

# DIRECTION REGARDING REMOVAL OF INERTIA OBLIGATION FOR MPF SINGLETON JUMPER REMOVAL AND MPF BULK JUMPER REMOVAL

Decision with regards to the Direction under section 49 of the Communications Act 2003 and paragraph FAA4(A).16 of SMP services Condition FAA4(A) imposed on BT as a result of the charge control determination made by OFCOM in “*Charge control review for LLU and WLR services*” as published on 7 March 2012 following a market power determination made by OFCOM in “*Review of the wholesale local access market – Statement on market definition, market power and remedies*” as published on 7 October 2010, that BT has significant market power in the market for wholesale local access services in the United Kingdom excluding the Hull Area

## Background

1. On 7 October 2010, OFCOM published their statement entitled “*Review of the wholesale local access market – Statement on market definition, market power and remedies*” (the “**WLA Statement**”).
2. In the WLA Statement, OFCOM determined that BT held Significant Market Power (“**SMP**”) in the market for wholesale local access in the United Kingdom but not including the Hull Area.
3. As a result, OFCOM imposed a number of remedies on BT in order to address identified competition concerns. Those remedies included the imposition of a charge control obligation, which applied to, among others, the market set out at paragraph 2 above, but deferred consideration of the specifics of the charge control, including the relevant costs, in a separate consultation.
4. On 7 March 2012, OFCOM published their statement entitled “*Charge control review for LLU and WLR services*” (the “**Charge Control**”).
5. In the Charge Control, OFCOM set a SMP services Condition FAA4(A), paragraph FAA4(A).6 of which imposes an inertia obligation upon BT, as follows:

**FAA4(A).6** *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 7.5 percentage points; and*

*(b) no less than the Controlling Percentage reduced by 7.5 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 within the basket in question and the definition of  $p_0$  shall be replaced with the following:*

*$p_0$  is (i) for the First Relevant Year, the charge specified in Part I, II or III of the Annex to this Condition FAA4(A) 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.*

6. In the Charge Control, OFCOM also set paragraph FAA4(A).2 of SMP services Condition FAA4(A), which imposes starting charge adjustment obligations on BT, as follows:

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

....

*(h) for MPF Singleton Jumper Removal, the amount of £25.81 in the First Relevant Year;*

....

*(j) for MPF Bulk Jumper Removal, the amount of £19.63 in the First Relevant Year;*

....

7. The requirements of paragraph FAA4(A).2 in relation to MPF Singleton Jumper Removal and MPF Bulk Jumper Removal impose starting charge adjustments that require a Percentage Change that is greater than that specified by the inertia obligation, and therefore is not consistent with paragraph FAA4(A).6. Therefore, OFCOM considers that the inertia obligations imposed by paragraph FAA4(A).6 should not apply to MPF Singleton Jumper Removal and MPF Bulk Jumper Removal in the First Relevant Year.

8. For the reasons set out in the explanatory statement accompanying this Direction, in accordance with section 49(2) of the Act, OFCOM are satisfied that this Direction is—

- (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
- (b) not such to discriminate unduly against particular persons or against a particular description of persons;
- (c) proportionate to what it is intended to achieve; and
- (d) in relation to what it is intended to achieve, transparent.

9. In accordance with section 49C of the Act, copies of this Direction have been sent to the Secretary of State and the European Commission.

10. For the reasons set out in the explanatory statement accompanying this Direction, OFCOM have considered and acted in accordance with their general duties set out in section 3 of, and the six Community requirements set out in section 4 of the Act in making this Direction.

## Direction

11. OFCOM hereby, in accordance with section 49 of the Act and under paragraph FAA4(A).16 of SMP services Condition FAA4(A).6, directs that paragraph FAA4(A).6 of SMP services Condition FAA4(A) shall not apply in the First Relevant Year to MPF Singleton Jumper Removal and MPF Bulk Jumper Removal provided by BT in the market set out in paragraph 8(a) of the Notification to the WLA Statement, that is to say wholesale local access services.

12. The effect of, and the reasons for making, this Direction are set out in the accompanying explanatory statement.

## Effective date

13. This Direction shall take effect on 31 March 2012.

## Interpretation

14. Except for references made to the identified services market in this Direction and subject to paragraph 15 below, words or expressions used in this Direction shall have the same meaning as they have been ascribed in the Act.

