



Draft Determination to resolve a Dispute between Cable & Wireless Access Limited and BT relating to BT's charges for connecting new customers to fully unbundled local loops

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by [X]

Consultation

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Closing Date for Responses: 29 November 2007

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Section 1

Draft Determination

[DRAFT] DETERMINATION UNDER SECTIONS 188 AND 190 OF THE COMMUNICATIONS ACT 2003 (the “Act”) FOR RESOLVING A DISPUTE BETWEEN CABLE AND WIRELESS LIMITED AND BT ABOUT CHARGES FOR CONNECTING NEW CUSTOMERS TO FULLY UNBUNDLED LOOPS

WHEREAS:

- A. Section 188(2) of the Communications Act 2003 provides that where there is a dispute between different communications providers, and Ofcom has decided pursuant to section 186(2) of the Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the Act, together with a full statement of the reasons on which the determination is based.
- B. Section 190 of the Act sets out the scope of Ofcom’s powers on resolving a dispute which may include, in accordance with section 190(2) of the Act:
 - (i) making a declaration setting out the rights and obligations of the parties to the dispute;
 - (ii) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - (iii) giving a direction imposing an obligation, enforceable by the parties to the dispute, to enter into a transaction between themselves on the terms and conditions fixed by Ofcom; and
 - (iv) for the purpose of giving effect to a determination by Ofcom of the proper amount of a charge in respect of which amounts have been paid by one of the parties to the dispute to the other, giving a direction, enforceable by the party to whom sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.
- C. On 16 December 2004 Ofcom published its “Review of the Wholesale Local Access Market”, determining that BT Group plc (“BT”) has significant market power (“SMP”) in the wholesale local access market in the UK excluding the Hull Area. Ofcom imposed conditions on BT in the wholesale local access market:
 - (i) not to unduly discriminate; and
 - (ii) to charge prices that were oriented to costs for Network Access.
- D. Ofcom also imposed charge ceilings on specific local loop unbundling (“LLU”) services, including a charge ceiling of £168 per connection for the service known as MPF new provide. BT’s published service description for this service includes a visit by a BT engineer to the premises where the service is to be connected (a “site visit”).

¹ [Ofcom RWLAM statement](#)

In setting the connection charge ceiling, Ofcom's published decision expressly included the cost of a site visit.

- E. On 1 and 18 August 2005, Ofcom published its conclusions in both the cost of capital and cost of copper studies. As a result the charge for a MPF new provide was reduced in December 2005 to the current charge of £99.95.
- F. On 1 July 2006, BT began providing another LLU-based service, known as "stopped line provide" which was priced at £47.43 (currently £40.49)². One of the features of this service is that it does not include a site visit.
- G. On 2 August 2007, Cable & Wireless Access Limited ("C&WA") wrote to Ofcom to refer a dispute for resolution between C&WA and BT about the connection charges paid by C&WA to BT before 1 July 2006 for the service known as "MPF new provide" (the "New Provide" service).
- H. On 7 September 2007, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of its decision.
- I. In order to resolve this dispute, Ofcom has considered, among other things, the current regulatory framework for LLU charges, the SMP conditions imposed upon BT in the wholesale local access market, the information supplied by the parties and Ofcom's relevant duties as set out in sections 3 and 4 of the Act.
- J. A fuller explanation of the background to the dispute and Ofcom's reasons for making this determination is set out in the explanatory statement accompanying this determination.
- K. This draft determination is issued to the parties in dispute on 15 November 2007, for which responses are invited by 29 November 2007.

NOW, THEREFORE, PURSUANT TO SECTION 186 AND 190 OF THE ACT OFCOM MAKES THE FOLLOWING [DRAFT] DETERMINATION:

1. It is hereby determined that BT's charge of £168 (as charged between 16 December 2004 and 14 December 2005) for the New Provide service, and specifically the inclusion of the cost of a site visit within that charge, is consistent with its obligations under FA3 and FA9;
2. Furthermore, BT's charge of £168 (as charged between 16 December 2004 and 14 December 2005) is to be regarded as having been provided at a fair and reasonable charge under FA9.2 and at a charge which was reasonably derived from costs of provision based on a forward-looking long-run incremental cost approach under FA3.1;
3. In light of the fact that a charge for a site visit was not included within the price for the MPF new provide service (as charged between 15 December 2005 and 30 June 2006), C&WA's allegations are not relevant to the MPF new provide connection charge during the 15 December 2005 to 30 June 2006 period;
4. BT has not breached Condition FA2 by unduly discriminating in favour of its own business and making available to itself those inputs in the wholesale local access

² [Openreach LLU price list](#)

market which it uses in its own downstream business on more favourable terms than those it offers to C&WA;

5. The Determination shall take effect on [] December 2007.

Neil Buckley

Director of Investigations

A person authorised under paragraph 18 of the Schedule to the Office of Communications Act 2002

15 November 2007

Section 2

Executive Summary

- 2.1 This dispute concerns BT's charges for connecting new customers of C&WA to fully unbundled local loops between 16 December 2004 and 30 June 2006 and specifically whether BT over-charged C&WA in relation to site visits carried out by BT engineers to establish those connections.
- 2.2 It also considers whether in providing certain inputs in the wholesale local access market with a reactivate facility, BT unduly discriminated in favour of its own downstream business.
- 2.3 C&WA referred this dispute to Ofcom for resolution on 2 August 2007³.
- 2.4 According to C&WA, when it purchased network access to connect new customers between 16 December 2004 and 30 June 2006, it submitted an order for the New Provide. BT's service description for the New Provide service specifies that an engineer visit will be made for each site connected to the service to install a new line.
- 2.5 C&WA alleges that BT's charge for the New Provide service during this period did not reflect BT's costs (whether efficiently incurred and/or fair and reasonable).
- 2.6 C&WA had requested a new service from BT which reactivates an existing line and did not require an engineer's visit (the "Stopped Line Provide" service) on 7 June 2005⁴. The Stopped Line Provide service was made available to customers/introduced by BT on 1 July 2006.
- 2.7 Ofcom decided that it was appropriate for it to handle the dispute and opened a formal investigation on 7 September 2007.
- 2.8 Following submissions from both parties, Ofcom published the scope of the dispute in its Competition Bulletin:

"Whether BT's charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and

*Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA'*⁵.

- 2.9 In summary, Ofcom's provisional conclusion is that BT's charge for the New Provide service between 16 December 2004 and 30 June 2006 is consistent with its obligations under, FA3 and FA9. In addition, Ofcom considers that BT did not unduly discriminate in favour of its own downstream business in the provision of inputs within the wholesale local access market under FA2.

³ Please note that as further explained at paragraph 3.51, C&WA had previously submitted a dispute on the same facts which was accepted by Ofcom on 5 January 2007. This dispute was subsequently withdrawn by C&WA.

