service being offered and not the underlying technology used to deliver that product.

[42] Source: http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/wlr-cc-annexes.pdf. These calculations are based on volume forecasts provided by operators.

[43] Websites of BT, TalkTalk, Sky and Virginmedia as at 18 November 2011.

Table 4.2: Line Market Shares in the UK (excludes the Hull area)

	2009/10	2010/11	2011/12
LLU	8%	13%	18%
WLR (BT)	75%	70%	66%
Cable (Virgin Media)	17%	16%	16%

Source: Ofcom/operators

4.25 There is, therefore, no evidence that suggests a material change in the basis for our views about the constraint that a hypothetical monopolist would face from the supply of wholesale exchanges line using full LLU and cable.

4.26 Residential and business access services are in the same market: In the September 2009 Wholesale Review, we considered that, unlike retail customers, wholesale customers viewed the analogue exchange line services used to support residential and business retail services as sufficiently interchangeable as to be effective substitutes. We considered that the difference between residential and business services was the service levels and associated services provided. In that review we therefore concluded that residential and business services were in the same market. This was endorsed in the 2010 WFAEL review. The available evidence does not suggest a material change in the market that would cause this conclusion to be revisited. In fact, the wholesale services are now structured so that all services can be offered to businesses and residential customers. All wholesale services are now based on a core requirement, WLR Basic with customers then being offered differing care levels depending on their needs. This change, which we do not consider to be material, is consistent with (and indeed, strengthens) our earlier conclusion.

4.28 Digital and analogue access are in separate markets: As discussed above, we believe that there are separate analogue and digital markets at the retail level. In the WFAEL 2010 Market Review we noted that this led to the conclusion that wholesale analogue and wholesale digital services were not substitutes.

4.29 We do not see any evidence of a material change in the market relevant to this conclusion. The available evidence remains consistent with the conclusion of separate retail markets (for example, there is no evidence of demand-side substitution). Wholesale prices are different. We therefore do not see any evidence that would suggest a material change to our 2010 conclusion.

4.30 NGA: The term "next-generation access" or "NGA" is commonly used to describe technological upgrades to current generation access ("CGA") networks. These upgrades support higher-speed broadband services. At the time of the September 2009 Retail Review, Virgin Media had upgraded its cable access network to DOCSIS 3.0 and BT had announced plans to upgrade 40% of its network, using a combination of FTTC[44] and FTTP[45], by the end of 2012. By the WFAEL 2010 Market Review, BT had deployed FTTC to about 2 million homes (approximately

[44] Fibre-to-the-cabinet
[45] Fibre-to-the-premises

7% of its network) and had announced an extension to its original plans - 66% of its network by 2015[46].

4.31 We noted in the WFAEL 2010 Market Review that we did not expect NGA deployment to have a significant effect on the market for narrowband analogue access services. Virgin Media's DOCSIS 3.0 upgrade and BT's FTTC upgrade only affected their broadband services - their retail narrowband service remains unaffected. In the case of BT's FTTP upgrade, at the time this was intended to be deployed as an overlay to its existing copper network. Thus, BT expected that customers would continue to purchase the existing narrowband services, although BT considered it possible that the narrowband service could be delivered over the FTTP network in future. However, since the retail service provided to the end-user would be broadly the same and given that consumers were likely to consider fixed narrowband access (which are technically identical or very similar) to be substitutes regardless of the underlying network, we considered that any wholesale narrowband access services delivered over BT's FTTP network would fall within the scope of the wholesale analogue exchange lines market. Therefore, we did not expect these NGA deployments to affect the definition of the market for wholesale fixed analogue exchange line services.

4.32 Since 2010, there has been no material change to the structure of the proposed NGA deployment by BT or Virgin. NGA deployment continues to be largely an overlay service except in the very small number of cases where FTTP is proposed in Greenfield or trial sites – which is not material, given its small scale compared to the overall (national) market. Accordingly, we do not consider there has been any material change that would affect that our conclusions concerning on NGA's impact on the market in the period under consideration (to 2014).

4.33 <u>VoIP.</u> In our WFAEL 2010 Market Review we noted that whether or not consumers were increasing their use of VoIP technology, it was unlikely to impact our market definition.

4.34 VoIP services provide consumers with an alternative way of making and receiving calls. As such, they may potentially become candidates for inclusion in the same market as calls made over the public switched telephone network - they are not an alternative method of access in the UK given the nature of broadband provision (see below).

4.35 Consistent with the position noted in the WFAEL 2010 Market Review, at the current time nearly all fixed broadband services are only made available after the customer has already purchased a fixed narrowband access service. To our knowledge Virgin Media is the only network operator who is currently offering a broadband service without requiring the customer to also purchase a narrowband access service.[47] However, take-up of Virgin Media's 'broadband-only' service has been very low and we believe that this is directly related to the price. For example, for customers already purchasing a narrowband line, at £13.90 per month, Virgin Media's 30Mbit/s[48] broadband service is available for an additional £18.50 per month, however, the price for a 30Mbit/s broadband-only service is £28.50 per

[46] BT expects 75% of its network upgrade to be based on FTTC with the remainder being based on FTTP.
[47] We are aware that there are a number of providers who only provide broadband services, however, the end user is still required to purchase a narrowband access product, albeit from a different provider.
[48] In February 2011 Virgin Media stopped offering its 20Mbit/s service to new customers, and in its place launched a new 'up to' 30Mbit/s service.

month.[49] A saving of £3.90 per month if a customer only purchases a broadband line must be weighed against the fact that the broadband only customer must pay the installation fee of £49.95 (which is normally waived when broadband is purchased alongside a phone line (i.e. narrowband access)). The incremental cost of to consumers adding narrowband to broadband access connection is, therefore, very low. As such even consumers who intend to use VoIP for their fixed location calls may generally continue to purchase fixed narrowband access given its low marginal cost rather than rely on VoIP solely for fixed location access and calls.

4.36 In the WFAEL 2010 Market Review, we noted that Virgin Media's prices may well reflect the costs of deploying and operating a fixed access network. That is, the incremental cost of adding narrowband access (i.e. to allow the consumer to make calls) to the fixed access connection is likely to be quite low. Indeed, we consider that this is likely to be the reason why no other communications provider is offering broadband-only services.

4.37 Further, there is no evidence of any change in consumer behaviour. Fixed line access remains largely static.

4.38 In the light of this evidence, we do not consider that there has been a material change to the market that impacts on our WFAEL 2010 Market Review conclusion that VoIP is not a substitute for narrowband access, or that the prospective growth in VoIP usage has any direct implications for our market definition.

4.39 Geographic markets. In the WFAEL 2010 Market Review we found there were two distinct geographic markets: the Hull Area and; the remainder of the UK. This was on the basis of behavioural evidence, and evidence of economic incentives on BT that a common pricing constraint exists across the UK in the WFAEL market and that there was a national market (excluding the Hull Area). It was also clear that the Hull Area remained a separate market due to the differences in supply.

4.40 The arguments for considering there to be common pricing constraints across the UK excluding the Hull Area remain sound and unchanged.

4.41 We go on to consider whether there has been any material change to competitive conditions in the WFAEL market.

Competitive conditions in the WFAEL market in the UK excluding the Hull Area

4.42 In the WFAEL 2010 Market Review we had regard to evidence that:

- BT's market share of wholesale analogue exchange lines was over 70%, which gave rise to a presumption of market power.

- The significant (sunk) investment required to set up an access network presented a substantial barrier to entry. While LLU reduced the cost of deploying access network products (as it allows a CP to use BT's existing infrastructure) the investment required to deploy narrowband services over LLU remained substantial and it seemed unlikely that additional CPs would enter this market based on LLU, though existing communications providers were continuing to increase in market share.

[49] Prices from Virgin Media's web site as at 25 October 2011.

- BT had significant economies of scale and scope in the WFAEL services market, due mainly to its access infrastructure, which was able to support a range of other communication services.

- We did not consider that other CPs were likely to possess sufficient countervailing buyer power to undermine BT's market power given the limited availability of alternative suppliers.

- We noted that BT's prices had been charge controlled for analogue WLR and BT has so far set its analogue WLR charge to the maximum level permitted by the charge control.

- We noted that the new upstream access remedies recently introduced under the WLA market could possibly provide a competitive constraint in this market in the future, but that it was too early to assess the likely impact.

- We concluded that LLU was unlikely to have a significant effect on BT's SMP in this market in the next three and a half years.

- We did not expect any significant changes over the next three and a half years that followed our review (i.e. up to 2014) that would affect our proposed conclusions.

4.43 Overall, we considered that BT's market share was strong evidence of SMP and that there were no features of the market that would overturn the presumption of SMP.

4.44 A number of the points noted above remain unchanged. We will consider these briefly below before turning to those more susceptible to change.

4.45 Infrastructure: The core economic features of BT's (sunk) infrastructure advantage remains unchanged, as do the significant economies of scale and scope in the industry. There have been no substantial initiatives in new infrastructure developments and while there is some consideration of alternative supply in the future (via our determination on Physical Infrastructure Access ("PIA")), any material impacts of those projects remain outside the timescale of the 2010 review and therefore, this assessment.

4.46 Supply: BT remains the major significant wholesale service provider of access services and the only major CP not focussed primarily on self-supply. Thus there remains no real scope for countervailing buyer power (arising from a credible threat to switch) within the timescale of the WFAEL 2010 Market Review.

4.47 Charging: BT's prices for relevant services appear to be determined significantly by the controls imposed on it rather than by market forces, consistent with a finding of SMP.

4.48 We has assessed whether there has been a material change in the other three factors:

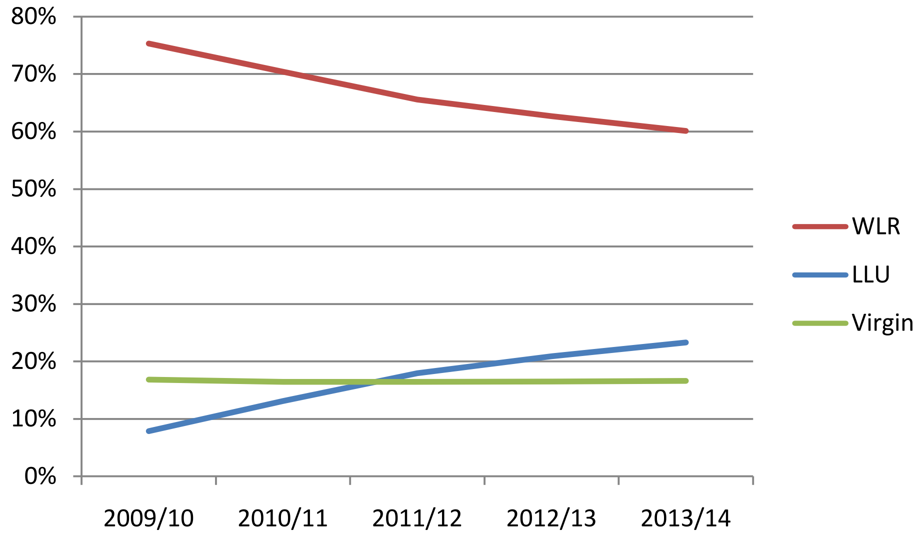
- Market share;

- Progress on upstream access remedies; and

- Impact of full LLU.

4.49 Market share: Figure 4.4 below shows market shares based on the volumes for wholesale access services published in the 2010 LLU Charge Control consultation.[50] These represent actual data for 2009/10 and forecasts[51] for the remainder of the period to 2013/14. These figures forecast BT's market share in WFAEL to be 62% in 2011. Figure 4.4 also shows that although BT's market share is forecast to decline gradually, it remains high. Between 2009/10 and 2010/11, BT's share was projected to fall by around 5%. This trend is observed in 2011/12 and is projected to continue, albeit at a slower rate in future years. Therefore, our provisional assessment is that there has been no change to BT's market share since the WFAEL 2010 Market Review that would constitute a material change for the purposes of this assessment.

Figure 4.4: Market share of wholesale fixed exchange lines to 2014



Source: Ofcom/operators

4.50 Progress on upstream remedies: The WLA 2010 Market Review instituted a new set of access conditions on BT which were further upstream than LLU – that is, access to BT's ducts and poles (PIA). PIA will allow competitors to deploy their own NGA infrastructure from customer sites to the local exchange, using BT's duct and pole infrastructure, to provide services such as broadband and telephony.

4.51 BT has released its full reference offer for PIA[52]. At present there are no committed plans for the use of PIA, though we understand there is interest in using these products for extension of broadband to those areas of the UK not currently well served, as well as potential use by alternative network provider within existing more highly competitive broadband areas.

[50] Source: http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/wlr-cc-annexes.pdf.

[51] Forecast provided by Openreach based on consultation with CPs and assessment of current market trends. This forecast was presented in our 31 March consultation.

[52] http://www.openreach.co.uk/orpg/home/products/ductandpolesharing/ductandpolesharing/ductandpolesharing.do

4.52 The announced use of PIA is consistent with our expectations as set out in the WFAEL 2010 Market Review. While it is difficult to anticipate precisely the extent of PIA use, we do not consider that the available evidence suggests its use will have a substantive short-term change on overall national market competition within the term of the WFAEL 2010 Market Review (i.e. up to 2014). Accordingly, and given that this picture has not changed since our 2010 Market Review, we do not consider that there is any material change in the market that would affect the conclusions in that review.

4.53 Full LLU impact: As we have noted above, the investment required to deploy an access network presents a substantial barrier to entry in the market for the wholesale supply of analogue exchange lines. Full LLU was imposed as a remedy in the upstream WLA market to provide access to BT's access network for providers of narrowband and broadband services.[53]

4.54 However, while LLU reduces the barriers to entry it is unlikely that significant additional entry will occur based on LLU in the next few years. This is because LLU requires CPs to make a sizeable fixed investment in each local exchange. In order to be able to recover the investment costs an LLU operator needs to secure a significant group of customers in each local exchange. This has two consequences:

- LLU will rarely be used in small exchanges (i.e. exchanges that do not serve many customers). Consistent with this view, LLU is currently in use in about 2,000 exchanges, which cover approximately 89% of premises. LLU is not in use in the remaining 3,500 or so exchanges, which cover approximately 11% of premises.
- The number of LLU operators that can achieve the required scale will be limited. Even in the exchanges where LLU has been used, there are currently only four main LLU operators (Cable &Wireless ("C&W"), O2, Sky and TalkTalk Group ("TTG")). Eighteen months ago there were six main LLU operators. Since then, however, Tiscali has been acquired by TTG and Everything Everywhere has decided to use BT wholesale products rather than LLU.