15. In this Direction—

- (a) “**Act**” means the Communications Act 2003 (c.21);
- (b) “**BT**” means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;
- (c) “**Charge Control**” has the meaning given to it in paragraph 4 of this Direction;
- (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) “**First Relevant Year**” means the period beginning on 1 April 2012 and ending on 31 March 2013;
- (f) “**MPF Bulk Jumper Removal**” shall be construed as having the same meaning as ‘MPF MDF Remove Jumper Order Bulk Charge’ as provided by BT on its website for definitions and explanations of its products;
- (g) “**MPF Singleton Jumper Removal**” shall be construed as having the same meaning as ‘MPF MDF Remove Jumper Order Singleton Charge’ as provided by BT on its website for definitions and explanations of its products;
- (h) “**OFCOM**” means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (c. 11);
- (i) “**Percentage Change**” has the meaning given to it in paragraph FAA4(A).4 and FAA4(A).5 of SMP services Condition FAA4(A), as applicable;

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

(k) **“WLA Statement”** has the meaning given to it in paragraph 1 of this Direction.

19. For the purpose of interpreting this Direction—

(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.

**Signed by**

A handwritten signature in dark ink, appearing to be 'D. Clarkson', with a stylized flourish at the end.

**David Clarkson**

**Director Competition Policy**

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

**28 March 2012**

# Explanatory Statement

## Direction

### Background

On 7 March 2012, Ofcom published its Statement on the Charge Control Review for LLU and WLR Services (the “Statement”) which, *inter alia*, set charge controls related to LLU services under SMP services Condition FAA4(A).

The charge controls include a requirement on BT (Openreach)<sup>1</sup> under paragraph FAA4(A).2 of SMP services Condition FAA4(A) to set starting charges for the first year of the charge control for a number of services including MPF Singleton Jumper Removal<sup>2</sup> and MPF Bulk Jumper Removal.<sup>3</sup> In the Statement, we set out our decision to make a one-off adjustment to reduce the starting charge for MPF Singleton Jumper Removal to its 2011/12 CCA FAC and a one-off adjustment to MPF Bulk Jumper Removal, in order to maintain the current absolute difference in price between the Singleton and Bulk variants.<sup>4</sup> In particular we noted that LLU (i.e. MPF and SMPF) Singleton Jumper charges are passed onto consumers and, therefore, any differential in the prices for MPF and SMPF variants would potentially have an impact on the competitive position between those services. We also noted 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. Accordingly, following consultation, we decided to set the starting charges of both MPF Singleton Jumper removal services and SMPF Singleton Jumper removal services to their respective 2011/12 CCA FACs. We also recognised, after careful consideration, that there should be an appropriate price differential between the LLU Singleton Jumper removal and LLU Bulk Jumper removal services, to maintain an appropriate price differential between the respective Singleton and Bulk services. Accordingly, in order to set an appropriate differential between these services we decided to set starting charges for the MPF Bulk Jumper removal service (and SMPF Bulk Jumper removal service).

In the Statement, we also set out our decision to set an inertia obligation, under paragraph FAA4(A).6, across the MPF Ancillary Services basket (and SMPF and Co-mingling Ancillary Services baskets) to 7.5%.<sup>5</sup> We considered that our decision was appropriate and proportionate to prevent any potential risk of gaming by BT. Accordingly, the charge controls include a requirement under paragraph FAA4(A).6 of SMP services Condition FAA4(A) for BT to comply with an inertia obligation which requires that the percentage change applied to each of the categories of service in the MPF Ancillary Services basket (and the SMPF Ancillary Services basket and the Co-Mingling Services basket) is no more than the Controlling Percentage increased by 7.5 per cent or no less than the Controlling Percentage

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<sup>1</sup> Openreach is the access division of BT established by Undertakings in 2005. Whilst the proposed SMP services conditions in the Statement formally apply to British Telecommunications plc, Openreach is the division of BT which provides the LLU and WLR services we regulate. Therefore, we refer to Openreach as the supplier of wholesale LLU and WLR services.

<sup>2</sup> Described in the price list as “MPF MDF Remove Jumper Order Singleton Charge”.

<sup>3</sup> Described in the price list as “MPF MDF Remove Jumper Order Bulk Charge”.

<sup>4</sup> See paragraphs 4.261-4.291 of the Statement.

<sup>5</sup> See paragraphs 4.138-4.184 of the Statement.

reduced by 7.5 per cent. The applicable Controlling Percentage is specified by paragraph FAA4(A).8.

## **Decision**

The MPF Singleton Jumper Removal and MPF Bulk Jumper Removal services are included within the MPF Ancillary Services basket. BT has drawn to our attention that the inertia obligation on the MPF Ancillary Services basket cuts across the starting charge adjustment for MPF Singleton Jumper Removal and MPF Bulk Jumper Removal. This was not our intention when we made our decision on the relevant starting charges and inertia obligations. Rather, our intention was that BT should be able to price MPF Singleton Jumper Removal and MPF Bulk Jumper Removal at £25.81 and £19.63 respectively (see paragraphs 4.284 and 4.290 of the Statement). Therefore, in order to achieve this it is necessary to disapply the inertia obligation for MPF Singleton Jumper Removal and MPF Bulk Jumper Removal for the First Relevant Year of the charge control.