⁴ Email from C&WA to BT of 7 June 2005

⁵ [Ofcom Competition Bulletin entry](#)

- 2.10 In reaching this conclusion, Ofcom has had regard to BT's obligations to offer a cost-oriented charge based on long-run incremental costs under SMP Condition FA3.1, to offer fair and reasonable charges under SMP Conditions FA9.2 and to not unduly discriminate in matters related to network access under SMP Condition FA2.1.
- 2.11 The background to this investigation is set out in **section 3**. Ofcom's consideration of this dispute and proposed decision is set out in **section 5**.

Section 3

Background and history of the dispute

The parties to the dispute

BT/Openreach

- 3.1 BT is a communications provider whose principal activities include local, national and international telecommunications services, and higher-value broadband and internet products and services and networked IT services. In the UK, BT serves more than 20 million business and residential customers with more than 30 million exchange lines, as well as providing network services to other communications providers.⁶
- 3.2 BT's local access network and, specifically, the copper pairs linking BT's exchange sites with the residential and business premises of its customers (known as the "local loop"), is the only ubiquitous fixed access network for the provision of telecommunications in the UK.⁷
- 3.3 Openreach is a business unit within the BT group that is operationally separate from BT's other businesses (such as BT Retail and BT Wholesale). Openreach was established in January 2006 as one element of undertakings offered by BT, and accepted by Ofcom in lieu of a reference to the Competition Commission, on 22 September 2005 (the "Undertakings").⁸
- 3.4 The purpose of Openreach is to manage and operate BT's local access and backhaul network. Openreach provides access services to communication providers who purchase them to enable those communications providers to offer their own downstream (e.g. retail) services. The Undertakings specify that Openreach will offer those services to all communications providers (including BT Wholesale and BT Retail) on an equivalent basis (applying a principle known as "equivalence of inputs").
- 3.5 One of the services that Openreach provides is access to unbundled local loops pursuant to BT's SMP conditions FA1 to FA9.
- 3.6 References in this document are to either BT or Openreach, depending on the time period in question.

C&WA

- 3.7 C&WA is a wholly-owned subsidiary of Cable & Wireless PLC. Under its previous name of Bulldog Communications Ltd, it has been an active participant in the local loop unbundling process from the very beginning. C&WA provides wholesale services to Cable & Wireless and other wholesale customers including retail ISPs. Unlike many providers, C&WA has predominantly used a fully unbundled loop strategy rather than shared loops (for further details of what these terms mean, see paragraphs 3.11 to 3.17 below), and since September 2004, has used fully unbundled loops for all new customers.
- 3.8 Although the Bulldog retail customer base was sold on 7 September 2006 to Pipex, C&WA retains all of the other assets and liabilities of Bulldog Communications Ltd.

⁶ Source: see [BT's website](#)

⁷ [Ofcom's Telecoms Strategic Review statement](#)

⁸ [BT Undertakings](#)

Services which were formerly provided direct to end users by Bulldog Communications Ltd are still provided over C&WA's infrastructure, which includes unbundled local loops.

- 3.9 For ease of reference we refer to Cable & Wireless PLC, Cable & Wireless Access Ltd and Bulldog Communications Ltd as C&WA throughout this document.

The services relevant to this dispute

Unbundled Local Loops and MPFs

- 3.10 Ofcom has imposed a regulatory condition on BT that it must provide access to unbundled local loops, as a result of Ofcom's finding that BT has significant market power within the wholesale local access market.⁹
- 3.11 There are two types of access using local loop unbundling (or "LLU"): full and shared.
- 3.12 In "full" unbundling, local loops are physically disconnected from BT's equipment and connected to another communications provider's equipment (i.e. the LLU operator takes over control of the line). This type of unbundling is available from BT as the metallic path facility ("MPF") product.
- 3.13 In "shared" unbundling, the line remains connected to the BT network, but an additional connection is made to a competing provider's network to enable that provider to use that line to deliver services to customers. This type of unbundling is available from BT as the shared metallic path facility ("SMPF") product.
- 3.14 In essence, LLU enables competing providers partly or wholly to control a customer's access line and provide voice and/or data services directly to customers without further intervention by BT.
- 3.15 The requirement to provide LLU was imposed to promote competition in downstream electronic communications services (particularly the provision of broadband internet access and voice services). The advantages of LLU over other forms of network access includes the ability of competing providers to innovate, to differentiate their services to a greater extent and to provide higher-bandwidth services, as well as a better range of applications and improved service levels.
- 3.16 MPF is a form of full LLU comprising a two-wire point to point metallic transmission path extending between a network termination point ("NTP") at the (end-user) customer's premises to the line side of a main distribution frame ("MDF") in the relevant BT exchange.
- 3.17 Communications providers who purchase an MPF are therefore able to connect the MPF directly to their own communications network (assuming that it has a point of presence in the relevant local exchange), and provide services directly to end users who are connected to that loop.

Wholesale line rental

- 3.18 Wholesale Line Rental ("WLR") allows alternative suppliers to rent access lines on wholesale terms from BT, and resell the lines to customers, providing a single bill that covers both line rental and telephone calls.

⁹ [Ofcom RWLAM statement](#) - please refer to section 7

Transfer

- 3.19 Prior to July 2006, communications providers who wanted to use MPF had two options in taking control of a specific loop.
- 3.20 The first was a process referred to as “transfer”. Transfer occurs if a communications provider takes over service from an exchange to a site with an active connection supplied by another provider.
- 3.21 This dispute concerns cases where the customer is either not taking a service from an existing supplier or requires a new connection.

The New Provide service

- 3.22 The second option available to communications providers to use MPF before June 2006 was to purchase the New Provide service from BT.
- 3.23 The New Provide service comprises the provision of a new line (including the installation of a new physical connection and the installation of a new NTP in the customer’s premises). BT’s process documentation sets out the detailed specification for the steps comprising the New Provide service and is attached as Annex 2 to this explanatory statement.
- 3.24 BT submitted that the New Provide service had been introduced in May 2001, following consultation with communications providers who had sought to provide services direct to end-users via MPFs.¹⁰ For example, in such circumstances the resultant MPF was required to have certain minimum characteristics as specified by the DSL Task Group¹¹ and documented within SIN349.¹² In addition, communications providers’ broadband equipment has to conform to the Industry agreed Access Network Frequency Plan.¹³
- 3.25 From Ofcom’s involvement in discussions with industry at the time, it was clear that a site visit was originally requested by communications providers as part of the New Provide service. One reason for this was that, at the time, MPF was primarily being considered to support business services and as such the communications providers were keen to have a more managed installation service, which included the identification and possibly the repositioning of the Network Termination Equipment (master socket).

The Stopped Line Provide service

- 3.26 On 1 July 2006, BT commenced offering the “Stopped Line Provide” service.
- 3.27 Stopped Line Provide is a service that is suitable in situations where a stopped line (that is, a line that has previously been active and that could be re-activated without an engineer site visit) already existed providing for reactivation of an uninterrupted loop from the exchange to the NTE at the customer’s premises.
- 3.28 Therefore, the Stopped Line Provide service can be provided only when a communications provider orders a New Provide at their customer’s premises and there is an existing line to the premises which is not currently in use.