4.55 Also, LLU expansion is driven by fixed broadband demand. Customers seeking narrowband alone are not currently served by operators using an LLU-based service (although some of those operators also offer WLR-based services) and we do not consider this is likely to change in the period relevant to this assessment.

4.56 As set out earlier, while full LLU's share of access lines has continued to rise in line with expectations, BT retains a market share of around 60% and is forecast to retain over 50% of the market for the remainder of the WFAEL 2010 Market Review period. In addition, the rate of growth for full LLU is showing signs of slowing, which is consistent with the known limits of its expansion.

[53] *Review of the wholesale local access market: Identification and analysis of markets, determination of market power and setting of SMP conditions - Explanatory statement and notification*, 26 August 2004, at http://stakeholders.ofcom.org.uk/binaries/consultations/rwlam/summary/rwlam2.pdf.

Question 4.1: Do you agree with our assessment that there has been no material change in the WFAEL market since our market power determination that BT had SMP in WFAEL 2010 Market Review? If not, please explain your reasons.

WLA

4.57 We consider that there is no evidence that the market has changed since our 7 October 2010 review of the WLA market (the "WLA 2010 Market Review). In that market we found BT to have SMP in wholesale local access services in the UK excluding the Hull Area. To address BT's SMP, we required BT to provide LLU on cost-oriented terms and subject to charge controls.

Downstream markets

4.58 Demand from end users for various communications services drives the demand for local access connections. A fixed local access connection continues to be an integral element in the delivery of retail services such as voice telephony, (asymmetric) broadband internet access and some symmetric broadband (leased line) services for end users.

4.59 In addition, there are wholesale (intermediate) markets downstream of WLA but upstream of retail services. In our 2010 WLA Market Review, our starting point was the set of retail markets that lie downstream of WLA. In addition, as we assume the absence of upstream regulation, suppliers of local loop connections, or potential substitutes, would not necessarily make local access products available at the wholesale level to third parties (such as LLU or sub loop unbundling ("SLU") remedies imposed as a result of previous findings of SMP in the relevant market). The downstream markets serviced by local access products are: the markets for fixed narrowband exchange lines; asymmetric broadband access.

Wholesale market

4.60 The wholesale market assessment concluded: the market includes loop-based, cable-based and fibre-based local access at a fixed location; it excludes mobile-based, fixed wireless-based and satellite-based access; there is a single market for WLA connections which are used for business and residential use; and there are two geographic WLA markets (the UK excluding Hull and Hull).

<u>Copper loop-based, cable-based and fibre-based local access at a fixed location</u>

4.61 Our starting point in the WLA 2010 Market Review was to consider whether a distinct wholesale market existed for loop-based local access connections only since the majority of connections to end user premises involve such loops. We then considered the candidate substitutes for this product and the extent to which these impose a sufficient constraint so as to be included within the scope of the relevant market. In the assessments noted below, we have considered whether there has been a material change that would cause us to revisit these conclusions.

4.62 <u>Cable.</u> We considered the indirect constraints from cable-based local access at the retail level provided by Virgin Media and whether it was sufficient to render a price increase at the wholesale level unprofitable. Our conclusion, in the WLA 2010 Market Review was that it was likely to act as constraint and that the wholesale market should be broadened to include cable-based local access within the same market as loop-based local access.

4.63 The evidence from retail pricing is that Cable, as provided by Virgin Media, directly competes with other forms of local access. As noted in the WFAEL section above, cable provision of narrowband service is in the same market as copper provision. The retail cable prices for broadband are also clearly marketed to directly compete with copper based services – Virgin Media up to 30 Mb service is charged at £18.50 per month compared to BT's up to 20 Mb at £18 per month[54].

4.64 Accordingly, our provisional assessment is that there has been no material change in relation to that conclusion in the WLA 2010 Market Review.

4.65 Fibre-based NGA: The WLA 2010 Market Review considered whether NGA using fibre should be included in the market definition. We noted the current state of the market (fibre-based services are an overlay to BT's copper and Virgin Media's cable networks). To encourage take up, some operators had priced the new, higher speed services competitively compared to top-end current generation products (setting relatively small price differentials between these products). Our demand-side substitution analysis in the WLA 2010 Market Review showed a hypothetical monopolist providing NGA services would be constrained by consumers potentially switching to copper based services. On this basis we considered that fibre-based local access should be included within the scope of the relevant wholesale market.

4.66 As noted previously, NGA take up is still at a nascent stage with no current material impact on local access conditions, although, consistent with the finding in the WLA 2010 Market Review, NGA take up is expected to emerge by 2014.

4.67 BT's roll-out plan will see NGA availability be available to around 65% of households by the end of 2014, though take up will substantially lag this roll out. However, marketing of NGA services (principally by BT at this stage) is linked to the higher end of current generation service – BT is charging £18 per month for its up to 20 Mb current generation service and £18 per month for its up to 40 Mb Infinity service.[55] This suggests that such NGA services are expected to be within a chain of substitution that links them with current generation service.

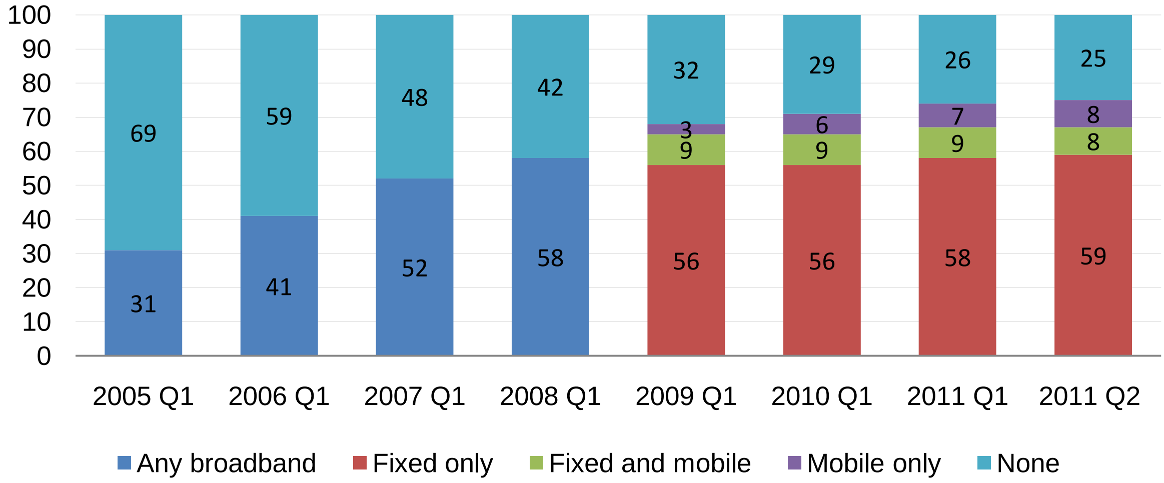
4.68 In addition, for now almost all NGA services are provided via BT's overlay network, ie using the existing copper path from the cabinet with voice services provided in the traditional manner. Accordingly, given the nature of the existing NGA network and the expected chain of substitution in the service provision, our provisional assessment is that there has been no material change in fibre-based NGA deployment that would cause us to revisit the conclusions of the WLA 2010 Market Review.

4.69 Mobile access: in our WLA 2010 Market Review we concluded that despite the developments in mobile broadband access technology and the availability and take up of retail packages, mobile broadband access is predominantly considered as complementary to existing fixed broadband services.

[54] BT and Virgin Media websites as at 21 November 2011
[55] BT website as at 21 November 2011

4.70 As shown in Figure 4.5 below, in the period since the WLA 2010 Market Review, the observed trends in the proportions of households taking fixed line only, mobile access only and both mobile and fixed access since 2010 have continued. These changes, which we do not consider to be material, indicate that the proportion of mobile only households has continued to grow slightly, as has the proportion of fixed only households, with the proportion of households taking both fixed and mobile services remaining broadly constant. On this basis, our provisional assessment is that there has been no material change to market conditions that would affect our conclusion that mobile and fixed services continue to be seen as complements rather than substitutes.

Figure 4.5 Household penetration of fixed and mobile broadband (per cent)



Source: Ofcom

4.71 Fixed wireless access: the WLA 2010 Market Review also noted that retail market analysis suggested that fixed wireless access services are currently priced and positioned as a cheaper alternative to symmetric digital subscriber line ("SDSL") and therefore targeted primarily at SMEs. The nature and pricing of symmetric services (often priced at over 10 times an asymmetric digital subscriber line ("ADSL") service used for residential broadband) suggested that there were significant differences in the retail demand characteristics between ADSL and SDSL, and accordingly, the WLA 2010 Market Review concluded that one is unlikely to be a substitute for the other. However, we also noted that, given the current take-up of fixed wireless access, it would be unlikely to make any material difference to our SMP findings even if it was included in the market.

4.72 Fixed wireless access has not grown materially since 2010, so our provisional assessment is that there has been no material change relevant to the conclusion reached in the WLA 2010 Market Review.

4.73 Satellite: with respect to satellite-based local access, our assessment in the WLA 2010 Market Review was that higher retail price of satellite telephony services mean that there is unlikely to be sufficient demand from business customers (and even less demand from residential customers) switching to undermine the profitability of a 10 per cent SSNIP at the wholesale level. The lack of indirect constraints from the retail level suggest that satellite-based local access is more appropriately considered to be outside the scope of the relevant wholesale market. The WLA 2010 Market Review survey of prices from satellite based access providers revealed that whilst monthly charges for basic packages at that time could be comparably priced to ADSL services[56] –upfront charges for hardware, installation and surcharges were quite significant; above £200. Moreover the standard contract term was for 24 months.

4.74 We have considered whether there is any evidence of a material change in the satellite market. It remains a less attractive retail offering compared to fixed line services (the terms are not substantially changed since 2010[57] [58], largely due to the additional hardware options and restrictions on total data transfer limits. While there will be some demand for such services where fixed line services are limited, our provisional assessment is that there has been no material change suggesting that such services offer a more competitive service than considered in the WLA 2010 Market Review.

4.75 Business and residential: We noted in the WLA 2010 Market Review that despite the differences between business and residential services at the retail level, such distinctions do not apply at the wholesale level. The loop and cable connections used for residential applications are essentially identical to those used for business use, even if they support different retail services, including leased lines and ISDN services. In this respect, provision of local access is different to provision of retail services, where business and residential customers might be expected to have different demands for supplementary services. As such we considered it appropriate to define a single WLA market for supply to both residential and business customers.

4.76 Our provisional assessment is that there has been no material change that would undermine these conclusions. The wholesale products remain undifferentiated. Communications providers use the revised regulated wholesale services without any requirement to specify customer types. Furthermore the pricing for the narrowband and broadband services at the retail level are differentiated by the quality of the services provided over the WLA line.

4.77 Self-supply: In the WLA 2010 Market Review, we considered that if there were no regulatory requirement to provide a wholesale service, such as LLU or wholesale broadband access ("WBA"), such services are not be likely to be offered to third parties. As a result, the only services would be those that are used by the network operator to serve its own retail arm ("self-supplied"). Self-supplied service could provide an indirect constraint on the pricing of the copper-based broadband products. Therefore we included within the defined market the supply of wholesale products by other operators to themselves in order to be able to offer a retail broadband service (even though at that time there was limited evidence of any self-supply aside from Virgin Media).

4.78 We have not seen any substantial self-provision since the WLA 2010 Market Review, which we consider unsurprising given the availability of regulated wholesale access.

4.79 Geographic markets: In the WLA 2010 Market Review we concluded that there were separate geographic markets for the UK excluding the Hull Area, and the Hull Area. We concluded that there was a single market in the UK excluding the

[56] Basic packages for 6Mbps download access costs around £19.99 per month; charges are significantly higher for higher speeds.

[57] http://www.toowaybroadband.co.uk/order_now.php

[58] http://www.broadbandwherever.net/home.aspx?gclid=CJei966RrqwCFYEZ4QodrCB0GQ

Hull Area. The conclusion that there was a separate WLA market for the Hull Area followed from the nature of the copper loop infrastructure. Our finding of a common pricing constraint suggests that the market was national in scope, although we recognised that the market exhibits local characteristics (i.e. direct cable competition in some areas).

4.80 The arguments for considering there to be common pricing constraints across the UK excluding the Hull Area remain sound and unchanged.

4.81 NGA. PIA will allow roll-out by non-BT NGA providers. At present while there are plans by Broadband Development UK ("BDUK")[59] for the funding of NGA into areas not subject to likely commercial interest. The take-up of any services, and hence the impact of that activity, is likely to become material in the period beyond 2014 (ie outside the scope of this assessment). Finally, the nature of such BDUK deployments is such that they are limited to specific areas and even if they were accelerated, are unlikely to be material in relation to a national wholesale market.

4.82 Aside from BDUK, we are not aware of any current plans for large scale or substantial regional developments that might impact on our WLA 2010 Market Review conclusions.

4.83 Local new build access: The development of local new build access continues to represent a minor element of the market and not one that has changed since 2010. With the continued below average level of activity in new housing development in the current economic climate[60], it is likely that the growth of local new build access remains no higher throughout the forward look period of the WLA 2010 Market Review than might have been expected even at the time of that review.

4.84 Local pricing: BT has not moved to local pricing nor has it signalled any intention of doing so.

4.85 We go on to consider whether there has been any material change to competitive conditions in the WLA market.

Competitive conditions in the WLA market in the UK, excluding the Hull Area

4.86 In the WLA 2010 Market Review we concluded that BT has SMP in the WLA market in the UK excluding the Hull Area. In reaching this decision, we first considered evidence of market power based on market share. As with the WFAEL market, we do not consider the Hull Area market since this review is only concerned with imposing a charge control on BT and not KCOM.

4.87 Based on information received through requests to relevant operators, in the WLA 2010 Market Review we estimated BT's and Virgin Media's market shares of the UK (excluding Hull) to be 84 per cent and 16 per cent respectively. The BT market share of 84 per cent at that time created a presumption that BT had significant market power. These market shares were based on the percentage of active BT lines used by LLU operators.

