



# Openreach Financial Framework Local Loop Unbundling Charge Control

Adoption of Revised SMP Services Conditions following the  
Competition Appeal Tribunal's Directions of 11 October  
2010

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## Section 1

# Background to Revisions

- 1.1 On 22 May 2009 Ofcom published the Openreach Financial Framework statement<sup>1</sup> (the “LLU Statement”) imposing charge controls on the supply of selected Local Loop Unbundling services pursuant to sections 45, 87 and 88 of the Communications Act 2003 (the “2003 Act”).

- 1.2 More specifically Ofcom imposed the following new charge controls:

For the core rental services

	Price prior to LLU Statement	Price in 2009/10	Indexation in 2010/11
<b>MPF</b>	£81.69	£86.40	RPI +5.5%
<b>SMPF</b>	£15.60	£15.60	RPI +1.0%

For ancillary services

Service	Indexation in 2009/10	Indexation on 1 April 2010
<b>MPF ancillary services</b>	3.0%	RPI +4.5%
<b>SMPF ancillary services</b>	3.0%	RPI +4.5%
<b>Co-mingling services</b>	3.0%	RPI +4.5%

- 1.3 Ofcom also set sub-caps and, in some cases, individual starting charges for key migration services within the individual baskets. Details of the relevant SMP Services Conditions are set out in Annex 3 to the LLU Statement.

## The LLU Appeal

- 1.4 On 22 July September 2009, Carphone Warehouse Group PLC (“CPW”) brought an appeal against the LLU Statement to the Competition Appeal Tribunal (the “Tribunal”) under section 192 of the 2003 Act. British Sky Broadcasting Ltd (“Sky”) and British Telecommunications plc (“BT”) both intervened (the “Interveners”).
- 1.5 On 27 November 2009, the Tribunal referred to the Competition Commission (the “CC”) the specified price control matters arising in CPW’s appeal pursuant to section 193 of the 2003 Act.

<sup>1</sup> <http://stakeholders.ofcom.org.uk/consultations/openreachframework/statement/>

- 1.6 On 31 August 2010 the CC notified the Tribunal of their determination of the price control matters<sup>2</sup>.
- 1.7 On 11 October 2010 the Tribunal disposed of the appeal (the “Ruling”)<sup>3</sup>. Having regard to Section 5 particularly paragraphs 5.246 to 5.360 of the CC’s determination, and pursuant to section 195(3) of the 2003 Act, the Tribunal set the appropriate directions for Ofcom to take in relation to the LLU Statement in the Annex to its Ruling (see paragraph 1.8).

## Directions from the Tribunal to Ofcom

- 1.8 Pursuant to section 195(4) of the 2003 Act, the Tribunal has remitted the decision under appeal to Ofcom with the below directions. The relevant Reference Questions referred to in the Ruling are listed in full in the CC’s determination.

“ ...

2. *In relation to the errors found in Reference Questions 1(i) and 1(v), the Tribunal directs OFCOM to adopt a revised price control Condition FA3(A) in which:*
  - (a) *For MPF services the annual rental charge for the unelapsed period of the price control is £89.10; and*
  - (b) *For SMPF services the annual rental charge for the unelapsed period of the price control is £15.04.*
3. *In relation to the errors found in Reference Question 2, the Tribunal directs OFCOM to adopt a revised price control Condition FA3(A) in which:*
  - a. *The ancillary service MPF New Provide is moved out of the basket of MPF Ancillary Services;*
  - b. *The MPF New Provide charge for the unelapsed period of the charge control is £62.11;*
  - c. *No other adjustments are made to the ancillary services baskets used by OFCOM in the LLU Statement, as indicated in paragraph 5.324(b)(ii) of the Determination;*

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<sup>2</sup> [http://www.catribunal.org.uk/files/1.1111\\_Carphone\\_Warehouse\\_CC\\_Determination\\_310810.pdf](http://www.catribunal.org.uk/files/1.1111_Carphone_Warehouse_CC_Determination_310810.pdf)

<sup>3</sup> [http://www.catribunal.org.uk/files/2.1111\\_Carphone\\_Warehouse\\_Ruling\\_111010.pdf](http://www.catribunal.org.uk/files/2.1111_Carphone_Warehouse_Ruling_111010.pdf)

- d. *BT is prohibited from making further upward changes to the price of any product in the Co-Mingling Ancillary Services basket or to the price of the Bulk Retermination and LLU Cease Services during the unelapsed period of the price control, as indicated in paragraph 5.234(c) of the Determination.”*