¹⁰ Submitted in BT’s response dated 19 February 2007 to Ofcom’s information request under section 191 of the Act dated 13 February 2007

¹¹ Digital Subscriber Line Task Group

¹² Supplier Information Note about BT MPF Interface Description

¹³ [Openreach LLU product description](#)

'Spare Pair'

- 3.29 A spare pair refers to the presence of existing copper capacity in the access network between the exchange and the distribution point to deliver service to an end user without requiring the deployment of new copper or infrastructure between the distribution point and the customer's premises. The presence of a spare pair does not imply the same functionality associated with a "stopped line".
- 3.30 The spare pair is simply a physical connection (a copper wire) joining the exchange and the distribution point ("DP") that is not currently in use as an active or stopped line. It does not imply that a drop wire (the physical connection between the DP and the customer's premises) is necessarily in place.
- 3.31 A "stopped line" implies that sufficient capability is also present (for example, a working NTE at the customer's premises) to avoid the need for a site visit.
- 3.32 Availability of a spare pair alone, therefore, does not enable Openreach to deliver the New Provide service without a site visit to complete the loop between the DP or street cabinet and the customer's premises.
- 3.33 For example, Oftel's description of the New Provide service when it was introduced in May 2001 describes how that service may use a spare pair where it exists:

"It is expected that, in general, BT will be able to meet the obligation to provide this service in all circumstances where there is a connection which:

- (i) is spare or has become available through cancellation of existing services by a customer;*
- (ii) extends (or could readily be made to extend) between the MDF and at least the relevant distribution point (DP) and where any connection between the DP and NTP could readily be provided;*
- (iii) is of the relevant quality or reasonably capable of being made so.*

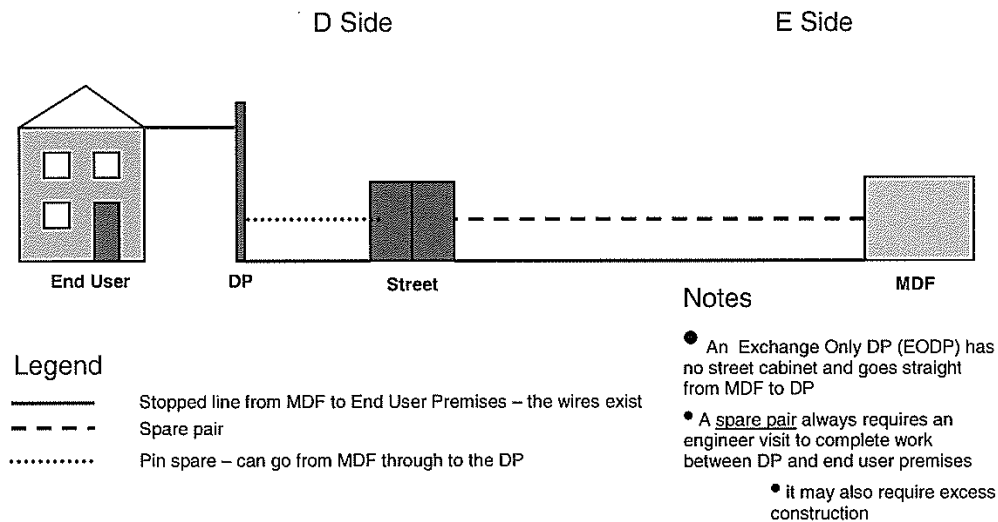
MPFs may be provided over existing lines or new lines (spare pairs), where a connection is or can be made available." (emphasis added)¹⁴.

- 3.34 Ofcom considers that the definition makes clear that the availability of a spare pair does not by itself enable Openreach to deliver the New Provide service without a site visit, i.e. through a reactivation-type service.
- 3.35 Figure 1 below has been provided by Openreach:

¹⁴ [Oftel LLU guidelines](#)

Figure 1

Overview of spare pairs in the Openreach network



Source: Openreach/LRC/TEF/V1/Feb_07

Regulatory reviews relevant to this dispute

3.36 A number of Ofcom's previous regulatory reviews are relevant to this dispute.

Wholesale local access market review

3.37 On 16 December 2004 Ofcom published the *Review of the Wholesale Local Access Market* ("RWLAM")¹⁵, which:

3.37.1 concluded that BT had significant market power ("SMP") in the wholesale local access market in the UK excluding the Hull area. Ofcom also identified co-location as an appropriate technical area for the purposes of imposing appropriate regulatory remedies. LLU services fall within the wholesale local access market and co-location; and

3.37.2 imposed various SMP conditions on BT (amongst other things) to provide Network Access on fair and reasonable terms and not to unduly discriminate against persons.

3.38 These SMP conditions included:

3.38.1 Condition FA3 (basis of charges);

3.38.2 Condition FA9 (requirement to provide Local Loop Unbundling Services);

3.38.3 Condition FA2 (requirement not to unduly discriminate in relation to Network Access).

¹⁵ [Ofcom RWLAM statement](#)

- 3.39 Under Condition FA3.1 BT shall secure that each charge payable for Network Access under FA9 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach.
- 3.40 Condition FA9.2 states that BT must provide Local Loop Unbundling Services as soon as reasonably practicable and on fair and reasonable charges, and on such terms, conditions and charges as Ofcom may from time to time direct.
- 3.41 Condition FA2.1 states that BT shall not unduly discriminate against particular persons in relation to matters connected with Network Access.
- 3.42 Conditions FA3 and FA9 contain a direction-making power for Ofcom to set terms, conditions and charges for Network Access and LLU services which would include New Provide services.
- 3.43 The RWLAM set charge ceilings for fully unbundled and shared access connection and rental charges. In the case of the MPF New Provide service the charge ceiling was set at £168, effective from 1 January 2005. The service to which this ceiling applied included the cost of a site visit by an engineer¹⁶.

Cost of Copper

- 3.44 Ofcom deferred setting the charge ceiling for the fully unbundled rental charge at the time the other LLU charge ceilings were set in December 2004 under the RWLAM. This was because a high proportion of the total cost of this charge was determined by the cost of laying and maintaining the copper loop, the costs for which Ofcom was in the process of reviewing.
- 3.45 On 18 August 2005, Ofcom published its statement on *Valuing copper access*¹⁷. Ofcom was able, therefore, to set a ceiling for the fully unbundled rental charge which was published in *Local loop unbundling: setting the fully unbundled rental charge ceiling* (the “November 2005 LLU Statement”¹⁸).