[59] BDUK is a team within DCMS that was set up to deliver the Government's broadband strategy, bringing superfast broadband to all parts of the UK.
http://www.culture.gov.uk/what_we_do/telecommunications_and_online/7781.aspx
[60] http://communities.gov.uk/publications/corporate/statistics/housebuildingq12011

4.88 In the WLA 2010 Market Review, we acknowledged that it was possible that, in the absence of regulation of the WLA market, LLU-based entry would not have occurred and Virgin Media could then have won some additional market share currently taken by LLUOs. This would have reduced BT's share of the WLA market to some extent. However, we noted that Virgin's market share has not changed significantly since 2004, despite the growth of LLU in this period. This suggested that Virgin's share might not have been markedly higher even if LLU-based entry had not occurred, although it is not possible to reach a definitive conclusion about what would have happened in the absence of LLU. Moreover, given the level of BT's market share a substantial change in Virgin Media's success and hence market share would have been required to have altered our findings.

4.89 We did not expect any significant changes over the next four years (ie up to 2014) that would affect our conclusions regarding BT's position in the market since, as noted above, the market share for the cable network has not shown any significant change since the last market review in 2004, and the cable network was at the time limited to around half of the UK.

4.90 Further, we regarded it as clear that Virgin Media did not have SMP in the market. Virgin Media's current market share was 16 per cent and, even allowing for the possibility that this could have been somewhat higher in the absence of LLU, it was well below the level at which a firm can be considered to have market power. As the geographic scope of the market is national, it is the national market shares that give the best indication of market power and which indicate the extent to which BT would feel constrained by Virgin Media when setting prices.

4.91 We rejected the possibility of there being joint dominance between BT and Virgin Media in the UK excluding the Hull area. This was because BT is significantly larger than Virgin Media on a market share basis, and Virgin Media was present in only around half of the UK, so we did not consider that there was any realistic prospect of BT and Virgin Media being jointly dominant. Given its relative size and its coverage, we considered that Virgin Media would not pose a threat to the majority of BT's customer base and as a result Virgin Media would have little ability to induce cooperation through the implicit threat of a price war.

4.92 We also considered the possibility for new entry to constrain operators, and proposed that BT's lead in terms of market share is sustained by significant barriers to entry and expansion. The size of the investment necessary to construct a local access network, and the associated risk, make it unlikely that BT would be constrained by new entrants or the threat of new entry. The WLA 2010 Market Review did not find evidence of significant new investment in local access networks.

4.93 Furthermore, we considered that countervailing buyer power would not constrain BT's market power in this market. A purchaser of WLA would need to build its own infrastructure to connect to that of the access provider and once completed, switching to another provider would be difficult. Existing wholesale purchasers (LLU operators) have already built their networks to connect with BT and switching to a cable access product would be difficult. In the absence of SMP regulation, it seems possible that neither BT nor Virgin Media would offer a WLA product to third parties. Were they to do so, an entirely new purchaser buying WLA products in the cable area could have some degree of buyer power where it could bargain simultaneously with both BT and Virgin Media. However, we were not aware of any such purchaser emerging and hence we considered that this did not affect our analysis.

4.94 Overall, having applied the criteria, in the WLA 2010 Market Review, we considered that BT's market share was strong evidence of SMP and that there were no features of the market that would overturn or modify the proposed conclusions that derived from our market share analysis.

4.95 We have considered the available evidence regarding market conditions, in light of the SMP assessment made in the WLA 2010 Market Review, to assess whether there has been a material change.

4.96 Market Share: BT's share in the WLA market remains at 84%.[61] As shown in Figure 4.4, Virgin's market share has not moved, nor has its footprint changed materially.

4.97 By itself, this indicates that there has been no material change in BT's market power in the relevant market. We have also briefly considered the other issues considered in 2010, market entry and countervailing buyer power.

4.98 Market entry: As we noted in the WLA 2010 Market Review, there are high barriers to new market entry. While PIA, imposed in the WLA 2010 Market Review, offers a lower cost path to new entrants, as we have discussed earlier, this remains at a nascent stage and does not, in our provisional assessment, constitute a material change

4.99 The BDUK plans include projects covering up to 25% of the market but, as discussed, it is not clear to what extent services will be available in time to be material for the period relevant to this assessment. Also, while there is clearly interest by companies in utilising PIA for commercial local access provision, such planning is at an early stage and it is not clear what, if any, impact this will have on BT national or local market power. We will be continuing to monitor this situation in future market reviews but our provisional assessment is that there is no evidence of a material change to our assessment of BT market power position.

4.100 Countervailing buyer power: In the absence of alternative provision, there is no evidence that users of WLA would be able to assert countervailing buyer power.

Question 4.2: Do you agree with our assessment that there has been no material change in the WLA market since our market power determination that BT had SMP in WLA 2010 Market Review? If not, please explain your reasons.

[61] Ofcom compiled statistics from Openreach and Virgin Media

Annex 1

Responding to this consultation

How to respond

A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 23 December 2011**.

A1.2 Ofcom strongly prefers to receive responses using the online web form at http://stakeolders.ofcom.org.uk/consultations, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.

A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email lluwlr.chargecontrol@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.

A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Ciaran MacCann
Floor 4
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 4109

A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.

A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Ciaran MacCann on 020 7981 3829.

Confidentiality

A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. 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.

A1.9 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. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.

A1.10 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

A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in February 2012.

A1.12 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

Ofcom's consultation processes

A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.

A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.

A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Tel: 020 7981 3601

Email Graham.Howell@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will consult for up to 10 weeks depending on the potential impact of our proposals.

A2.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why.

After the consultation

A2.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.

A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.

A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.

A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.

A3.5 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	☐	Name/contact details/job title	☐
Whole response	☐	Organisation	☐
Part of the response	☐	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)

Annex 4

Consultation question

Sub heading

A4.1 The questions we have raised in the Consultation are set out below.

Question 2.1: Do you consider that our revised treatment of the Power and Ventilation costs taking account of changes in individual service volumes is appropriate? If not, please give your reasons.

Question 2.2: Do you have any views on our approach to the reallocation of LLU – other revenues?

Question 2.3: Do you agree that Option 1 is a more effective remedy than Option 2 - if not please explain why - in particular, we welcome evidence on why you alignment would significantly negatively impact on competitive conditions.

Question 2.4: Do you agree that the charge for MPF and SMPF Cease should be set to zero and CCA FAC costs recovered from rental charges? If not please, please set out your reasoning.

Question 2.5: Do you agree that we should recover the CCA FAC Cease costs equally from the MPF and WLR rentals, or do you consider that we should retain the March 2011 Consultation proposal to recover LLU Cease CCA FAC proportionately from the line rentals. Please set out your reasons for your preference.

Question 2.6: Do you agree with the imposition of a sub-cap on MPF Stopped Line Provide set at the controlling percentage of the MPF basket? If not please give your reasons.

Question 2.7 Do you agree with our proposal to set an aligned starting charges of both the LLU Bulk Migration variants by creating a volume weighted average of both their 2011/12 CCA FACs, where we choose to align the MPF Singleton Migration and SMPF Singleton Migration/provide variants. If you do not agree please give you reasons.

Question 2.8: Do you agree that, in the event of an aligned single migration charge, we should set the starting charges of MPF and SMPF Bulk migration to set an aligned starting charge for both the LLU bulk migration charges which is equal to the starting charge for the single migration services less the difference between the single and bulk migration average 2011/12 CCA FACs costs. Or in the event that single migration charges are not aligned set starting charges equal to the single migration charge less their respective difference in single and bulk migration 2011/12 CCA FACs. If not please give your reasons.

Question 2.9: Do you agree that we should not modify the inertia clause set out in the March 2011 consultation? If not. Do you agree with our proposed alternative set out in the draft legal instrument at Annex 5?

Question 2.10: Do you agree that we should not align or intervene to narrow the differential in charges for MPF and SMPF Expedite connections?

Question 2.11: Do you agree that we should set the starting charges of both MPF and SMPF Singleton Jumper removals to their respective 2011/12 CCA FACs.

Question 2.12: Do you agree that we should not align (at any point of the charge control) the SMPF and MPF services set out in paragraph 2.177 above?

Question 4.1: Do you agree with our assessment that there has been no material change in the WFAEL market since our market power determination that BT had SMP in WFAEL 2010 Market Review? If not, please explain your reasons.

Question 4.2: Do you agree with our assessment that there has been no material change in the WLA market since our market power determination that BT had SMP in WLA 2010 Market Review? If not, please explain your reasons.

Annex 5

Legal instruments

PART I – PROPOSED SETTING OF, AND MODIFICATION TO, SMP CONDITIONS

NOTIFICATION UNDER SECTIONS 48A AND 86 OF THE COMMUNICATIONS ACT 2003 Proposals for the setting of and modification to SMP services conditions to be imposed on BT as a result of the market power determination made by OFCOM in their "Review of the wholesale local access market - Statement on market definition, market power and remedies" as published on 7 October 2010

Background

1. On 7 October 2010, OFCOM published a document entitled '*Review of the wholesale local access market - Statement on market definition, market power and remedies'* (the "**WLA Statement**")[62].

2. At Annex 2 to the WLA Statement, OFCOM published a notification identifying, in accordance with section 79 of the Act, the services market for wholesale local access services within the United Kingdom, but not including the Hull Area, in which OFCOM determined that, for the purposes of making a market power determination under the Act, BT has Significant Market Power (**"SMP**") (the "**2010 Notification**").

3. As a result of that market power determination, in accordance with section 48(1) of the Act, OFCOM set on BT pursuant to section 45 of the Act the SMP services conditions set out in Schedule 1 to the 2010 Notification, including Condition FAA4 which imposes obligations on BT with regard to cost based charges and Condition FAA9 which imposes a requirement on BT to provide a Local Loop Unbundling service.

4. Although the WLA Statement which accompanied the 2010 Notification concluded that in principle a charge control on the local loop unbundling service is necessary, it deferred consideration of the specifics of that charge control, including the relevant costs, method and design as to how that charge control should be applied, to a separate consultation.

5. On 31 March 2011, OFCOM published a consultation document entitled "*Charge control review for LLU and WLR services*"[63] (the "**March 2011 Consultation**") which included, in Annex 13 to that document, the publication of a notification under section 48 of the Act setting out OFCOM's proposals to impose SMP services conditions on BT and to modify certain SMP services conditions already imposed on BT.

6. Following comments from stakeholders received in response to the March 2011 Consultation, OFCOM have made some amendments to the proposals set out in that consultation. In light of those amendments, this Notification relates to the proposed setting of SMP condition FAA4(A) and the modification of SMP condition FAA4 under the market definitions and market analysis as set out in the WLA Statement and the 2010 Notification (in relation to which Ofcom are satisfied there has been no material change since the

[62] http://stakeholders.OFCOM.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf.
[63] As updated on 18 April 2011 and 18 May 2011, see: http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/Correction18011.pdf and http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/changes180511.pdf.

determination was made) in order to address the identified risk of BT having the ability and the incentive to price excessively.

Proposals in this Notification

Proposals to set SMP service conditions

7. OFCOM hereby, in accordance with section 48A(3) of the Act, propose, in relation to the services market identified in paragraph 8(a) of the 2010 Notification, to set SMP Condition FAA4(A) to apply to BT as set out in **Schedule 1** to this Notification.

8. OFCOM are proposing, in accordance with section 86(1)(b) of the Act, to set that SMP Condition FAA4(A) by reference to the market power determination made in relation to the services market identified in paragraph 9(a) of the 2010 Notification in which OFCOM are satisfied there has been no material change since the determination was made.

9. The proposed SMP Condition shall have effect from [•][64].

10. The effect of, and OFCOM's reasons for making, these proposals are contained in Section 2 of the consultation accompanying this Notification and in Sections 4 and 9 of the March 2011 Consultation.

Proposals to modify SMP service conditions

11. OFCOM are also proposing in accordance with section 86(4) of the Act to make a minor modification to SMP Condition FAA4 to ensure that it cross references to the proposed new SMP condition FAA4(A) imposing a charge control (see paragraph 8 above). Accordingly, in paragraph FAA4.1 of SMP condition FAA4 as set in Schedule 1 to the 2010 Notification, for the reference to SMP condition FA3(A), there shall be substituted the reference to SMP condition FAA4(A), and SMP condition FAA4 shall be read accordingly. In making this change, OFCOM are satisfied that there has been no material change in the market indentified since the determination in the 2010 Notification was made.

12. The proposed modification to this SMP Condition shall have effect from [•][65].

13. The effect of, and OFCOM's reasons for making, these proposals are contained in the consultation accompanying this Notification and the March 2011 Consultation.

OFCOM's duties and legal tests

14. OFCOM consider that the proposed setting of SMP Condition FAA4(A), and the proposed modification to Condition FAA4, referred to above comply with the requirements of sections 45 to 47, 87 and 88 of the Act as appropriate and relevant to them.

15. In making the proposals set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3, and the six Community requirements in section 4, of the Act.

Making representations

16. Representations may be made to OFCOM about the proposals set out in this Notification by no later than **23 December 2011**.

[64] The date which is 28 days from the date of Notification under section 48(1) of the Act.
[65] The date which is 28 days from the date of Notification under section 48(1) of the Act.

17. A copy of this Notification and the accompanying document has been sent to the Secretary of State in accordance with section 48C(1) of the Act.

Interpretation

18. Except for references made to the identified services market in this Notification as set out in the 2010 Notification and except as otherwise defined in paragraph 19 of this Notification, words or expressions used in this Notification shall have the same meaning as they have been ascribed in the Act.

19. In this Notification—

(a) "**2010 Notification**" has the meaning given to it in paragraph 2 above;

(b) "**Act**" means the Communications Act 2003 (c. 21);

(c) "**BT**" means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;

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

(e) "**March 2011 Consultation**" has the meaning given to it in paragraph 5 above;

(f) "**OFCOM**" means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (c. 11);

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

(h) "**WLA Statement**" has the meaning given to it in paragraph 1 above.