## Section 2

# Amendment to SMP Services Conditions

## The revised SMP Services Conditions

- 2.1 Pursuant to section 195(6) of the Communications Act 2003, Ofcom has a duty to comply with the Tribunal's Directions.
- 2.2 As per the Tribunal's Directions:
- 2.2.1 the MPF services annual rental charge is amended to £89.10 for the remainder of the charge control period;
  - 2.2.2 the SMPF services annual rental charge is amended to £15.04 for the remainder of the charge control period;
  - 2.2.3 the ancillary service MPF New Provide is moved out of the basket of MPF Ancillary Services; and
  - 2.2.4 the MPF New Provide Charge is amended to £62.11 for the remainder of the charge control period.
- 2.3 Ofcom, therefore, now adopts the following revisions to (i) FA3(A).1, (ii) FA3(A).2, (iii) FA3(A).5, (iv) FA3(A).8, (v) FA3(A).9, (vi) FA3(A).10, (vii) FA3(A).12, (viii) FA3(A).15, (ix) Part 2 of the Annex to FA3(A) and (x) adds a new paragraph FA3(A).16 all of which are to take effect from 15 October 2010.

(i)

**“FA3(A).1** Without prejudice to the generality of Condition FA3, and subject to paragraphs FA3(A).3 and FA3(A).6, the Dominant Provider shall take all reasonable steps to secure that, at the end of each Relevant Year, the Percentage Change 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 FA3(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 FA3(A).2(d) applies;~~
- (f) the charge for MPF Cease;
- (g) the charge for SMPF Connection, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FA3(A).2(e) applies;
- (h) the charge for SMPF Cease;

~~(i) the charge for MPF Rental, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FA3(A).2(a) applies;~~

~~(j) the charge for SMPF Rental, except for the First Relevant Year in relation to which the charge ceiling specified in paragraph FA3(A).2(b) applies;~~

in each of the ~~ten~~ seven categories of products and/or services specified in paragraphs FA3(A).1(a) to (d) and (f) to (h)~~(j)~~ above is not more than the Controlling Percentage (as determined in accordance with paragraph FA3(A).8).”

(ii)

“**FA3(A).2** The Dominant Provider shall not charge more than:

(a) for MPF Rental, the amount of **£86.40** in the First Relevant Year, ~~the amount of~~ £90.46 for the period beginning on 1<sup>st</sup> April 2010 and ending on 14 October 2010 and the amount of **£89.10** for the remainder of the Second Relevant Year;

(b) for SMPF Rental, the amount of **£15.60** in the First Relevant Year, ~~the amount of~~ £15.63 for the period beginning on 1<sup>st</sup> April 2010 and ending on 14 October 2010 and **£15.04** for the remainder of the Second Relevant Year;

(c) for the MPF Transfer, the amount of **£38.00** in the First Relevant Year;

(d) for MPF New Provide, the amount of **£99.95** for the period beginning on 22 May 2009 and ending on 31 August 2009, and the amount of **£76.00** for the remainder of the First Relevant Year, ~~the amount of~~ £75.01 for the period beginning on 1<sup>st</sup> April 2010 and ending on 14 October 2010 and **£62.11** for the remainder of the Second Relevant Year;

(e) for the SMPF Connection, the amount of **£38.00** in the First Relevant Year.”

(iii)

“**FA3(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 FA3(A).1(d), ~~FA3(A).1(e)~~, FA3(A).1(f), FA3(A).1(g), and FA3(A).1(h), ~~FA3(A).1(i) and FA3(A).1(j)~~ respectively shall be calculated 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 the Annex to this Condition in respect of the specific product and/or service; and (ii) for the Second



Relevant Year, the published charge made by the Dominant Provider for the specific product and/or service 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 at the time  $t$  during the Relevant Year excluding any discounts offered by the Dominant Provider.”

(iv)

**“FA3(A).8** Subject to paragraphs FA3(A).9 and FA3(A).10, the Controlling Percentage in relation to any Relevant Year means:

(a) for the category of products and/or services specified in paragraph FA3(A).1(a),

- i. for the First Relevant Year, 3 percentage points, and
- ii. for the Second Relevant Year, RPI increased by 4.5 percentage points;

(b) for the category of products and/or services specified in paragraph FA3(A).1(b),

- i. for the First Relevant Year, 3 percentage points, and
- ii. for the Second Relevant Year, RPI increased by 4.5 percentage points;

(c) for the category of products and/or services specified in paragraph FA3(A).1(c),

- i. for the First Relevant Year, 3 percentage points, and
- ii. for the Second Relevant Year, RPI increased by 4.5 percentage points;