LLU: setting the fully unbundled rental charge ceiling

- 3.46 On 30 November 2005, Ofcom published the November 2005 LLU Statement. In this Statement Ofcom directed that the costs for new drop wire installation for fully unbundled loops were to be recovered in the rental charge in order to achieve consistency between LLU, wholesale line rental and BT’s retail products.
- 3.47 As in the RWLAM, Ofcom considered it preferable to set charge ceilings as opposed to exact charges. Ofcom made a number of assumptions in calculating the proposed ceiling; these are set out in the November 2005 LLU Statement.
- 3.48 A charge ceiling, as opposed to an exact charge, provides BT with the flexibility to charge below the proposed ceiling in the event that its own assumptions were different to those Ofcom applied and if costs moved over the period in which the ceiling was in place.
- 3.49 On 15 December 2005, the cost of a New Provide service was reduced by BT to £99.95. From this date onwards the cost of the site visit associated with the New Provide service has been recovered in the rental charge.

¹⁶ [Ofcom RWLAM statement](#) - please refer to paragraph 9.65.

¹⁷ [Ofcom Cost of Copper Statement](#)

¹⁸ [Ofcom LLU statement](#)

Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services

- 3.50 In January 2006, Ofcom published the statement *Wholesale Line Rental: Reviewing and setting charge ceilings for WLR services* (the “January 2006 WLR Statement”¹⁹). In this Statement, Ofcom reduced the annual rental charges which communications providers pay for WLR. Ofcom determined that the ceiling for the WLR connection charge should be £88 per line and confirmed that the approach to setting this ceiling was “reasonable”. In this document, Ofcom emphasised that it intended to set WLR and LLU charges on a consistent basis:

“[Ofcom has] used the same methodology for projecting cost as used in setting the charges for local loop unbundling”.

History of this dispute

- 3.51 A previous dispute between C&WA and BT involving the same facts had been accepted for resolution by Ofcom on 5 January 2007 (the “First Dispute”). This dispute was subsequently withdrawn by C&WA and the investigation closed by Ofcom on 19 April 2007 without issuing a final determination²⁰.
- 3.52 On 2 August 2007 C&WA referred a dispute between C&WA and BT to Ofcom for resolution, citing BT’s charges to C&WA for connecting new customers to fully local unbundled loops as being in dispute.
- 3.53 On 30 August 2007, C&WA submitted comments on the proposed scope of the present dispute.
- 3.54 On 14 August and 3 September 2007, BT submitted comments on C&WA’s dispute referral.
- 3.55 On 7 September 2007, after holding discussions with both of the parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision.
- 3.56 Ofcom published the scope of the dispute in its Competition Bulletin on 7 September 2007 as being:

“Whether BT’s charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and

Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA”.

Information sought by Ofcom

- 3.57 The parties have been notified that Ofcom has used information obtained during the First Dispute²¹.

¹⁹ [Ofcom WLR statement](#)

²⁰ [Ofcom First Dispute Competition Bulletin entry](#)

²¹ Emails from Ofcom to BT and C&WA on 5 November 2007

- 3.58 Ofcom confirmed that further information received from C&WA was accurate. Specifically, Ofcom used its powers under section 191 of the Act: to confirm whether the information received from C&WA was accurate.
- 3.59 During the course of the investigation, Ofcom has also met with BT and C&WA on 11 September 2007 and 13 September 2007 respectively.
- 3.60 In reaching its proposed decision, Ofcom has used analysis previously undertaken by Ofcom to the extent that it is relevant to the current dispute.
- 3.61 Finally, Ofcom has discussed this dispute with the staff of the Office of the Telecoms Adjudicator ("OTA") and obtained information from the OTA. The OTA was appointed by Ofcom in July 2004 as an industry facilitation entity, independent of Ofcom and of communications providers. The purpose of the OTA is to facilitate swift implementation of the processes necessary to enable competitors to gain access to BT's local loop on an equivalent basis to that enjoyed by BT's own businesses.

Section 4

Submissions of the parties

Cable and Wireless Access Ltd

Charges for the New Provide service

- 4.1 In its referral to Ofcom, C&WA alleges that BT has been over-recovering for the New Provide service on the following grounds:

“By charging C&WA for costs it did not incur efficiently, BT was in breach of its cost orientation obligations²²”.

- 4.2 C&WA alleges that where it wished to connect a new customer using LLU, BT always charged for a New Provide, when in [X] of cases BT could have reactivated an existing line. C&WA argues that the reactivation of an existing line would have avoided the cost of a site visit, resulting in a lower charge to C&WA for the New Provide service.
- 4.3 In its submission to the First Dispute, C&WA also stated that the proportion of New Provide connections that should properly be carried out by reactivating the existing line could vary, depending on the source. For example, C&WA states that the most recently available data was BT data from the Stopped Line Provide service trial in 2006-2007, which suggested that the figure could be [X].²³
- 4.4 C&WA further stated in the First Dispute that a September 2005 Openreach presentation of September 2005 (in the context of new installations for BT retail in WLR) suggested the figure could be [X].
- 4.5 In addition, C&WA assert that during negotiation of the MPF product it sought the availability of a reactivate product to use existing lines that did not require a drop wire installation (i.e. site visit) and so meant a lower charge for MPF.
- 4.6 C&WA therefore alleges that the New Provide service was implemented and charged for in an inefficient manner and BT is not entitled to recover inefficient costs. C&WA also argues that this was the case because BT subsequently introduced the Stopped Line Provide service which re-activates the existing line, at a price that was “less than half” the current New Provide service charge.
- 4.7 Furthermore, C&WA states that BT should have known from its experience in the WLR provision process that existing lines could be identified and reactivated at less cost than connecting via a New Provide service. This would have avoided the need for a site visit. C&WA consider that the process for providing WLR is very similar to that for providing MPF.
- 4.8 In referring the dispute, C&WA divides the history of commercial negotiations between C&WA and BT in relation to the provision of the Stopped Line Provide service into four separate phases:
- 4.8.1 Phase 1 – bilateral discussions. C&WA considers that the components of this phase were:

²² 2.3.2 (i) of C&WA's dispute referral of 2 August 2007

²³ C&WA's submission in the First Dispute of 22 November 2006 Annex 1

- 4.8.2 2002 - discussions through industry groups and bi-lateral meetings.
- 4.8.3 30 April 2003 – Letter from C&WA's [3<] to BT identifying 12 issues, issue 4 of which was the:

"High cost of provisioning fully unbundled line based on spare pair [3<) compared to no cost for PSTN service".

- 4.8.4 March 2004 – dispute sent to Ofcom which included the "reactivate issue".
- 4.8.5 Phase 2 – OTA facilitation/industry discussion: C&WA states that during this time

"...[the reactivation] issue sat on the OTA's list of industry requirements for much of 2004 under the generic banner of pricing issues...although the OTA and the co-operative approach they sponsored was a success on many levels, this issue was never tackled effectively by that process"²⁴

- 4.8.6 Phase 3 – Joint approach: C&WA state that by mid-2005 C&WA concluded that an industry-wide OTA approach was "not likely to produce a result on the reactivate issue" and recommenced discussions with BT (with ongoing assistance from the OTA). C&WA states that the document that triggered this was C&WA's list of issues for the OTA of 7 June 2005. C&WA state that:

"...it does appear to have been at around this time that serious discussions began which ultimately resulted in today's Stopped Line Provide product...[BT] agreed to launch a 'tactical' reactivation product late in 2005. In the end...both parties accepted it was not a workable product"²⁵.