19. For the purpose of interpreting this Notification—

(a) headings and titles shall be disregarded; and

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

20. Schedule 1 to this Notification shall form part of this Notification.

David Stewart
Competition Policy Director

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

23 November 2011

Schedule 1

[DRAFT] Setting of SMP services condition FAA4(A) as a result of the market power determination made by Ofcom in a statement entitled Review of the wholesale local access market - Statement on market definition, market power and remedies as published on 7 October 2010 in which it was determined that BT has significant market power

1. The following new SMP Condition FAA4(A) shall be set by inserting it after Condition FAA4 in Part 2 of Schedule 1 to the 2010 Notification—

Condition FAA4(A) – Charge control

FAA4(A).1 Without prejudice to the generality of Condition FAA4, and subject to paragraphs FAA4(A).3 and FAA4(A).6, the Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Year, the Percentage Change (determinate in accordance with paragraphs FAA4(A).4 and FAA4(A).5, as applicable) in:

(a) the aggregate of charges for SMPF Ancillary Services;

(b) the aggregate of charges for MPF Ancillary Services;

(c) the aggregate of charges for Co-Mingling Services;

(d) the charge for MPF Transfer, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FAA4(A).2(c) applies;

(e) the charge for MPF New Provide, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FAA4(A).2(d) applies;

(f) the charge for SMPF Connection, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FAA4(A).2(e) applies;

(g) the charge for MPF Rental, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FAA4(A).2(a) applies;

(h) the charge for SMPF Rental, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FAA4(A).2(b) applies,

(i) the charge for MPF Connection;

in each of the nine categories of products and/or services specified in paragraphs FAA4(A).1(a) to (i) above is not more than the Controlling Percentage (as determined in accordance with paragraph FAA4(A).8).

FAA4(A).2 The Dominant Provider shall not charge more than:

(a) for MPF Rental, the amount of £[•] in the First Relevant Year;

(b) for SMPF Rental, the amount of £[•] in the First Relevant Year;

(c) for MPF Transfer, the amount of £[•] in the First Relevant Year;

(d) for MPF New Provide, the amount of £[•] in the First Relevant Year;

(e) for SMPF Connection, the amount of £[•] in the First Relevant Year;

(f) for MPF Cease, the amount of £0.00 in each of the First Relevant Year and the Second Relevant Year;

(g) for SMPF Cease, the amount of £0.00 in each of the First Relevant Year and the Second Relevant Year;

(h) for MPF Bulk Migration, the amount of £[•] in the First Relevant Year;

(i) for SMPF Bulk Migration, the amount of £[•] in the First Relevant Year;

(j) for MPF Singleton Jumper Removal, the amount of £[•] in the First Relevant Year; and

(k) for SMPF Singleton Jumper Removal, the amount of £[•] in the First Relevant Year.

FAA4(A).3 For the purpose of complying with paragraph FAA4(A).1 (and except in relation to the charges specified in FAA4(A).2(a) to (e) for the First Relevant Year), the Dominant Provider shall take all reasonable steps to secure that the revenue it accrues as a result of all individual Charge Changes during any Relevant Year shall be no more than that which it would have accrued had all of those Charge Changes been made at the beginning of the Relevant Year.

The Dominant Provider shall be deemed to have satisfied this obligation where, in the case of a single Charge Change during the Relevant Year, the following formula is satisfied:

$$RC\left(1-D\right)\leq TRC$$

where:

RC is the revenue change associated with the single Charge Change made in the Relevant Year, calculated by the relevant Percentage Change immediately following the Charge Change multiplied by the revenue accrued during the Prior Financial Year;

TRC is the target revenue change required in the Relevant Year to achieve compliance with paragraph FAA4(A).1, calculated by the Percentage Change required in the Relevant Year to achieve compliance with paragraph FAA4(A).1 multiplied by the revenue accrued during the Prior Financial Year; and
D is the elapsed proportion of the Relevant Year in question, calculated as:

(a) for the First Relevant Year, the date on which the Charge Change takes effect, expressed as a numeric entity on a scale ranging from 1 April = 0 to 31 March = 365, divided by 366;

(b) for the Second Relevant Year, the date on which the Charge Change takes effect, expressed as a numeric entity on a scale ranging from 1 April = 0 to 31 March = 364, divided by 365.

FAA4(A).4 The Percentage Change for the purposes of each of the categories of products and/or services (each of which is known as a 'basket') specified in paragraphs FAA4(A).1(a), FAA4(A).1(b) and FAA4(A).1(c) respectively shall be calculated for the purposes of complying with paragraph FAA4(A).1 by employing the following formula:

$$C_t = \frac{\sum_{i=1}^{n}\left[R_i \frac{(p_{t,i} - p_{0,i})}{p_{0,i}}\right]}{\sum_{i=1}^{n} R_i}$$

where:

C_t is the Percentage Change in the aggregate of charges for the products and/or services in the basket at a particular time *t* during the Relevant Year;
n is the number of products and/or services in the basket;

R_i is the sum of the revenue accrued during the Prior Financial Year in respect of the specific product and/or service *i* and the revenue accrued during the Prior Financial Year in respect of equivalent products and/or services provided by the Dominant Provider to itself, calculated to exclude any discounts offered by the Dominant Provider;

$p_{0,i}$ is (i) for the First Relevant Year, the charge specified in the Annex to this Condition in respect of the corresponding specific product and/or service *i*; and (ii) for the Second Relevant Year, the published charge made by the Dominant Provider for the specific product and/or service *i* at the beginning of the Relevant Year excluding any discounts offered by the Dominant Provider; and

$p_{t,i}$ is the published charge made by the Dominant Provider for the specific product and/or service *i* at time *t* during the Relevant Year excluding any discounts offered by the Dominant Provider.

For the avoidance of doubt, for the purpose of calculating the Percentage Change for the basket specified in paragraph FAA4(A).1(c), the revenues accrued for Co-Mingling Services shall be taken to include all revenue accrued from selling Co-Mingling Services and/or other services irrespective of their use.

FAA4(A).5 The Percentage Change for the purposes of each of the categories of products and/or services specified (each of which is referred to in this paragraph as a "single charge category") in paragraphs FAA4(A).1(d), FAA4(A).1(e), FAA4(A).1(f), FAA4(A).1(g), FAA4(A).1(h) and FAA4(A).1(i) respectively shall be calculated for the purposes of complying with paragraph FAA4(A).1 by employing the following formula:

$$C_t = \frac{(p_t - p_0)}{p_0}$$

where:

C_t is the Percentage Change in charges for the specific product and/or service in the single charge category in question at a particular time *t* during the Relevant Year;

p_0 is (i) for the First Relevant Year, the charge specified in paragraph FAA4(A).2 in respect of the single charge category in question; and (ii) for the Second Relevant Year, the published charge made by the Dominant Provider for the specific product

and/or service in the single charge category in question at the beginning of the Relevant Year excluding any discounts offered by the Dominant Provider; and
p_t is the published charge made by the Dominant Provider for the specific product and/or service in the single charge category in question at the time t during the Relevant Year excluding any discounts offered by the Dominant Provider.

FAA4(A).6 Subject to paragraph FAA4(A).6A, in the case of each of the categories of products and/or services (each of which is known as a ‘basket’) specified in paragraphs FAA4(A).1(a), FAA4(A).1(b) and FAA4(A).1(c) respectively, the Dominant Provider shall also and, in any event, take all reasonable steps to secure that, at the end of each Relevant Year, the Percentage Change in discrete charges for each and every product and/or service falling within the basket in question is:

(a) no more than the Controlling Percentage increased by [•] percentage points; and

(b) no less than the Controlling Percentage reduced by [•] percentage points;

where, for the purposes of (a) and (b) above, Controlling Percentage is the Controlling Percentage (as determined in accordance with paragraph FAA4(A).8) for the basket within which the product and/or service falls to which the discrete charges relate. For the purpose of this paragraph FAA4(A).6, the Percentage Change shall be calculated by employing the formula set out in paragraph FAA4(A).5 and its references to a single charge category shall be treated as references to charges for the specific product and/or service falling with the basket in question.

FAA4(A).6A. Paragraph FAA4(A).6 does not apply in relation to:

(a) the categories of products and/or services specified in paragraph FAA4(A).1(a) in any Relevant Year where the SMPF MDF Remove Jumper Order Singleton Charge is £[ ] and where the following is true:

$$|RPI + \mathrm{X}| > |I|$$

where:
X is the Controlling Percentage set out at paragraph FAA4(A).8(a); and
I is [•] percentage points.

(b) the categories of products and/or services specified in paragraph FAA4(A).1(b) in any Relevant Year where the MPF MDF Remove Jumper Order Singleton Charge is £[ ] and and where the following is true:

$$|RPI + \mathrm{X}| > |I|$$

where:
X is the Controlling Percentage set out at paragraph FAA4(A).8(b); and
I is [•] percentage points.

FAA4(A).7 For the purpose of complying with paragraph FAA4(A).6, the Dominant Provider shall take all reasonable steps to secure that the revenue it accrues as a result of all relevant individual charge changes during any Relevant Year shall be no more than that which it would have accrued had all of those changes been made at the beginning of the Relevant Year.

The Dominant Provider shall be deemed to have satisfied this obligation where, in the case of a single change in charges during the Relevant Year, the following formula is satisfied:

$$RC(1-D) \leq TRC$$

where:

RC is the revenue change associated with the single charge change made in the Relevant Year, calculated by the relevant Percentage Change immediately following the charge change multiplied by the revenue accrued during the Prior Financial Year;

TRC is the target revenue change required in the Relevant Year to achieve compliance with paragraph FAA4(A).1, calculated by the Percentage Change required in the Relevant Year to achieve compliance with paragraph FAA4(A).1 multiplied by the revenue accrued during the Prior Financial Year; and
D is the elapsed proportion of the Relevant Year in question, calculated as:

(a) for the First Relevant Year, the date on which the Charge Change takes effect, expressed as a numeric entity on a scale ranging from 1 April = 0 to 31 March = 365, divided by 366;

(b) for the Second Relevant Year, the date on which the Charge Change takes effect, expressed as a numeric entity on a scale ranging from 1 April = 0 to 31 March = 364, divided by 365.

FAA4(A).8 Subject to paragraphs FAA4(A).9 and FAA4(A).10, the Controlling Percentage in relation to any Relevant Year means:

(a) for the category of products and/or services specified in paragraph FAA4(A).1(a),
  i. for the First Relevant Year, [•] percentage points, and
  ii. for the Second Relevant Year, RPI decreased by [•] percentage points;

(b) for the category of products and/or services specified in paragraph FAA4(A).1(b),
  i. for the First Relevant Year, [•] percentage points, and
  ii. for the Second Relevant Year, RPI decreased by [•] percentage points;

(c) for the category of products and/or services specified in paragraph FAA4(A).1(c),
  i. for the First Relevant Year, [•] percentage points, and
  ii. for the Second Relevant Year, RPI decreased by [•] percentage points;

(d) for the category of products and/or services specified in paragraph FAA4(A).1(d), for the Second Relevant Year, RPI decreased by [•] percentage points;

(e) for the category of products and/or services specified in paragraph FAA4(A).1(e), for the Second Relevant Year, RPI decreased by [•] percentage points;

(f) for the category of products and/or services specified in paragraph FAA4(A).1(f), for the Second Relevant Year, RPI decreased by [•] percentage points;

(g) for the category of products and/or services specified in paragraph FAA4(A).1(g), for the Second Relevant Year, RPI decreased by [•] percentage points;

(h) for the category of products and/or services specified in paragraph FAA4(A).1(h), for the Second Relevant Year, RPI decreased by [•] percentage points;

(i) for the category of products and/or services specified in paragraph FAA4(A).1(i),
  i. for the First Relevant Year, [•] percentage points, and

ii. for the Second Relevant Year, RPI decreased by [•] percentage points

For the avoidance of doubt, the MPF Transfer, MPF New Provide, MPF Rental, SMPF Connection, SMPF Rental charges, MPF Bulk Migration, SMPF Bulk Migration, MPF Singleton Jumper Removal and SMPF Singleton Jumper Removal are constrained by FAA4(A).2 in the First Relevant Year.

FAA4(A).9 Where the Percentage Change in the First Relevant Year is less than the Controlling Percentage (the "Excess"), then for the purposes of each of the categories of products and/or services specified in paragraphs FAA4(A).1(a), FAA4(A).1(b), FAA4(A).1(c), FAA4(A).1(d), FAA4(A).1(e), FAA4(A).1(f), FAA4(A).1(g), FAA4(A).1(h) and FAA4(A).1(i) respectively the Controlling Percentage for the following Relevant Year shall be determined in accordance with paragraph FAA4(A).8, but increased by the absolute value of the Excess.

FAA4(A).10 Where the Percentage Change in the First Relevant Year is more than the Controlling Percentage (the "Deficiency"), then for the purposes of each of the categories of products and/or services specified in paragraphs FAA4(A).1(a), FAA4(A).1(b), FAA4(A).1(c), FAA4(A).1(d), FAA4(A).1(e), FAA4(A).1(f), FAA4(A).1(g), FAA4(A).1(h) and FAA4(A).1(i) respectively the Controlling Percentage for the following Relevant Year shall be determined in accordance with paragraph FAA4(A).8, but decreased by the absolute value of the Deficiency.

FAA4(A).11 The Dominant Provider shall ensure that during each Relevant Year:

(a) the charge made by it for MPF Special Fault Investigation (SFI) is the same as the charge made by it for SMPF Special Fault Investigation (SFI);

(b) the charge made by it for MPF Special Fault Investigation 2 (SFI2) - Base module is the same as the charge made by it for SMPF Special Fault Investigation 2 (SFI2) - Base module;

(c) the charge made by it for MPF Special Fault Investigation 2 (SFI2) - Network module is the same as the charge made by it for SMPF Special Fault Investigation 2 (SFI2) - Network module;

(d) the charge made by it for MPF Special Fault Investigation 2 (SFI2) - Frame module is the same as the charge made by it for SMPF Special Fault Investigation 2 (SFI2) - Frame module;

(e) the charge made by it for MPF Special Fault Investigation 2 (SFI2) - Internal Wiring module is the same as the charge made by it for SMPF Special Fault Investigation 2 (SFI2) - Internal Wiring module;

(f) the charge made by it for MPF Special Fault Investigation 2 (SFI2) - Internal equip module is the same as the charge made by it for SMPF Special Fault Investigation 2 (SFI2) - Internal equip module;

(g) the charge made by it for MPF Special Fault Investigation 2 (SFI2) - Coop module is the same as the charge made by it for SMPF Special Fault Investigation 2 (SFI2) - Coop module; and

(h) the charge made by it for MPF Special Fault Investigation 2 (SFI2) - Frame direct module is the same as the charge made by it for SMPF Special Fault Investigation 2 (SFI2) - Frame direct module.