(d) for the category of products and/or services specified in paragraph FA3(A).1(d), for the Second Relevant Year, RPI increased by 2.5 percentage points;

~~(e) for the category of products and/or services specified in paragraph FA3(A).1(e), for the Second Relevant Year, RPI decreased by 0.5 percentage points;~~

(f) for the category of products and/or services specified in paragraph FA3(A).1(f),

- i. for the First Relevant Year, 3 percentage points, and
- ii. for the Second Relevant Year, RPI increased by 4.5 percentage points;

(g) for the category of products and/or services specified in paragraph FA3(A).1(g) for the Second Relevant Year, RPI increased by 2.5 percentage points;

(h) for the category of products and/or services specified in paragraph FA3(A).1(h),

- i. for the First Relevant Year, 3 percentage points, and
- ii. for the Second Relevant Year, RPI increased by 4.5 percentage points;

~~(i) for the category of products and/or services specified in paragraph FA3(A).1(i) for the Second Relevant Year, RPI increased by 5.5 percentage points;~~

~~(j) for the category of products and/or services specified in paragraph FA3(A).1(j) for the Second Relevant Year, RPI increased by 1.0 percentage points;~~

For the avoidance of doubt, the MPF Transfer, ~~MPF New Provide~~, and SMPF Connection, ~~MPF Rental and SMPF Rental~~ charges are constrained by FA3(A).2 in the First Relevant Year.”

(v)

**“FA3(A).9** Where the Percentage Change in any Relevant Year is less than the Controlling Percentage, then for the purposes of each of the categories of products and/or services specified in paragraphs FA3(A).1(a), FA3(A).1(b), FA3(A).1(c), FA3(A).1(d), ~~FA3(A).1(e), FA3(A).1(f), FA3(A).1(g), and FA3(A).1(h), FA3(A).1(i) and FA3(A).1(j)~~ respectively the Controlling Percentage for the following Relevant Year shall be determined in accordance with paragraph FA3(A).8, but increased by the amount of such deficiency.”

(vi)

**“FA3(A).10** Where the Percentage Change in any Relevant Year is more than the Controlling Percentage, then for the purposes of each of the categories of products and/or services specified in paragraphs FA3(A).1(a), FA3(A).1(b), FA3(A).1(c), FA3(A).1(d), ~~FA3(A).1(e), FA3(A).1(f), FA3(A).1(g), and FA3(A).1(h), FA3(A).1(i) and FA3(A).1(j)~~ respectively the Controlling Percentage for the following Relevant Year shall be determined in accordance with paragraph FA3(A).8, but decreased by the amount of such excess.”

(vii)

**“FA3(A).12** 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 FA3(A), the calculated percentage change relating to each category of products and services listed in conditions FA3(A).1 (a) through to (d) and FA3(A).1 (f) through to (jh);

(b) pursuant to Condition FA3(A).3, calculation of the revenue accrued as a result of all relevant individual charge charges 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 FA3(A).4, including for each specific product or service  $i$ ;

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

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

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

(g) all relevant data the Dominant Provider used in the calculation the percentage change  $C_t$  pursuant to Conditions FA3(A).5, for the category of products and services specified in paragraph FA3(A).1(a), FA3(A).1(b), and FA3(A).1(c);

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

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

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

(viii) In paragraph FA3(A).15 paragraph (e) is replaced with the following:

“(e) **“MPF New Provide”** shall be construed as having the same meaning as ‘MPF Connection – New Provide – Standard’;”.

(ix) The following words and numbers are removed from Part 2 of the Annex to Condition FA3(A):

“2	MPF Connection - New Provide – Standard	£76.00”
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(x) The SMP Condition FA3(A) shall be modified by inserting the following new paragraph FA3(A).16 at the end of Condition FA3(A) in Schedule 1 to the Notification set out in Annex 3 to “A new pricing framework for Openreach: Statement” dated 22 May 2009.

**“FA3(A).16** During the period 15 October 2010 to 31 March 2011, the Dominant Provider shall not increase the charge made for any of the Co-Mingling Services, the Bulk Retermination Services and the LLU Cease Services.

In this Condition FA3(A).16:

- (a) **“Bulk Retermination Services”** means SMPF Tie Pair Modification (Multiple Retermination) and MPF Tie Pair Modification (Multiple Retermination), each of which shall be construed as having the same meaning as they have for the purpose of the Annex to this Condition, or any successor service or services from time to time; and
- (b) **“LLU Cease Services”** means SMPF Cease or MPF Cease, each of which shall be construed as having the same meaning as they have for the purpose of the Annex to this Condition, or any successor service or services from time to time.”