- 4.8.7 After 2006 C&WA sought further discussions.
- 4.8.8 Phase 4 – Withdrawn dispute: following the issuing of the Ofcom draft determination on 5 April 2007, C&WA state:

"On examination of the draft determination, it became clear to C&WA that there had been a potentially significant terminological misunderstanding in relation to the dispute. C&WA therefore withdrew its dispute with the intention of engaging in further discussions with BT"²⁶.

- 4.8.9 Further discussions took place with BT in May followed by a short exchange of letters.

Undue discrimination

- 4.9 C&WA also considers that BT has unduly discriminated in favour of its own business:

"By providing a more efficient process for Wholesale Line Rental (and retail PSTN) than for MPF, BT was in breach of the prohibition on undue discrimination in the wholesale local access market."²⁷

- 4.9.1 C&WA alleges that BT had access to copper pairs as a wholesale input enabling it to supply network access internally with a quick cheap way to reactivate stopped lines, including as SMPF. When BT supplied network access externally as MPF it did so without a reactivation facility.

²⁴ C&WA's dispute referral of 2 August 2007 paragraph 3.1(ii)

²⁵ C&WA's dispute referral of 2 August 2007 paragraph 3.1(iii)

²⁶ C&WA's dispute referral of 2 August 2007 paragraph 3.1(iv)

²⁷ C&WA's dispute referral of 2 August 2007 paragraph 2.3.2(ii)

- 4.9.2 BT therefore provided a more efficient process for Wholesale Line Rental (WLR) and SMPF internally than for MPF externally.
- 4.10 C&WA claims that BT has always reactivated stopped lines for WLR and now do the same for local loop unbundling products (i.e. MPF) through Stopped Line Provide. C&WA believe that the WLR and MPF order processes are very similar and rely on the same appointment books and same access to core systems.
- 4.11 According to C&WA, a New Provide is only used for WLR when wiring is needed behind the Network Termination Point (NTP) whereas a New Provide was used as a matter of course for the provision of MPF when it was not a transfer from an existing provider.
- 4.12 C&WA consider that the copper pair inputs that are used for WLR (including SMPF and MPF) are in the wholesale local access market.
- 4.13 Therefore C&WA views the facility to reactivate such an input as falling within the wholesale local access market and can be considered in terms of the undue discrimination obligation on BT.

BT

The level of the charge for the New Provide Service

- 4.14 As part of its submission BT refers to a letter of 5 December 2006 sent to Ofcom and information provided under a formal information request dated 13 February 2007 during the First Dispute²⁸.
- 4.15 BT notes that the New Provide product was introduced in May 2001 when a new line licence condition (Condition 83) became effective in August 2000.²⁹ The service was set up as an appointed service, meaning that an appointment was needed with every new provision order.
- 4.16 In July 2003, industry agreed that the engineering visit should be maintained and that no change to the product was required.
- 4.17 BT states that the charge for the New Provide service was subject to a charge ceiling determined by Ofcom in December 2004 following the conclusion of the RWLAM. BT states that the costs behind the current price of the New Provide service (effective from December 2005) were also discussed with Ofcom prior to its notification and implementation and are LRIC-based using average costs across all New Provides.

Undue discrimination

- 4.18 BT states that C&WA's contention that BT unduly discriminated in favour of WLR (and retail PSTN) is unfounded given that WLR products are not captured by BT's obligation not to unduly discriminate as set out in the wholesale local access market review.

²⁸ BT's submission of 14 August 2007

²⁹ BT's submission of 19 February 2007

Additional comments

- 4.19 BT considers that C&WA's dispute submission is in fact the same dispute as the First Dispute positioned in a different way and that it does not contain any new arguments or evidence.
- 4.20 BT maintains that the only discussions which took place between C&WA and BT in May 2007 concerned clarification of terminology, existing processes and cost recovery principles.
- 4.21 BT asserts that therefore C&WA did not raise any new issues.

Section 5

Ofcom's analysis and decision

Ofcom's legal powers

- 5.1 Sections 185 to 191 of the Act give Ofcom the power to resolve disputes submitted to it. Section 186 of the Act requires Ofcom to resolve disputes referred to it under section 185 where Ofcom has determined that it is appropriate for it to resolve the dispute.
- 5.2 Ofcom has general duties under the Act in relation to all of its activities, in particular under section 3 of the Act which include:
 - 5.2.1 the principal duty to further the interests of citizens in relation to communications matters (section 3(1)(a)) and;
 - 5.2.2 to further the interests of consumers in relevant markets, where appropriate by promoting competition (section 3(1)(b)).
- 5.3 The current dispute relates to obligations imposed under SMP Conditions FA2, FA3 and FA9 (i.e. obligations not to unduly discriminate, to ensure that network access and the provision of LLU services occurs as soon as reasonably practicable on fair and reasonable terms and that charges are cost-oriented and LRIC-based).
- 5.4 The obligations in SMP Conditions FA2, FA3 and FA9 came into force on 16 December 2004.

Issues to be resolved

- 5.5 In resolving this dispute Ofcom has considered the following two issues as set out in the published scope of this dispute. Namely:

“Whether BT's charge for the new provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9 and, if not, what (if any) adjustments should be made to payments made by C&WA to BT in respect of the new provide service during this period; and

Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA”.

Whether BT's charge for New Provides from 16 December 2004 to 30 June 2006 was consistent with Conditions FA3 and FA9

- 5.6 As noted above in paragraph 5.3, FA3 and FA9 require that BT ensures that network access and the provision of LLU services occurs as soon as reasonably practicable on fair and reasonable terms and that charges are cost-oriented and LRIC-based.
- 5.7 In referring this dispute C&WA consider that BT has contravened these conditions as follows:

- 5.7.1 BT overcharged for a New Provide service because a new line was not in fact required and a site visit by an engineer was therefore unnecessary;
- 5.7.2 Even where a new line was required, it was provided in an inefficient manner; and
- 5.7.3 In assessing BT's charge for the New Provide service to C&WA, Ofcom has considered whether the site visit costs included in the charge for New Provide services were fair, reasonable and efficient, in accordance with Condition FA3.

The period from 16 December 2004 to December 2005

- 5.8 As noted in paragraph 3.43 the New Provide service charge ceiling (of £168) during this period was set by Ofcom in the RWLAM, which was published on 16 December 2004.
- 5.9 Given that the service had been developed on the basis that a site visit was required, as discussed in paragraph 3.22 onwards, Ofcom considered during the RWLAM that it was appropriate for this cost to be included within the new provide charge.
- 5.10 Ofcom consulted on its proposals in the RWLAM twice before making its final determination. C&WA responded during the original withdrawn dispute of 5 January 2007 by stating that its response at the time to the RWLAM :

"identifies [C&WA's] concern with the inclusion of the engineering visit in the charge for the new provide product".