For the avoidance of doubt, nothing in this paragraph FAA4(A).11 shall prevent the Dominant Provider from increasing and/or decreasing the charges made for each of the services at paragraphs FAA4(A).11 (a) to (h) above provided the requirements set out in this paragraph FAA4(A).11 are complied with.

FAA4(A).12 The Dominant Provider shall ensure that during each Relevant Year:

(a) the charge made by it for MPF Service Maintenance Level 3 is the same as the charge made by it for WLR Service Maintenance Level 3; and

(b) the charge made by it for MPF Service Maintenance Level 4 is the same as the charge made by it for WLR Service Maintenance Level 4.

(c) the charge made by it for SMPF Service Maintenance Level 3 is the same as the charge made by it for WLR Service Maintenance Level 3; and

(d) the charge made by it for SMPF Service Maintenance Level 4 is the same as the charge made by it for WLR Service Maintenance Level 4.

For the avoidance of doubt, nothing in this paragraph FAA4(A).12 shall prevent the Dominant Provider from increasing and/or decreasing the charges made for each of the services at paragraphs FAA4(A).12 (a) to (d) above provided the requirements set out in this paragraph FAA4(A).12 are complied with.

FAA4(A).13 Where:

(a) the Dominant Provider makes a material change (other than to a Charge) to any Charge Controlled Service for which a Charge is charged;

(b) the Dominant Provider makes a change to the date on which its financial year ends; or

(c) there is a material change in the basis of the Retail Prices Index,

paragraphs FAA4(A).1 to FAA4(A).12 shall have effect subject to such reasonable adjustment to take account of the change as OFCOM may direct to be appropriate in the circumstances. For the purposes of this paragraph FAA4(A).13, a material change to the Charge Controlled Service includes (but is not limited to) the introduction of a new product and/or service wholly or substantially in substitution for that existing Charge Controlled Service.

FAA4(A).14 The Dominant Provider shall record, maintain and supply to OFCOM in writing, no later than three months after the end of each Relevant Year, the data necessary for OFCOM to monitor compliance of the Dominant Provider with the price control by performing the calculation of the Percentage Change. The data shall include:

(a) pursuant to Condition FAA4(A).4 and FAA4(A).5, as applicable, the calculated Percentage Change relating to each category of products and services listed in conditions FAA4(A).1 (a) through to (i);

(b) pursuant to Condition FAA4(A).3, calculation of the revenue accrued as a result of all relevant individual charge changes during any Relevant Year compared to the target revenue change;

(c) all relevant data the Dominant Provider used in the calculation of the percentage change C_t pursuant to Condition FAA4(A).4, for the category of products and services specified in paragraph FAA4(A).1(d), FAA4(A).1(e), FAA4(A).1(f), FAA4(A).1(g), FAA4(A).1(h) and FAA4(A).1(i);

(d) all relevant data the Dominant Provider used in the calculation the percentage change C_t pursuant to Conditions FAA4(A).5, for the category of products and services specified in paragraph FAA4(A).1(a), FAA4(A).1(b) and FAA4(A).1(c);

(e) all relevant data the Dominant Provider used in the calculation of the revenue change and target revenue change pursuant to Condition FAA4(A).3;

(f) all relevant data the Dominant provider used in determining Condition FAA4(A)6A applied in any particular circumstances;

(g) all relevant revenues accrued during the Prior Financial Year in respect of the specific product or service;

(a) published charges made by the Dominant Provider at time *t* during the Relevant Year excluding any discounts offered by the Dominant Provider;

(b) the relevant published charge at the start of the Relevant Year; and

(c) other data necessary for monitoring compliance with the charge control.

FAA4(A).15 If it appears to OFCOM that the Dominant Provider is likely to fail to secure that the Percentage Change does not exceed the Controlling Percentage for the Second Relevant Year, the Dominant Provider shall make such adjustment to any of its charges for the provision of Charge Controlled Services and by such day in that Relevant Year (or if appropriate in OFCOM's opinion, by such day that falls after the end of that Relevant Year) as OFCOM may direct for the purpose of avoiding such a failure.

FAA4(A).16 Paragraphs FAA4(A).1 to FAA4(A).15 shall not apply to such extent as OFCOM may direct.

FAA4(A).17 The Dominant Provider shall comply with any direction OFCOM may make from time to time under this Condition.

FAA4(A).18 In this Condition:

(a) "**Charge**" means for the purposes of paragraph FAA4(A).11, the charge (being in all cases the amounts offered or charged by the Dominant Provider) to a communications provider for the Charge Controlled Service;

(b) "**Charge Change**" means a change to any of the charges for the provision of the products and/or services listed in paragraphs FAA4(A).1(a) to FAA4(A).1(i);

(c) "**Charge Controlled Service**" means a service or basket of services listed in FAA4(A).1(a) to FAA4(A).1(i);

(d) "**Co-Mingling Services**" means all of the products and/or services listed from time to time for the purpose of Part 3 of the Annex to this Condition;

(e) "**Controlling Percentage**" is to be determined in accordance with paragraph FAA4(A).8;

(f) "**Dominant Provider**" means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;

(g) "**MPF Ancillary Services**" means all of the products and/or services listed from time to time for the purpose of Part 2 of the Annex to this Condition;

(h) "**MPF Bulk Migration**" shall be construed as having the same meaning as 'MPF MDF Remove Jumper Order Bulk Charge' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(i) "**MPF Cease**" shall be construed as having the same meaning as 'MPF Cease charge' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(j) "**MPF Connection**" shall be construed as having the same meaning as 'MPF Connection Charge Stopped Line Provide' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(k) "**MPF New Provide**" shall be construed as having the same meaning as 'MPF Connection charge – New Provide – Standard' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(l) "**MPF MDF Remove Jumper Order Singleton Charge**" shall be construed as having the same meaning as 'MPF MDF Remove Jumper Order Singleton Charge' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(m) "**MPF Rental**" shall be construed as the annual rental of access to Metallic Path Facilities;

(n) "**MPF Singleton Jumper Removal**" shall be construed as having the same meaning as 'MPF MDF Remove Jumper Order Singleton Charge' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(o) "**MPF Service Maintenance Level 3**" shall be construed as having the same meaning as 'Service Maintenance Level 3 (Annual Rental)' in respect of the feature 'LLU MPF', as provided by the Dominant Provider on its website for definitions and explanations of its products;

(p) "**MPF Service Maintenance Level 4**" shall be construed as having the same meaning as 'Service Maintenance Level 4 (Annual Rental)' in respect of the feature 'LLU MPF', as provided by the Dominant Provider on its website for definitions and explanations of its products;

(q) "**MPF Special Fault Investigation (SFI)**" shall be construed as having the same meaning as 'MPF Special Fault Investigation (SFI)' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(r) "**MPF Special Fault Investigation 2 (SFI2) - Base module**" shall be construed as having the same meaning as 'MPF Special Fault Investigation 2 (SFI2) - Base module' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(s) "**MPF Special Fault Investigation 2 (SFI2) - Coop module**" shall be construed as having the same meaning as 'MPF Special Fault Investigation 2 (SFI2) - Coop module' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(t) "**MPF Special Fault Investigation 2 (SFI2) - Frame direct module**" shall be construed as having the same meaning as 'MPF Special Fault Investigation 2 (SFI2) - Frame direct module' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(u) "**MPF Special Fault Investigation 2 (SFI2) - Frame module**" shall be construed as having the same meaning as 'MPF Special Fault Investigation 2 (SFI2) - Frame module' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(v) "**MPF Special Fault Investigation 2 (SFI2) - Internal equip module**" shall be construed as having the same meaning as 'MPF Special Fault Investigation 2 (SFI2) - Internal equip module' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(w) "**MPF Special Fault Investigation 2 (SFI2) - Internal Wiring module**" shall be construed as having the same meaning as 'MPF Special Fault Investigation 2 (SFI2) - Internal Wiring module' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(x) "**MPF Special Fault Investigation 2 (SFI2) - Network module**" shall be construed as having the same meaning as 'MPF Special Fault Investigation 2 (SFI2) - Network module' as provided by the Dominant Provider on its website for definitions and explanations of its products;

(y) "**MPF Transfer**" shall be construed as having the same meaning as 'MPF Connection charge – Singleton migrations (Transfer from WLR/SMPF or Change of CP migrations)' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(z) "**OFCOM**" means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;

(aa) "**Percentage Change**" has the meaning given to it in paragraph FAA4(A).4 and FAA4(A).5, as applicable;

(bb) "**Prior Financial Year**" means the period of 12 months ending on 31 March immediately preceding the Relevant Year;

(cc) "**Relevant Year**" means each of the following two periods:

(1) the period beginning on 1 April 2012 and ending on 31 March 2013 (the "**First Relevant Year**");

(2) the period beginning on 1 April 2013 and ending on 31 March 2014 (the "**Second Relevant Year**");

(dd) "**Retail Prices Index**" means the index of retail prices compiled by an agency or a public body on behalf of Her Majesty's Government or a governmental department (which is the Office for National Statistics at the time of publication of this Notification) from time to time in respect of all items;

(ee) "**RPI**" means the amount of the change in the Retail Prices Index in the period of twelve months ending on 31st October immediately before the beginning of a Relevant Year, expressed as a percentage (rounded to two decimal places) of that Retail Prices Index as at the beginning of that first mentioned period;

(ff) "**SMPF Ancillary Services**" means all of the products and/or services listed from time to time for the purpose of Part 1 of the Annex to this Condition;

(gg) "**SMPF Bulk Migration**" shall be construed as having the same meaning as 'SMPF MDF Remove Jumper Order Bulk Charge' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(hh) "**SMPF Cease**" shall be construed as having the same meaning as 'SMPF Cease charge' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(ii) "**SMPF Connection**" shall be construed as having the same meaning as 'SMPF Connection charge, Basic Provide on existing narrowband, Simultaneous Provide of SMPF with narrowband, Singleton Migration (Transfer or change of CP migrations) from Narrowband, MPF, SMPF and ISDN/ Highway', as provided by the Dominant Provider on its website for definitions and explanations of its products;

(jj) "**SMPF MDF Remove Jumper Order Singleton Charge**" shall be construed as having the same meaning as 'SMPF MDF Remove Jumper Order Singleton Charge' has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(kk) "**SMPF Rental**" shall be construed as rental of access to the non-voice band frequency of Metallic Path Facilities; and (ll) “**SMPF Service Maintenance Level 3**” shall be construed as having the same meaning as ‘Service Maintenance Level 3 (Annual Rental)’ in respect of the feature ‘LLU Shared MPF’, as provided by the Dominant Provider on its website for definitions and explanations of its products;

(mm) “**SMPF Service Maintenance Level 4**” shall be construed as having the same meaning as ‘Service Maintenance Level 4 (Annual Rental)’ in respect of the feature ‘LLU Shared MPF’, as provided by the Dominant Provider on its website for definitions and explanations of its products;

(nn) “**SMPF Singleton Jumper Removal**” shall be construed as having the same meaning as ‘SMPF MDF Remove Jumper Order Singleton Charge’ has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(oo) “**SMPF Special Fault Investigation (SFI)**” shall be construed as having the same meaning as ‘SMPF Special Fault Investigation (SFI)’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(pp) “**SMPF Special Fault Investigation 2 (SFI2) - Base module**” shall be construed as having the same meaning as ‘SMPF Special Fault Investigation 2 (SFI2) - Base module’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(qq) “**SMPF Special Fault Investigation 2 (SFI2) - Coop module**” shall be construed as having the same meaning as ‘SMPF Special Fault Investigation 2 (SFI2) - Coop module’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(rr) “**SMPF Special Fault Investigation 2 (SFI2) - Frame direct module**” shall be construed as having the same meaning as ‘SMPF Special Fault Investigation 2 (SFI2) - Frame direct module’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(ss) “**SMPF Special Fault Investigation 2 (SFI2) - Frame module**” shall be construed as having the same meaning as ‘SMPF Special Fault Investigation 2 (SFI2) - Frame module’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(tt) “**SMPF Special Fault Investigation 2 (SFI2) - Internal equip module**” shall be construed as having the same meaning as ‘SMPF Special Fault Investigation 2 (SFI2) - Internal equip module’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(uu) “**SMPF Special Fault Investigation 2 (SFI2) - Internal Wiring module**” shall be construed as having the same meaning as ‘SMPF Special Fault Investigation 2 (SFI2) - Internal Wiring module’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(vv) “**SMPF Special Fault Investigation 2 (SFI2) - Network module**” shall be construed as having the same meaning as ‘MPF Special Fault Investigation 2 (SFI2) - Internal equip module’ as provided by the Dominant Provider on its website for definitions and explanations of its products;

(ww) “**SMPF Transfer**” shall be construed as having the same meaning as ‘SMPF Connection charge – Basic Provide on existing narrowband, Simultaneous Provide of SMPF with narrowband, Singleton Migration (Transfer or change of CP migrations) from Narrowband, MPF, SMPF and ISDN/ Highway’ has as provided by the Dominant Provider on its website for definitions and explanations of its products;

(xx) “**WLR Service Maintenance Level 3**” shall be construed as having the same meaning as ‘Service Maintenance Level 3 (Annual Rental)’ in respect of the feature ‘WLR – Wholesale Premium - per line’, as provided by the Dominant Provider on its website for definitions and explanations of its products; and

(yy) “**WLR Service Maintenance Level 4**” shall be construed as having the same meaning as ‘Service Maintenance Level 3 (Annual Rental)’ in respect of the feature ‘WLR – Wholesale Premium - per line’, as provided by the Dominant Provider on its website for definitions and explanations of its products.