Paragraph FAA4(A).16 of SMP services Condition FAA4(A) provides for certain paragraphs of SMP services Condition FAA4(A) not to apply to such extent as Ofcom may direct. This includes paragraph FAA4(A).6. Therefore, we are making a direction under paragraph FAA4(A).16 that paragraph FAA4(A).6 shall not apply to MPF Singleton Jumper Removal and MPF Bulk Jumper Removal in the First Relevant Year.

## **Legal framework**

Sections 49A and 49B of the Communications Act 2003 (the “Act”) set out the relevant procedures that must be followed for domestic and EU consultations respectively on directions. However, it is our view that these do not apply in this case.

Section 49A of the Act applies where the proposals are for the purposes of:

- (a) an SMP apparatus condition; or
- (b) any other condition set under section 45 where what is proposed would, in Ofcom’s opinion, have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which Ofcom has functions under Chapter 1 of Part 2 of the Act.

We consider that Section 49A(1)(a) does not apply in this case because we are not proposing to give a direction for the purposes of an SMP apparatus condition. Section 49A(1)(b) also does not apply because in our view the direction would not have a significant impact on a market for any of the services, facilities, apparatus or directories in relation to which we have functions under Chapter 1 of Part 2 of the Act. The Direction gives effect to our intention in the Statement which was fully consulted on and evaluated as part of our process in reaching that decision.

Section 49B of the Act applies where the proposals are of EU significance. Section 150A(2) of the Act sets out the cumulative criteria that must be satisfied in order for a proposal to be of EU significance.

We further consider that Section 49B does not apply because our decision to give a direction is not of EU significance, as defined under section 150A(2), in particular because in our opinion, given the nature and limited extent of the direction we are giving, this decision would

not affect trade between Member States.<sup>6</sup> Again, the Direction gives effect to our intention in the Statement which was fully consulted on and evaluated as part of our process in reaching that decision.

## **Legal tests**

We set out below the basis on which we are satisfied that the legal tests applicable to the direction we are making are satisfied, including our duties under sections 3, 4 and 49(2) of the Act.

### Sections 3 and 4 of the Act

Our general duties are set out in Section 3 of the Act. These include our principal duty in carrying out functions to further the interests of citizens in relation to communications matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.

Section 4 of the Act sets out our duties for the purposes of fulfilling Community obligations. In summary, these require that Ofcom acts in accordance with six Community requirements for regulation, namely: the promotion of competition; the development of the European internal market; the promotion of the interests of all EU citizens; non-discrimination; promoting efficiency and sustainable competition and the maximum benefit for consumers; and facilitating service interoperability and securing freedom of choice for consumers.

We consider that the direction is consistent with our duties under sections 3 and 4 of the Act.

In particular, we consider that the direction is giving effect to the charge control for MPF Singleton Jumper Removal and MPF Bulk Jumper Removal imposed in the Statement.

We explained in section 8 of the Statement why we considered that the charge control will, in particular further the interests of citizens and of consumers in the relevant markets by the promotion of competition in line with section 3 of the Act. In particular, we outlined that the charge control seeks to ensure the availability throughout the UK of a wide range of electronic communications services. In imposing the charge control, we had regard to the desirability of promoting competition in relevant markets, the desirability of encouraging investment and innovation in relevant markets and the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom.

Further, we considered 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.

### Section 49(2) tests

Ofcom may only make a direction where it is satisfied that the direction is objectively justifiable, not unduly discriminatory, proportionate and transparent, in accordance with

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<sup>6</sup> The cumulative criteria that must be satisfied in order for a proposal to be of EU significance include the criterion that the proposal would, in Ofcom's opinion, affect trade between Member States (see section 150A(2)(d) of the Act).

section 49(2) of the Act. We set out below why we consider that the direction fulfils those tests.

*Objective justification*

For MPF Singleton Jumper Removal and MPF Bulk Jumper Removal it is necessary to disapply the inertia obligation since the inertia obligation on the MPF Ancillary Services basket cuts across the starting charge adjustments for each of these services.

*Undue discrimination*

The direction applies only to products provided by Openreach, so it affects all communication providers and therefore their customers equally.

*Proportionate*

We consider that the direction is proportionate. We have limited the disapplication of the inertia obligation to the services affected (i.e. MPF Singleton Jumper Removal and MPF Bulk Jumper Removal ) for the First Relevant Year only.

*Transparent*

We consider that the direction clearly sets out the position as to how the inertia obligation applies to this market. We consider that we have clearly identified the services that we consider should be exempted from the obligation in order to ensure that it is clear and unequivocal as to when the obligation does not apply.