- 5.11 Ofcom has considered C&WA's response to the RWLAM which states that:

"Bulldog believes that the cost of the site visit for the standard new provide category of MPFs must reflect the fact that over 90 percent of standard new provides are in fact provisioned over spare pairs³⁰".

- 5.12 Ofcom considers that C&WA's response to the RWLAM does not query the inclusion of the engineering visit in the New Provide charge, rather that the cost should take into account the existence of spare pairs (the relevance of the availability of spare pairs is considered further at paragraph 5.28 onwards).
- 5.13 In the final statement³¹ concluding the RWLAM, Ofcom confirmed that

"[t]he cost of the site visit reflects the number of new provides that are provisioned over spare pairs."

- 5.14 In other words, the ceiling set by Ofcom for the charge for a New Provide service is based on the proportion of New Provide connections that are provisioned over spare pairs (meeting the concern that C&WA had raised).
- 5.15 The RWLAM imposed on BT a requirement to charge for the provision of network access in the wholesale local access market (which includes the provision of New Provide services) on the basis of long run incremental cost ("LRIC").
- 5.16 Furthermore, in setting the charge ceiling in the market review, Ofcom considered the question of whether the costs had been incurred efficiently, including BT's estimates for the average length of time spent by engineers during site visits.

³⁰ [Bulldog's second response to RWLAM](#) - please refer to page 5

³¹ [Ofcom RWLAM statement](#)

- 5.17 Therefore, in the RWLAM, Ofcom set a cost-oriented charge ceiling of £168 for the New Provide service. The average cost of the site visit was included in the charge, and reflects the proportion of all New Provide connections provisioned over spare pairs.
- 5.18 As noted in the RWLAM, that cost-oriented charge reflects the LRIC of providing the elements of the service to be recovered from the connection charge, plus a mark-up using the average costs across all New Provide connections.
- 5.19 Ofcom has not received any evidence in this investigation to suggest that the charge of £168 was not fair or reasonable, cost-oriented, or efficiently incurred as it concluded in the RWLAM. As a result, Ofcom is applying the decision on the reasonableness of the charge, as taken during this market review, in the context of this dispute.
- 5.20 Therefore Ofcom considers that:
- 5.20.1 BT's charges for the cost of site visits were fair and reasonable, since a site visit would be required to provide the service (even where a spare pair was present); and
- 5.20.2 The price charged by BT (which in turn reflected the charge ceiling imposed by Ofcom) already accounted for the extent to which spare pairs were available in calculating that price in the RWLAM.

The period 15 December 2005 to 30 June 2006

- 5.21 On 15 December 2005, BT's charge for New Provide services dropped from £168 to £99.95. Two regulatory reviews are relevant to the New Provide charge during this period.
- 5.22 In the November 2005 LLU Statement Ofcom confirmed that the costs for new drop wire installation (i.e. costs pertaining to a site visit) for fully unbundled loops were henceforward to be recovered in the rental charge. This was to achieve a consistent treatment of drop costs between LLU, WLR and BT's retail products and to reduce incentives for arbitrage and the risk of over-recovery where there is churn between products.
- 5.23 In addition, it is stated that

"to reflect this change, BT has notified a new connection charge for fully unbundled new provides which will apply from 15 December 2005³²".

- 5.24 This new connection charge was £99.95.
- 5.25 BT has confirmed that since 15 December 2005 the cost of the engineering visit associated with New Provide has been recovered in the rental charge.
- 5.26 C&WA's allegation is that the New Provide connection charge is not based on reasonably incurred costs, including the period between 15 December 2005 and 30 June 2006. This is because a site visit is charged for when in many cases it is not required due to an existing line that can be reactivated at less cost.

³² [Ofcom LLU statement](#) – please refer to paragraph 4.40 page 17

- 5.27 Given that the £99.95 charge does not include a site visit element, C&WA's allegations in respect of FA3 and FA9 are therefore not applicable to the New Provide connection charge during the 15 December 2005 to 30 June 2006 period.

The availability of existing lines during the period

- 5.28 C&WA has argued that BT has breached its regulatory obligations by supplying the New Provide service to C&WA in an inefficient manner, particularly because BT has required that a site visit take place when it was unnecessary.
- 5.29 C&WA claims that in up to [33] of cases an existing line could have been reactivated, without the cost of a site visit.
- 5.30 However, according to data received from BT³³, the number of existing lines that could be reactivated appears much lower. This is as a result of the correct identification of those lines that were spare pairs that could be reactivated.
- 5.31 As noted in paragraphs 3.29 to 3.35 above, an important distinction is made between a spare pair and the use of a stopped line (i.e. where a drop line has already been provided and terminates at the end user's premises). The availability of a spare pair still involves network costs entailing a site visit to complete the work between the street cabinet and the end user's premises.
- 5.32 In the light of this, C&WA's dispute seeking compensation for over-payment is made on the premise that the presence of a spare pair means that a connection exists between the exchange through to the customer's premises and therefore no site visit is necessary.
- 5.33 Therefore, C&WA's claim for repayment is based on the number of (notional) stopped line provides that could have been delivered during this period based on its estimate of the number of spare pairs.

Industry requirement for a site visit

- 5.34 In addition to C&WA's assertion that there were more existing lines available to reactivate it also maintains that it sought to have the facility to reactivate existing lines where available. This would have meant that the specification of the New Provide product allowed for reactivation and did not necessarily always require a site visit when connecting C&WA to a LLU customer.
- 5.35 In addition, the MPF product was designed by BT during a process of negotiation with industry. Bulldog (the forerunner of C&WA) actively took part in the MPF product specification process between BT and the industry that started in 1999.
- 5.35.1 During the period of the dispute it was normal practice to submit statements of requirements ("SoRs") for new LLU products and C&WA was free to submit a SoR for an MPF product with a reactivate facility. SoRs are the standard industry method of setting out what the required specification of a product is during negotiation.
- 5.35.2 Under SMP condition FA1 BT is required to provide Network Access on reasonable request. Thereby, if a communications provider wanted a stopped line provide service for MPF they have the option to submit such a request to BT. If BT were to refuse such a request then the matter could be brought to Ofcom as a

³³ Information received by a section191 information request during the previous withdrawn dispute.

dispute. The OTA's records of industry meetings do not contain any request for a reactivation facility³⁴.