Annex to Condition FAA4(A)

Products and/or services subject to charge control pursuant to paragraphs FAA4(A).1(a), FAA4(A).1(b), FAA4(A).1(c) and FAA4(A).1(d)

Part 1

Meaning of SMPF Ancillary Services

For the purposes of Condition FAA4(A), the expression **"SMPF Ancillary Services"** shall be construed as including only the following fourteen products and/or services, subject to such changes as OFCOM may direct from time to time following any proposal by the Dominant Provider to introduce a new product and/or service or to substitute one or more of these fourteen products and/or services for another (in which case this list shall be construed accordingly):

	Item	Initial charge
1	SMPF Bulk Migrations Normal – Delivered during a 24 hour period	£33.14
2	SMPF Tie Pair Modification (3 working day lead time Re-termination)	£47.53
3	SMPF Tie Pair Modification (Multiple Re-termination)	£35.88
4	SMPF MDF Remove Jumper Order Singleton Charge	£28.89
5	SMPF MDF Remove Jumper Order Bulk Charge	£24.88
6	SMPF Order rejected at initial validation	£1.20
7	SMPF Order rejected at detailed evaluation	£13.05
8	SMPF Order returned for amendment	£13.05
9	Cancellation of SMPF orders for Provide, Simultaneous provide, Migration, Modification or Amend	£11.74
10	Amend orders. Allowable change to SMPF Order	£14.35
11	SMPF standard line test (RWT)	£4.43
12	Network RWT	£81.60
13	SMPF Flexi Cease Fault Investigation Charges	£71.81
14	SMPF Expedite	£103.20

Except in so far as the context otherwise requires, the terms or descriptions of products and/or services used in this Part 1 shall be construed as having the same meaning as those provided by the Dominant Provider on its website for definitions and explanations of its products in addition to future product updates. These are currently found as follows:

- For SMPF product information, please refer to http://www.openreach.co.uk/orpg/home/products/llu/smpf/smpf.do.
- For assurance information including care levels, please refer to the Service Products section of the Openreach website: http://www.openreach.co.uk/orpg/home/products/serviceproducts/service_products.do.

- For 21C related products, please refer to LLU secure portal, of the Openreach website for which CPs need to request access. This is done by choosing “LLU secure” from the Local Loop Unbundling menu available at: http://www.openreach.co.uk/orpg/home/products/llu/llu.do.
- For information held in the price list, please refer to the “LLU Pricing” section of the price list available at: http://www.openreach.co.uk/orpg/home/products/pricing/loadPricing.do.

Part 2

Meaning of MPF Ancillary Services

For the purposes of Condition FAA4(A), the expression **"MPF Ancillary Services"** shall be construed as including only the following fifteen products and/or services, subject to any such changes as OFCOM may direct from time to time following any proposal by the Dominant Provider to introduce a new product and/or service or to substitute one or more of these fifteen products and/or services for another (in which case this list shall be construed accordingly):

	Item	Initial charge
1	MPF Connection Charge Stopped Line Provide	£45.75
2	MPF Expedite	£158.40
3	MPF Same CP Mass Migration charge – Normal hours	£34.80
4	MPF Tie Pair Modification (3 working day lead time Re-termination)	£39.25
5	MPF Tie Pair Modification (Multiple Re-termination)	£34.80
6	MPF MDF Remove Jumper Order Singleton Charge	£16.80
7	MPF MDF Remove Jumper Order Bulk Charge	£10.80
8	MPF Order rejected at initial validation	£1.20
9	MPF Order rejected at detailed evaluation	£13.05
10	MPF Order returned for amendment	£13.05
11	Cancellation of MPF orders for Provide, Migration, Modification or Amend	£11.74
12	Amend orders. Allowable change to MPF Order	£14.35
13	MPF Standard line test	£4.43
14	Network RWT	£81.60
15	MPF Working Line Takeover (WLTO)	£45.75

Except in so far as the context otherwise requires, the terms or descriptions of products and/or services used in this Part 2 shall be construed as having the same meaning as those provided by the Dominant Provider on its website for definitions and explanations of its products in addition to future product updates. These are currently found as follows:

- For MPF product information, please refer to http://www.openreach.co.uk/orpg/home/products/llu/mpf/mpf.do.
- For assurance information including care levels, please refer to the Service Products section of the Openreach website: http://www.openreach.co.uk/orpg/home/products/serviceproducts/service_products.do.
- For 21C related products including Test Access Product, please refer to LLU secure portal, of the Openreach website for which CPs need to request access. This is done

by choosing "LLU secure" from the Local Loop Unbundling menu available at: http://www.openreach.co.uk/orpg/home/products/llu/llu.do.

- For information held in the price list, please refer to the "LLU Pricing" section of the price list available at: http://www.openreach.co.uk/orpg/home/products/pricing/loadPricing.do.

Part 3

Meaning of Co-Mingling Services

For the purposes of Condition FAA4(A), the expression **"Co-Mingling Services"** shall be construed as including only the following ninety eight products and/or services, subject to any such changes as OFCOM may direct from time to time following any proposal by the Dominant Provider to introduce a new product and/or service or to substitute one or more of these ninety eight products and/or services for another (in which case this list shall be construed accordingly):

	Item	Current Charge
1	Internal Tie Cable (2) (Notes 9)	£421.20 connection
2	Internal Tie Cable (2) (Notes 9)	£15.60 pa rental
3	Internal Tie Cable (2) Jointing Fixed Charge per External Tie Cable	£153.60 fixed charge per cable
4	Handover Distribution Frame Extension to provide additional 1500 tie pair capacity for MCU1	£216.00
5	Additional Handover Distribution Frame to provide additional 4800 tie pair capacity for B-BUSS7	£1,629.60
6	Standalone Handover Distribution Frame (HDF) 9	£2,070.00
7	Standalone Handover Distribution Frame (HDF) 18	£2,168.40
8	MDF Licence Fee per Internal Tie Cable per annum	£26.40 pa per cable
9	20 CN Enhanced Specification LLU Internal Tie Cable (1) for Co-location and Co-mingling	£921.60 connection
10	20 CN Enhanced Specification LLU Internal Tie Cable (1) for Co-location and Co-mingling	£78.00 pa rental
11	21CN-32 pair standard Internal Tie Cable-HDF connected	£414.00 connection
12	21CN-32 pair standard Internal Tie Cable-HDF connected	£34.80 pa rental
13	21CN-64 pair standard Internal Tie Cable-HDF connected	£528.00 connection
14	21CN-64 pair standard Internal Tie Cable-HDF connected	£44.40 pa rental
15	21CN-32 pair standard Internal Tie Cable-Bare Ended Coil	£34.08 pa rental
16	21CN-64 pair standard Internal Tie Cable-Bare Ended Coil	£43.44 pa rental

17	21CN-100 pair standard Internal Tie Cable-Bare Ended Coil	£70.20 pa rental
18	21CN-32 pair enhanced Internal Tie Cable-HDF connected	£434.40 connection
19	21CN-32 pair enhanced Internal Tie Cable-HDF connected	£37.20 pa rental
20	21CN-64 pair enhanced Internal Tie Cable-HDF connected	£559.20 connection
21	21CN-64 pair enhanced Internal Tie Cable-HDF connected	£48.00 pa rental
22	21CN-100 pair enhanced Internal Tie Cable-HDF connected	£921.60 connection
23	21CN-100 pair enhanced Internal Tie Cable-HDF connected	£78.00 pa rental
24	21CN-32 pair enhanced Internal Tie Cable-Bare Ended Coil	£35.16 pa rental
25	21CN-64 pair enhanced Internal Tie Cable-Bare Ended Coil	£45.68 pa rental
26	21CN-100 pair enhanced Internal Tie Cable-Bare Ended Coil	£74.40 pa rental
27	LLU Internal Tie Cable Cease of 1-10 Cables	£723.60
28	LLU Internal Tie Cable Cease of 11-20 Cables	£814.80
29	LLU Internal Tie Cable Cease of 21-30 Cables	£906.00
30	LLU Internal Tie Cable Cease of 31-40 Cables	£994.80
31	LLU Internal Tie Cable Cease of 41-50 Cables	£1086.00
32	BT Provided External 100 Pair cable @ 100 metres - Rental per annum fixed charge per cable	£117.60 pa rental
33	BT Provided External 100 Pair cable @ 100 metres - Connection fixed charge per cable	£1498.80 connection
34	BT Provided External 100 Pair cable @ 100 metres - Rental per annum Per extra 100 pairs	£99.60 pa rental
35	BT Provided External 100 Pair cable @ 100 metres - Connection Per extra 100m	£234.00 connection
36	BT Provided External -500 Pair cable @ 100 metres - Rental per annum fixed charge per cable	£188.40 pa rental
37	BT Provided External -500 Pair cable @ 100 metres - Connection fixed charge per cable	£2451.60 connection
38	BT Provided External -500 Pair cable @ 100 metres - Rental per annum Per extra 100m	£147.60 pa rental
39	BT Provided External -500 Pair cable @ 100 metres - Connection Per extra 100m	£234.00 connection
40	BT Provided External 500 Pair cable @ 100 metres – Rental per annum Per extra 100 pairs	£99.60 pa rental

41	BT Provided External 500 Pair cable @ 100 metres – Connection fixed charge Per extra 100 pairs	£472.80
42	BT Provided External 100 Pair cable @ 100 metres - Rental per annum Per extra 100m	£79.20 pa rental
43	BT Provided External 100 Pair cable @ 100 metres - Connection Per extra 100 pairs	£472.80 connection
44	Operator provided External 100 Pair cable pull through @ 100 metres - Rental fixed per annum (fixed charge per cable)	£27.60 pa rental
45	Operator provided External 100 Pair cable pull through @ 100 metres - Connection (fixed charge per cable)	£1328.40 connection
46	Operator Provided External 500 Pair cable pull through @ 100 metres - Rental fixed per annum (fixed charge per cable)	£31.20 pa rental
47	Operator Provided External 500 Pair cable pull through @ 100 metres - Connection (fixed charge per cable)	£1888.80 connection
48	Operator provided External 100 Pair cable pull through @ 100 metres – rental fixed per annum Per extra 100 pairs	£14.40 pa rental
49	Operator provided External 100 Pair cable pull through @ 100 metres - Connection Per extra 100 pairs	£454.80 connection
50	Operator provided External 500 Pair cable pull through @ 100 metres – rental fixed per annum Per extra 100 pairs	£14.40 pa rental
51	Operator provided External 500 Pair cable pull through @ 100 metres – Connection Per extra 100 pairs	£454.80 connection
52	Hand-over Distribution Frame charge per 100 pair tie cable	£25.20
53	Distant location full survey	£972.00
54	Missed joint survey or testing appointment	£18.00
55	Co-location order rejection – no space available	£226.80
56	Co-location full survey	£5757.60
57	Site visit charge to be allocated to all orders not in conjunction with the installation of a base product.	£284.40
58	Co-Mingling order rejection – no space or insufficient space available	£464.40
59	Co-Mingling set up fee (per sq metre)	£256.80
60	Comingling Shared Point of Presence Administration Fee	£228.00
61	Ancillary Service Structure Fixed price to service 1-3 Rack Space Units	£4928.40
62	Ancillary Service Structure Fixed price to service 4-6 Rack Space Units	£6130.80
63	Ancillary Service Structure Fixed price to service 7-9 Rack Space Units	£7734.00
64	Ancillary Service Structure upgrade from 1-3 Rack Space Units to 4-6 Rack Space Units	£2650.80

65	Ancillary Service Structure downgrade from 4-6 Rack Space Units to 1-3 Rack Space Units	£856.80
66	Low Capacity Unit (LCU)	£3423.60
67	Medium Capacity Unit 1 (MCU with 1 customer rack space unit)	£3961.20
68	Medium Capacity Unit 2 (MCU with 2 customer rack space units)	£4204.80
69	B-BUSS3 (Broadband Britain Umbilical Services Structure with 3 customer rack space units)	£6530.40
70	B-BUSS7 (Broadband Britain Umbilical Services Structure with 7 customer rack space units)	£7731.60
71	AC Final Distribution Rental per 10kw increment per annum (Charges will appear in billed units of decawatts (100W)	£348.00 pa rental
72	Cooling per kw	£1545.60
73	Upgrade of existing MCU1 product to MCU2	£904.80
74	Upgrade of existing BBUSS3 Point Of Presence to BBUSS7 (power and space)	£1999.20
75	Upgrade of existing BBUSS 3 Point Of Presence to B-BUSS 7 (space only)	£1758.00
76	Downgrade of existing BBUSS 7 Point Of Presence to B-BUSS 3 (space only)	£650.40
77	MCU1 Max or MCU2 Max initial build	£4222.80
78	Upgrade of existing MCU1 / MCU2 to MCU1Max / MCU2Max	£2426.40
79	Out of Hours Connection Fee for upgrade of existing MCU1 / MCU2 to MCU1Max / MCU2Max	£932.40
80	Upgrade of existing MCU1 / MCU2 to MCU1MaxAux / MCU2MaxAux	£6195.60
81	Out of Hours Connection Fee for upgrade of existing MCU1 / MCU2 to MCU1MaxAux / MCU2MaxAux	£932.40
82	Basic Single Rack	£3049.20
83	Complete Single Rack	£4028.40
84	Security rental per sq. metre	£22.80
85	Service Charge per square metre per annum	£54.00
86	BT's Normal Working Hours, planned	£43.20 per hour (minimum £174.00)
87	BT's Normal Working Hours, unplanned	£64.80 per hour (minimum £260.40)
88	BASIS (BT Assisted Site Delivery Service) fixed charge	£346.80

89	Site Access	£328.80
90	Handover	£273.60
91	Security partitioning per site charge	£130.80
92	ESS Survey for capacity upgrade	£346.80 pa rental
93	ESS Rental of existing capacity per kW per annum (Note 2, charges will appear in billed units of decawatts (10W))	£162.00
94	Provision of sub meter	£822.00
95	APO Cancellation Charge	£301.20
96	Internal 100 pair Tie Cable - HDF connected (1) for Co-Location and Co-Mingling -Connection	£532.80
97	Internal 100 pair Tie Cable - HDF connected (1) for Co-Location and Co-Mingling -Rental	£21.60
98	Duct Charge - Hand-over Distribution Frame option per 100 pair Frame capacity	£115.20

Except in so far as the context otherwise requires, the terms or descriptions of products and/or services used in this Part 3 shall be construed as having the same meaning as those provided by the Dominant Provider on its website for definitions and explanations of its products in addition to future product updates. These are currently found as follows:

- For SMPF and MPF product information, please refer to http://www.openreach.co.uk/orpg/home/products/llu/llu.do.
- For assurance information including care levels, please refer to the Service Products section of the Openreach website: http://www.openreach.co.uk/orpg/home/products/serviceproducts/service_products.do.
- For 21C related products, please refer to LLU secure portal, of the Openreach website for which CPs need to request access. This is done by choosing “LLU secure” from the Local Loop Unbundling menu available at: http://www.openreach.co.uk/orpg/home/products/llu/llu.do.
- For information held in the price list, please refer to the Plan and Build area within the “LLU Pricing” section of the price list available at: http://www.openreach.co.uk/orpg/home/products/pricing/loadPricing.do.

PART II – PROPOSED SETTING OF, AND MODIFICATION TO, SMP CONDITIONS

NOTIFICATION UNDER SECTION 48A AND 86 OF THE COMMUNICATIONS ACT 2003 Proposals for the setting of and modification to SMP services conditions to be imposed on BT as a result of the market power determination made by OFCOM in their "Review of the wholesale fixed analogue exchange lines markets: Statement on market definition, market power determinations and remedies" as published on 20 December 2010

Background

1. On 20 December 2010, OFCOM published a "Review of the wholesale fixed analogue exchange lines markets: Statement on market definition, market power determinations and remedies" (the "**WFAEL Statement**"[66]).

2. At Annex 1 to the WFAEL Statement, OFCOM published a notification identifying, in accordance with section 79 of the Act, the services market for wholesale analogue exchange line services within the United Kingdom, excluding the Hull Area, in which OFCOM determined that, for the purposes of making a market power determination under the Act, BT has Significant Market Power ("**SMP**") (the "**2010 Notification**").

3. As a result of that market power determination, in accordance with section 48(1) of the Act, OFCOM set on BT pursuant to section 45 of the Act the SMP services conditions set out in Schedule 1 to the 2010 Notification, including Condition AAAA3 which imposes obligations on BT with regard to cost based charges and Condition AAAA10 which imposes a requirement on BT to provide a wholesale analogue WLR service.

4. Although the WFAEL Statement which accompanied the 2010 Notification concluded that in principle a charge control on the wholesale analogue WLR service is necessary, it deferred consideration of the specifics of that charge control, including the relevant costs, method and design as to how that charge control should be applied, to a separate consultation.

5. On 31 March 2011, OFCOM published a consultation document entitled "*Charge control review for LLU and WLR services*"[67] (the "**March 2011 Consultation**") which included, in Annex 13 to that document, publication of a notification under section 48 of the Act setting out OFCOM's proposals to impose SMP services conditions on BT and to modify certain SMP services conditions already imposed on BT.

6. Following comments from stakeholders received in response to the March 2011 Consultation, OFCOM have made some amendments to the proposals set out in that consultation. In light of those amendments, this Notification relates to the proposed setting of SMP condition AAAA4(WLR) and the modification of SMP conditions AAAA3, AAAA5, AAAA6(a) and AAAA10 under the market definitions and market analysis as set out in the WFAEL Statement and the 2010 Notification (in relation to which Ofcom are satisfied there has been no material change since the determination was made) in order to address the identified risk of BT having the ability and the incentive to price excessively.

[66] http://stakeholders.OFCOM.org.uk/binaries/consultations/review-wholesale-fixed-exchange/statement/statement.pdf.
[67] As updated on 18 April 2011 and 18 May 2011, see: http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/Correction18011.pdf and http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/annexes/changes180511.pdf.

Proposals in this Notification

Proposals to set SMP service conditions

7. OFCOM hereby, in accordance with section 48A(3) of the Act, propose, in relation to the services market identified in paragraph 8(a) of the 2010 Notification, to set SMP Condition AAAA4(WLR), to apply to BT as set out in **Schedule 1** to this Notification.

8. The proposed SMP Condition shall have effect from [•][68].

9. OFCOM are proposing, in accordance with section 86(1)(b) of the Act, to set that SMP Condition AAAA4(WLR) by reference to the market power determination made in relation to the services market identified in paragraph 9(a) of the 2010 Notification in which OFCOM are satisfied there has been no material change since the determination was made.

10. The effect of, and OFCOM's reasons for making, these proposals are contained in Section 2 of the consultation accompanying this Notification and in Section 5 and 9 of the March 2011 Consultation.

Proposals to modify SMP service conditions

11. OFCOM are also proposing in accordance with section 86(4) of the Act to modify SMP Condition AAAA10, as set out in **Schedule 2** to this Notification, to clarify that the requirement to provide a wholesale analogue WLR service includes providing such ancillary services as may be reasonably necessary for the use of that service. In making this change OFCOM are satisfied that there has been no material change in the market since the determination in the 2010 Notification was made.

12. OFCOM are also proposing in accordance with section 86(4) of the Act to modify SMP Conditions AAAA3, AAAA5 and AAAA6(a), as set out below, to ensure that they cross-reference to the proposed new SMP condition AAAA4(WLR) imposing a charge control (see paragraph 6 above). In making these changes, OFCOM are satisfied that there has been no material change in the market since the determination in the 2010 Notification was made. Accordingly:

(a) in paragraph AAAA3.2 as set out in Schedule 1 to the 2010 Notification, for the reference to Condition AAA4(WLR), there shall be substituted the reference to Condition AAAA4(WLR), and Condition AAAA3 shall be read accordingly; and

(b) in paragraphs AAAA5.2(q) and AAAA5.3 of SMP Condition AAAA5 as set out in Schedule 1 to the 2010 Notification, for the reference to Condition AAA4(WLR), there shall be substituted the reference to Condition AAAA4(WLR), and Condition AAAA5 shall be read accordingly; and

(c) in paragraphs AAAA6(a).3 and AAAA6(a).5 of SMP Condition AAAA6(a) as set out in Schedule 1 to the 2010 Notification, for the reference to Condition AAA4(WLR), there shall be substituted the reference to Condition AAAA4(WLR), and Condition AAAA6(a) shall be read accordingly.

13. The proposed modifications to SMP Conditions AAAA3, AAAA5, AAAA6(a) and AAAA10 shall have effect from [•][69].

[68] The date which is 28 days from the date of Notification under section 48(1) of the Act.
[69] The date which is 28 days from the date of Notification under section 48(1) of the Act.

14. The effect of, and OFCOM's reasons for making, each of these proposals are contained in Section [2] of the consultation accompanying this Notification and Section 5 and 9 of the March 2011 Consultation.

OFCOM's duties and legal tests

15. OFCOM consider that the proposed setting of SMP Condition AAAA4(WLR) and the proposed modifications to Conditions AAAA3, AAAA5, AAAA6(a) and AAAA10 referred to above comply with the requirements of sections 45 to 47, 87 and 88 of the Act as appropriate and relevant to them.

16. In making the proposals set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3, and the six Community requirements in section 4, of the Act.

Making representations

17. Representations may be made to OFCOM about the proposals set out in this Notification and the accompanying explanatory document by no later than **23 December 2011**.

18. A copy of this Notification and the accompanying document has been sent to the Secretary of State in accordance with section 48C(1) of the Act.

Interpretation

19. Except for references made to the identified services market in this Notification as set out in the 2010 Notification and except as otherwise defined in paragraph 20 of this Notification, words or expressions used in this Notification shall have the same meaning as they have been ascribed in the Act.

20. In this Notification—

(a) "**2010 Notification**" has the meaning given to it in paragraph 2 above;

(b) "**Act**" means the Communications Act 2003 (c.21);

(c) "**BT**" means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;

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

(e) "**March 2011 Consultation**" has the meaning given to it in paragraph 5 above;

(f) "**OFCOM**" means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (c. 11);

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

(h) “**WFAEL Statement**” has the meaning given to it in paragraph 1 above.

21. For the purpose of interpreting this Notification—

(a) headings and titles shall be disregarded; and

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

22. Schedules 1 and 2 to this Notification shall form part of this Notification.

David Stewart
Competition Policy Director

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

23 November 2011

Schedule 1

[DRAFT] Setting of SMP services condition AAAA4(WLR) as a result of the market power determination made by Ofcom in a statement entitled "Review of the wholesale fixed analogue exchange lines markets: Statement on market definition, market power determinations and remedies" as published on 20 December 2010 in which it was determined that BT has significant market power

1.The following new SMP Condition AAAA4(WLR) shall be set by inserting it after Condition AAAA3 in Part 2 of Schedule 1 to the 2010 Notification—

Condition AAAA4(WLR) - Charge control

AAAA4(WLR).1 Without prejudice to the generality of Condition AAAA3, and subject to paragraph AAAA4(WLR).3, the Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Year, the Percentage Change (determined in accordance with paragraph AAAA4(WLR).4, as applicable) in:

(a) the charge for Analogue Core WLR rental, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph AAAA4(WLR).2(a) applies;

(b) the charge for WLR Transfer except for the First Relevant Year in relation to which the charge ceiling specified in paragraph AAAA4(WLR).2(b) applies; and

(c) the charge for WLR New Connection except for the First Relevant Year in relation to which the charge ceiling specified in paragraph AAAA4(WLR).2(c) applies;

in each of the three single charge categories of products and/or services specified in paragraphs AAAA4(WLR).1(a) to (c) above is not more than the Controlling Percentage (as determined in accordance with paragraph AAAA4(WLR).5).

AAAA4(WLR).2 The Dominant Provider shall not charge more than:

(a) for Analogue Core WLR rental, the amount of £[•] in the First Relevant Year;

(b) for WLR Transfer, the amount of £[•] in the First Relevant Year;

(c) for WLR New Connection, the amount of £[•] in the First Relevant Year.

AAAA4(WLR).3 For the purpose of complying with paragraph AAAA4(WLR).1, (and except in relation to the charges specified in AAAA4(WLR).2 for the First Relevant Year), the Dominant Provider shall take all reasonable steps to secure that the revenue it accrues as a result of all individual Charge Changes during any Relevant Year shall be no more than that which it would have accrued had all of those Charge Changes been made for the Second Relevant Year, on 1 April of that year.

The Dominant Provider shall be deemed to have satisfied this obligation where, in the case of a single Charge Change during the Relevant Year, the following formula is satisfied:

$$RC(1-D) \leq TRC$$

where:

RC is the revenue change associated with the single Charge Change made in the Relevant Year, calculated by the relevant Percentage Change immediately following the Charge Change multiplied by the revenue accrued during the Prior Financial Year;

TRC is the target revenue change required in the Relevant Year to achieve compliance with paragraph AAAA4(WLR).1, calculated by the Percentage Change required in the Relevant Year to achieve compliance with paragraph AAAA4(WLR).1 multiplied by the revenue accrued during the Prior Financial Year; and

D is the elapsed proportion of the Relevant Year in question, calculated as:

(a) for the First Relevant Year, the date on which the Charge Change takes effect, expressed as a numeric entity on a scale ranging from 1 April = 0 to 31 March = 365, divided by 366;

(b) for the Second Relevant Year, the date on which the Charge Change takes effect, expressed as a numeric entity on a scale ranging from 1 April = 0 to 31 March = 364, divided by 365.

AAAA4(WLR).4 The Percentage Change for the purposes of each of the products and/or services specified (each of which is referred to in this paragraph as a "single charge category") in paragraphs AAAA4(WLR).1(a), AAAA4(WLR).1(b) and AAAA4(WLR).1 (c) respectively shall be calculated for the purposes of complying with paragraph AAAA4(WLR).1 by employing the following formula:

$$C_t = \frac{(p_t - p_0)}{p_0}$$

where:

C_t is the Percentage Change in charges for the specific product and/or service in the single charge category in question at a particular time *t* during the Relevant Year;

p_0 is (i) for the First Relevant Year, the charge specified in paragraph AAAA4(WLR).2 in respect of the single charge category in question; and (ii) for the Second Relevant Year, the published charge made by the Dominant Provider for the specific product and/or service in the single charge category in question at the beginning of the Relevant Year excluding any discounts offered by the Dominant Provider; and

p_t is the published charge made by the Dominant Provider for the specific product and/or service in the single charge category in question at the time *t* during the Relevant Year excluding any discounts offered by the Dominant Provider.

AAAA4(WLR).5 Subject to paragraphs AAAA4(WLR).6 and AAAA4(WLR).7, the Controlling Percentage in relation to any Relevant Year means:

(a) for the category of products and/or services specified in paragraph AAAA4(WLR).1.(a). for the Second Relevant Year, RPI decreased by [•] percentage points;

(b) for the category of products and/or services specified in paragraph AAAA4(WLR).1.(b) for the Second Relevant Year, RPI;

(c) for the category of products and/or services specified in paragraph AAAA4(WLR).1.(c) for the Second Relevant Year, RPI decreased by [•] percentage points.

For the avoidance of doubt, the charges for each of these products and/or services are constrained by AAAA4(WLR).2 in the First Relevant Year.

AAAA4(WLR).6 Where the Percentage Change in either of the First Relevant Year is less than the Controlling Percentage (the "Excess"), then for the purposes of each of the categories of products and/or services specified in paragraphs AAAA4(WLR).1(a), AAAA4(WLR).1(b) and AAAA4(WLR).1(c) respectively the Controlling Percentage for the following Relevant Year shall be determined in accordance with paragraph AAAA4(WLR).5, but increased by the absolute value of the Excess.

AAAA4(WLR).7 Where the Percentage Change in either of the First Relevant Year is more than the Controlling Percentage (the "Deficiency"), then for the purposes of each of the categories of products and/or services specified in paragraphs AAAA4(WLR).1(a), AAAA4(WLR).1(b) and AAAA4(WLR).1(c) respectively the Controlling Percentage for the following Relevant Year shall be determined in accordance with paragraph AAAA4(WLR).5, but decreased by the absolute value of the Deficiency.