- 5.36 C&WA states in further comments to Ofcom³⁵ that it did not formally request a reactivation facility as part of the MPF product by submitting a SoR because a collaborative bilateral approach had been adopted with BT during the negotiations and the process was also subject to the review of the OTA.
- 5.37 C&WA asserts that during the latter stages of the negotiation process, which coincides with the period under review in this investigation, SoRs were no longer being submitted as normal practice.
- 5.38 C&WA did submit a SoR for a reactivate product later on 5 June 2005. BT commenced providing another LLU-based service, known as MPF stopped line provide on 1 July 2006.
- 5.39 BT maintains (in response to a formal request for information under s191) that a site visit was specified as a requirement by industry during the negotiation process³⁶.
- 5.40 The OTA has stated the following³⁷:
 - 5.40.1 It was normal practice to use SoRs during negotiations for LLU products, including during the period of 2004 to 2006.
 - 5.40.2 Negotiations were difficult during the early stages around 2002 to 2003 but this was not specifically the fault of one party.
 - 5.40.3 During the 2004-2006 period of the negotiations, a more co-operative form of negotiation developed between BT and other communication providers (such as C&WA's forerunner Bulldog), which included offers from BT to look at product development without SoRs.
 - 5.40.4 The decision not to submit SoRs was made by Bulldog but it is clear that SoRs provide an unambiguous product specification and ultimately should result in more effective negotiation.
 - 5.40.5 Furthermore, while CPs stated that they would be submitting SoRs for desired products, in several cases SoRs were not submitted.
 - 5.40.6 There was no record of a requirement for a reactivate facility on the issues list from early OTA minutes of industry meetings³⁸.
- 5.41 Taking BT and the OTA's information into account Ofcom believes that it is reasonable to consider that a reactivate facility was not requested by industry as part of the New Provide service.
- 5.42 C&WA had stated that BT should have known from its experience in the WLR provision process that existing lines could be identified and used. However C&WA was involved in the industry negotiation for the New Provide product. The evidence shows that there was no requirement from industry to provide the product with a reactivate facility. When C&WA identified that it needed such a facility, it submitted a

³⁴ The OTA's LLU Industry Forum Issues Summary 8 September 2004

³⁵ C&WA letter of 11 October 2007

³⁶ C&WA letter of 11 October 2007

³⁷ Note of discussion with OTA on 31 October 2007

³⁸ The OTA's LLU Industry Forum Issues Summary 8 September 2004

request to BT in June 2005. BT then provided the product in July 2006. In these circumstances, we do not consider that BT acted unreasonably.

Conclusion

- 5.43 In the light of the evidence above, Ofcom's conclusion is that BT's charge for the New Provide service during the period 16 December 2004 to 30 June 2006 was consistent with its obligations as set out in Conditions FA3 and FA9.

Whether BT has breached Condition FA2 by making available to itself those inputs in the wholesale local access market which it uses in its own downstream business (for wholesale line rental) on more favourable terms than those it offers to C&WA

- 5.44 As noted above, FA2 requires BT not to unduly discriminate against persons or particular persons in relation to matters connected with Network Access.

- 5.45 Article 10(2) of the Access Directive³⁹ states:

"Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of its subsidiaries or partners."

- 5.46 In addition Ofcom has published guidelines on how Ofcom will investigate potential contraventions of requirements not to unduly discriminate imposed upon SMP providers ("the Guidelines")⁴⁰. In all cases, the Guidelines set out the questions that may be considered during an investigation. This would not prevent Ofcom from considering each potential contravention on the facts of the case.

- 5.47 The Guidelines state that

"In the case of non-price differences in transaction conditions, offered by a vertically integrated SMP provider in wholesale communications markets, Ofcom may take an alternative approach. Ofcom will begin the investigation with a presumption that these differences amount to undue discrimination."

- 5.48 Non-price transaction conditions refer to features of a product other than price. In such a case, the SMP provider will then have the opportunity to provide evidence demonstrating that differences are objectively justified, and Ofcom will consider any evidence provided in light of the questions above.

- 5.49 In its submission of 2 August 2007, C&WA claimed that BT provided a more efficient process for WLR (and retail PSTN) than for the New Provide service and therefore was unduly discriminating in favour of its own downstream business. C&WA noted that:

- 5.49.1 for WLR a New Provide only applies where wiring is required behind the NTP;

³⁹ [2002/19/EC]

⁴⁰ Undue discrimination by SMP providers - How Ofcom will investigate potential contraventions on competition grounds of Requirements not to unduly discriminate imposed on SMP providers at <http://www.ofcom.org.uk/consult/condocs/undsmc/contraventions/>

- 5.49.2 for MPF a New Provide is used whenever the connection was not a transfer;
 - 5.49.3 C&WA uses the New Provide product to compete with BT and other communication providers in retail markets for voice services;
 - 5.49.4 BT discriminated in the provision of SMPF because SMPF/retail broadband is attached to WLR;
 - 5.49.5 therefore C&WA suffered from the effects of undue discrimination in both voice and broadband markets; and
 - 5.49.6 Ofcom had considered undue discrimination between MPF and SMPF during the Opal case⁴¹.
- 5.50 In terms of the Opal case, the issue was not one of assessing undue discrimination between the provision of SMPF and MPF but rather considering undue discrimination in how customers could migrate between different wholesale services. The issue was resolved in that case by Ofcom noting:

“...the particular features and stage of development of LLU services during the relevant period and the lack of any evidence of harm or intent to harm competition...”⁴²

Further allegations by C&WA- copper loop input

- 5.51 In its further submission to Ofcom on 30 August 2007 C&WA claimed that BT had provided access to copper pairs as an input for voice and data services on favourable terms to its own downstream business. Specifically, for the period of the dispute, C&WA alleges that:
 - 5.51.1 BT has provided the copper loop input for voice services (as an input to WLR) with the facility of reactivating stopped lines which, at the relevant times, was not available to those who purchased Network Access in the WLAM as the New Provide product.
 - 5.51.2 BT discriminates against C&WA in the provision of the New Provide product when compared to the provision of SMPF by allowing SMPF to use the “stopped line provide” facility.
- 5.52 In relation to the second allegation, C&WA noted that SMPF, in addition to being sold externally to BT’s wholesale customers, is also used internally by BT to create downstream broadband products.
- 5.53 C&WA’s claims refer to the provision of copper inputs for downstream products (in particular WLR) and products falling in the WLAM. C&WA considers the reactivate facility to be a more efficient process than that used for the New Provide product and as such C&WA believes that BT’s use of it when providing WLR (and retail PSTN) and SMPF (which is used by itself and other communications providers) therefore constitutes undue discrimination in favour of BT’s downstream business.

⁴¹ [Opal case Competition Bulletin entry](#)

⁴² [Opal case determination](#) – please refer to paragraph 5.71 page 27

- 5.54 Figure 2 below shows how the copper inputs in the WLAM relate to the voice and broadband retail markets. The dotted line shows the boundaries of the WLAM.