AAAA4(WLR).8 Where

(a) the Dominant Provider makes a material change (other than to a Charge) to any Charge Controlled Service for which a Charge is charged;

(b) the Dominant Provider makes a change to the date on which its financial year ends; or

(c) there is a material change in the basis of the Retail Prices Index;

paragraphs AAAA4(WLR).1 to AAAA4(WLR).7 shall have effect subject to such reasonable adjustment to take account of the change as OFCOM may direct to be appropriate in the circumstances. For the purposes of this paragraph AAAA4(WLR).8, a material change to the Charge Controlled Service includes (but is not limited to) the introduction of a new product and/or service wholly or substantially in substitution for that existing Charge Controlled Service.

AAAA4(WLR).9 The Dominant Provider shall record, maintain and supply to OFCOM in writing, no later than three months after the end of the Relevant Year, the data necessary for OFCOM to monitor compliance of the Dominant Provider with the price control by performing the calculation of the Percentage Change. The data shall include:

(a) pursuant to Condition AAAA4(WLR).4, the calculated Percentage Change relating to each category of products and services listed in paragraphs AAAA4(WLR).1 (a) through to (c);

(b) pursuant to Condition AAAA4(WLR).3, calculation of the revenue accrued as a result of all relevant individual charge changes during any Relevant Year compared to the target revenue change;

(c) all relevant data the Dominant Provider used in the calculation of the percentage change C_t pursuant to Conditions AAAA4(WLR).4 for the category of products and services specified in paragraphs AAAA4(WLR).1 (a) through to (c);

(d) all relevant data the Dominant Provider used in the calculation of the revenue change and target revenue change pursuant to Condition AAAA4(WLR).3;

(e) all relevant revenues accrued during the Prior Financial Year in respect of the specific product or service;

(f) published charges made by the Dominant Provider at time *t* during the Relevant Year excluding any discounts offered by the Dominant Provider;

(g) the relevant published charge at the start of the Relevant Year; and

(h) other data necessary for monitoring compliance with the charge control.

AAAA4(WLR).10 If it appears to OFCOM that the Dominant Provider is likely to fail to secure that the Percentage Change does not exceed the Controlling Percentage for the Second Relevant Year, the Dominant Provider shall make such adjustment to any of its charges for the provision of Charge Controlled Services and by such day in that Relevant Year (or if appropriate in OFCOM's opinion, by such day that falls after the end of that Relevant Year) as OFCOM may direct for the purpose of avoiding such a failure.

AAAA4(WLR).11 Paragraphs AAAA4(WLR).1 to AAAA4(WLR).10 shall not apply to such extent as OFCOM may direct.

AAAA4(WLR).12 The Dominant Provider shall comply with any direction OFCOM may make from time to time under this Condition.

AAAA4(WLR).13 In this Condition:

(a) "**Analogue Core WLR Rental**" means, unless OFCOM directs otherwise from time to time for the purpose of the meaning of this expression, such services as the Dominant Provider is required to provide under SMP services condition AAAA10.1(a) and which on the date this Condition takes effect include:

i. the rental of an analogue exchange line for control and billing purposes;

ii. maintenance which is part of the service provided by the Dominant Provider in consideration of the charge for an Exchange Line and includes a maintenance service level with a fault repair time of no more than provided for Level 1 service care level for Basic lines, as defined in the Dominant Provider's standard terms and conditions; and

iii. one main directory listing per telephone number, comprising of either:

(i) a residential style listing; or

(ii) a business style listing, where the Dominant Provider provides to the Third Party a WLR3 service, as defined in the Dominant Provider's standard terms and conditions;"

(b) "**Charge**" means for the purposes of paragraph AAAA4(WLR).8, the charge (being in all cases the amounts offered or charged by the Dominant Provider) to a communications provider for the Charge Controlled Service;

(c) "**Charge Change**" means a change to any of the charges for the provision of the products and/or services listed in AAAA4(WLR).1(a), AAAA4(WLR).1(b) and AAAA4(WLR).1(c);

(d) "**Charge Controlled Service**" means a product and/or service listed in AAAA4(WLR).1(a), AAAA4(WLR).1(b) and AAAA4(WLR).1(c);

(e) "**Controlling Percentage**" is to be determined in accordance with paragraph AAAA4(WLR).5;

(f) "**Dominant Provider**" means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;

(g) "**OFCOM**" means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (c. 11);

(h) "**Percentage Change**" has the meaning given to it in paragraph AAAA4(WLR).4;

(i) "**Prior Financial Year**" means the period of 12 months ending on 31 March immediately preceding the Relevant Year;

(j) "**Relevant Year**" means each of the following three periods:

(1) the period beginning on 1 April 2012 and ending on 31 March 2013 (the "**First Relevant Year**");

(2) the period beginning on 1 April 2013 and ending on 31 March 2014 (the "**Second Relevant Year**");

(k) "**Retail Prices Index**" means the index of retail prices compiled by an agency or a public body on behalf of Her Majesty's Government or a governmental department (which is the Office for National Statistics at the time of publication of this Notification) from time to time in respect of all items;

(l) "**RPI**" means the amount of the change in the Retail Prices Index in the period of twelve months ending on 31 October immediately before the beginning of a Relevant Year, expressed as a percentage (rounded to two decimal places) of that Retail Prices Index as at the beginning of that first mentioned period.

(m) "**WLR Transfer**" means a charge for the transfer of control of an analogue access line; and

(n) "**WLR New Connection**" means a charge for the connection of a new analogue line to a premises.

SCHEDULE 2

Modification to SMP service condition AAAA10.

SMP Condition AAAA10 shall be modified by

(a) removing the current paragraphs AAAA10.1 and AAAA10.2 of Condition AAAA10 in Part 2 of Schedule 1 to the Notification published at Annex 1 of the statement entitled "Review of the wholesale fixed analogue exchange lines markets: Statement on market definition, market power determinations and remedies" published on 20 December 2010 by OFCOM and inserting in their place the following new paragraphs AAAA10.1 and AAAA10.2:

"**AAAA10.1** The Dominant Provider shall provide Wholesale Line Rental, which shall include, where also requested by a Third Party, such Ancillary Services as may be reasonably necessary for the use of Wholesale Line Rental, as soon as is reasonably practicable, or as directed by Ofcom, on reasonable terms to every Third Party who makes a reasonable request in relation to wholesale analogue exchange line services.

AAAA10.2 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges of providing WLR services in paragraph AAAA10.1, including for the avoidance of doubt such Ancillary Services as may be reasonably necessary for the use of Wholesale Line Rental, are based on the forward looking long-run incremental cost, except where the Dominant Provider and Third Party have agreed another basis for the charges."

(b) inserting the following new paragraph AAAAA10.6 in Condition AAAA10 after the current paragraph AAAA10.5:—

"**AAAA10.6** In this Condition:

"**Ancillary Services**" mean an Associated Facility or services associated with an Electronic Communications Network and/or an Electronic Communications Service which enable and/or support the provision of services via that Network and/or Service or have the potential to do so."

Annex 6

Glossary

21CN: BT's next generation network upgrade.

Ancillary services: Services that relate to the Core Rental Services and that are of an ancillary nature but which fall within markets in which BT has been found to have SMP.

BT: British Telecommunications plc.

BT Retail: The retail division of BT.

BT Wholesale: The wholesale division of BT.

Comingling Services: All essential support services which are used jointly by SMPF and MPF, including the collocation services e.g. electricity, ventilation.

Common costs: Costs which are shared by all the services supplied by a firm.

Competition Commission (CC): An independent public body that conducts inquiries into mergers, markets and the major regulated industries.

Cost orientation: The principle that the price charged for the provision of a service should reflect the underlying costs incurred in providing that service.

CP (Communications Provider): A person who provides an Electronic Communications Network or provides an Electronic Communications Service.

Current cost accounting (CCA): An accounting convention, where assets are valued and depreciated according to their current replacement cost whilst maintaining the operating or financial capital of the business entity.

Current cost accounting fully allocated cost (CCA FAC): An approach used to measure a company's costs.

Current generation network (CGN): A network that uses existing (copper) technology in the core and backhaul.

Distributed long run incremental cost (DLRIC): The LRIC of the individual service with a share of costs which are common to other services over BT's core network.

Distributed stand alone cost (DSAC): An accounting approach estimated by adding to the DLRIC a proportionate share of the inter-increment common costs. Rather than all common costs shared by a service being allocated to the service under consideration, the common costs are instead allocated amongst all the services that share the network increment.

Early termination charge (ETC): The fee that will be charged by a Communications Provider to their customer for early termination of a contract or agreement.

Ethernet Direct Access (EDA): Ethernet Access Direct provides point-to-point data connectivity between sites. It can be used to build and extend customer networks, develop new infrastructure, and meet low-capacity backhaul requirements. EAD supports cloud computing, simultaneous online pupil access in classrooms and storage area network connectivity.

Fibre to the cabinet (FTTC): "Next generation broadband" service based on fibre optic cable installed from the telephone exchange to the street-side telephone cabinet. The connection from the cabinet to the customer's premise is by copper wire.

Fibre to the premise (FTTP): "Next generation broadband" service based on fibre optic cable installed from the telephone exchange all the way to the customer's premise.

Fully allocated cost (FAC): An accounting approach under which all the costs of the company are distributed between its various products and services. The fully allocated cost of a product or service may, therefore, include some common costs that are not directly attributable to the service.

Glide path: The notional path that the charge of a product should follow so as to match the product's forecast cost at a particular point in the future (normally in this case the cost at the end of the control period).

Gross replacement cost (GRC): The cost of replacing an existing tangible fixed asset with an identical or substantially similar new asset having a similar production or service capacity.

Historic cost accounting (HCA): A method of accounting under which assets and liabilities are recorded at the values at which they were first acquired.

Incremental costs: Those costs which are directly caused by the provision of that service in addition to the other services which the firm also produces. Another way of expressing this is that the incremental costs of a service are the difference between the total costs in a situation where the service is provided and the costs in another situation where the service is not provided.

Inertia clause: A clause in which restricts relative charge movements within a basket of services.

ISDN2: A digital telephone line service that supports telephony and switched data services. ISDN2 provides the calling or data capacity equivalent to two analogue telephone lines.

ISDN30: A digital telephone service that provides up to the equivalent of 30 analogue lines over a common digital bearer circuit. These lines provide digital voice telephony, data services and a wide range of ancillary services.

Jumpering: The wiring arrangement for a given service on the main distribution frame (“MDF”).

Local loop: The access network connection between the customer’s premises and the local serving exchange, usually comprised of two copper wires twisted together.

Local loop unbundling (LLU): A process by which a dominant provider’s local loops are physically disconnected, or partially disconnected, from its network and connected to competing provider’s networks. This enables operators other than the incumbent to use the local loop to provide services directly to customers.

Local loop unbundling operator (LLUO): A CP using LLU to provide an electronic communications service to customers.

Long run incremental cost (LRIC): The cost caused by the provision of a defined increment of output given that costs can, if necessary, be varied and that some level of output is already produced.

Long Term Evolution (LTE): Long Term Evolution (LTE) is a wireless broadband technology developed by the Third Generation Partnership Project (3GPP), an industry trade group. 3GPP engineers named the technology "Long Term Evolution" because it represents the next step (4G) in a progression from GSM, a 2G standard, to UMTS, the 3G technologies based upon GSM. LTE provides significantly increased peak data rates, with the potential for 100 Mbps downstream and 30 Mbps upstream, reduced latency, scalable bandwidth capacity, and backwards compatibility with existing GSM and UMTS technology.

Main distribution frame (MDF)/unbundled local loop: An internal wiring frame where copper access network cables are terminated and cross connected to exchange equipment by flexible wire jumpers.

Metallic path facilities (MPF): The provision of access to the copper wires from the customer 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.

Migration services: The services rendered by Openreach in migrating a customer from one service provider to another for a given service.

Minimum contract period (MCP): The amount of time a consumer must remain in a contract before being able to cancel it.

Movements in the frontier (efficiency): The annual rate at which an efficient operator would be expected to reduce its operating costs in the future.

MPF - ancillary services (basket): The set of MPF ancillary services subject to a basket charge control.

Network terminating equipment (NTE): Transmission equipment located at the customer premises. Performs a similar function to LTE and also provides the customer interface.

Next generation network (NGN): A network that uses IP technology in the core and backhaul to provide all services over a single platform.

Openreach: The access division of BT established by Undertakings in 2005.

Public switched telecommunications network (PSTN): The conventional telephony network used to provide telephone calls using circuit-switching.

Regulatory financial statements (RFS): The financial statements that BT is required by Ofcom to prepare, have audited and publish.

Retail price index (RPI): A measure of inflation published monthly by the Office for National Statistics. It measures the change in the cost of a basket of retail goods and services.

Shared metallic path facility (SMPF)/shared access: The provision of access to the copper wires from the customer’s premises to a BT MDF that allows a competing provider to provide the customer with broadband services, while the dominant provider continues to provide the customer with conventional narrowband communications.

SMPF - ancillary services (basket): The set of SMPF ancillary services subject to a basket charge control.

Stand alone costs (SAC): An accounting approach under which the total cost incurred in providing a service is allocated to that service.

Significant market power (SMP): The term used in the European Common Regulatory Framework to describe the position of a person who enjoys a market position of dominance with respect to that market.

Tie cable: A cable that connects equipment to the Main Distribution Frame (MDF).

Wholesale Extension Services (WES): Wholesale Extension Services provides the connection between an end user and a CP's network. WES offers a secure link between a CP's recognised Point of Presence (POP) and an end user site. It enables end users to extend their network via another location and to share applications between those locations in a secure manner.

Wholesale Fixed Analogue Exchange Line (WFAEL) market review: A review undertaken by Ofcom of the wholesale fixed analogue exchange line services. The last market review was completed on 20 December 2010.

Wholesale Local Access (WLA) market review: A review undertaken by Ofcom of the wholesale local access market. The last market review was completed on 07 October 2010.

Wholesale line rental (WLR): The managed service offered by BT to other UK communications providers to enable them to offer retail line rental services in competition with BT's own retail services. It supports retail voice telephony services. Line rental is offered along with calls (and can be offered with other service elements, such as broadband) to retail customers.

WLR appeal: An appeal submitted by Talk Talk to the Competition Appeal Tribunal against the decisions contained in Ofcom's Statement "*Charge controls for Wholesale Line Rental and related services*" of 26 October 2009.

WLR calling and network features: Add-on services provided alongside core WLR rentals.