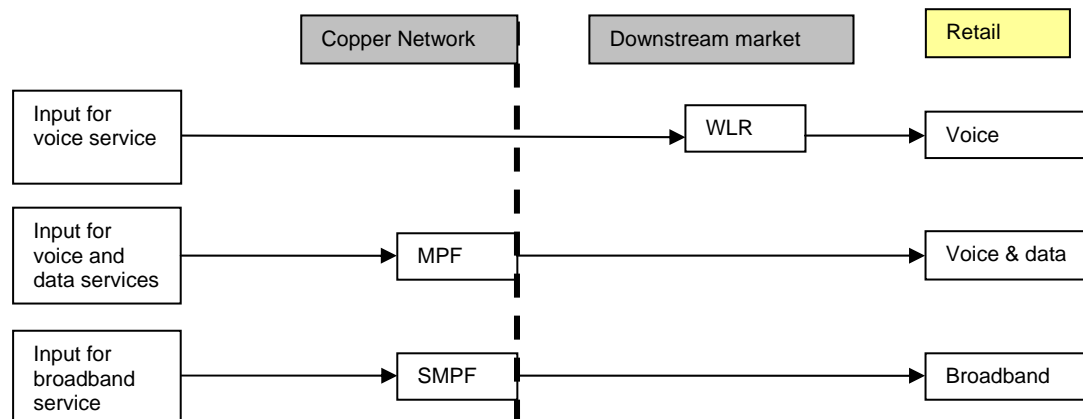


Figure 2: WLAM products and copper inputs in WLR and retail markets

Discrimination in favour of the provision of the copper inputs to WLR

- 5.55 C&WA claims that the inputs into WLR, that is to say the copper pair, are in the wholesale local access market. It further states that by providing this product with a reactivate facility, BT is providing this service on more favourable terms than those offered to C&WA for products which compete with WLR.
- 5.56 C&WA state:
- “WLR uses the same basic network elements as are made available to C&WA through MPF and as such, the availability of functionality in one product that is not available in the other must constitute discrimination”⁴³.*
- 5.57 C&WA uses the New Provide product to provide voice services which directly compete with external providers using WLR and with BT in the voice retail markets. C&WA believes that BT discriminated in favour of its own downstream products (e.g. WLR) and also in favour of communications providers who use WLR, and against it in the provision of the New Provide service.
- 5.58 The discrimination contended by C&WA relates to the ability to reactivate a stopped line; this is a non-price feature of a product. As BT is a vertically integrated SMP provider, the Guidelines show that there may be a presumption of undue discrimination.
- 5.59 Paragraph 5.19 of the Guidelines note that to rebut the presumption of undue discrimination when there are non-price differences offered by a vertically integrated SMP provider between an internal and external wholesale customer, the SMP provider may be able to demonstrate that there is no capability of harm to competition.
- 5.60 In the present case, BT offered WLR to both internal and external customers with a reactivate facility. External communications providers, including C&WA, had the choice of using WLR or the New Provide service to compete with BT in their downstream business. (Whilst WLR is in a separate market to the New Provide, the

⁴³ C&WA's submission 30 August 2007 paragraph 2.2

copper inputs which carry the reactivate facility are within the WLAM). C&WA could have used the same product that BT used for itself.

- 5.61 In relation to LLU, C&WA (and other broadband providers) had a number of competitive options available at the time of the dispute. It could choose to develop:
- 5.61.1 A business model based on using the New Provide for LLU, with relatively high up-front costs, but potentially longer term savings; or
 - 5.61.2 An SMPF strategy for broadband offerings, with WLR for voice services. This would have allowed the communications provider to take advantage of a stopped line provide service, at least until such a service could be provided for MPF by BT.
- 5.62 On this basis, there was no harm to competition. In addition Ofcom has considered whether there is an objective justification to explain why the New Provide product offered to C&WA and external communications providers does not have a reactivate facility but the inputs used by BT for WLR does have a stopped line service.
- 5.63 It is clear that the specification for the New Provide product was developed by the industry with a site visit and without a stopped line service (please see paragraphs 5.34 to 5.42 above). C&WA was involved in these negotiations.
- 5.64 When C&WA wanted an MPF to be provided with a reactivate facility it submitted a SoR. BT provided this product on 1 July 2006.
- 5.65 The presumption of undue discrimination is rebutted by the fact that C&WA had a choice between using the New Provide or WLR in competing with BT in its downstream business and that the industry had decided not to include a reactivate facility within the New Provide service. When C&WA wanted to have such a facility within MPF, this was developed and provided by BT.

Discrimination in the provision of SMPF

- 5.66 The second allegation made by C&WA relates to MPF versus SMPF, both products in the WLAM. MPF is not used by BT but is used by external communications providers and does not have a reactivate facility but SMPF, which is used by BT when providing WLR and by external providers, does have this facility.
- 5.67 SMPF is only available on telephone lines that already support a WLR (PSTN) service. Indeed, Openreach's SMPF product specification⁴⁴ states that:

"In order for a metallic path to be eligible for a Line Share Arrangement:

The analogue PSTN service must be provided to the end user by Openreach and the dial tone must originate from Openreach Equipment in the MDF Site where the Line Share Arrangement is being requested.

An existing metallic path carrying telephone service must be available to the end customer".

- 5.68 Therefore, by definition it would not be possible to provide a new telephone line, either using the New Provide or Stopped Line Provide service, when provisioning SMPF. Rather the line must already be in place and supporting a PSTN service. MPF

⁴⁴ [Openreach SMPF product description](#) – please refer to paragraph 3.3

and SMPF are not sufficiently similar or comparable products to enable an assessment of whether BT has unduly discriminated in the provision of SMPF to itself and the New Provide product to C&WA.

- 5.69 Ofcom is aware that BT offers a simultaneous provide service where WLR and SMPF are provided at the same time. However as noted at paragraphs 5.59 and 5.60 above, this service was offered to both internal and external customers with a reactivate facility. External communications providers, including C&WA, had the choice of using it or the New Provide service to compete with BT in their downstream business.
- 5.70 In light of the above, Ofcom is of the provisional view that BT has not discriminated against C&WA in the provision of SMPF with a reactivate facility and MPF without such a service.

Conclusion

- 5.71 In light of the evidence above, Ofcom's provisional conclusion is that BT did not unduly discriminate in favour of its own business during the period 16 December 2004 to 30 June 2006, and that it did not breach SMP Condition FA2.

Annex 1

Glossary

BT: British Telecommunications plc.

DSL (Digital Subscriber Line): a family of technologies generically referred to as DSL, or xDSL, capable of transforming ordinary local loops into high-speed digital lines, capable of supporting advanced services such as fast Internet access and video-on-demand. ADSL (Asymmetric Digital Subscriber Line), HDSL (High bit rate Digital Subscriber Line) and VDSL (Very high data rate Digital Subscriber Line) are all variants of xDSL.

Hull area: 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.

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 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.

Main distribution frame (MDF): the equipment where local loops terminate and cross connection to competing providers' equipment can be made by flexible 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.

Network Access: has the meaning given to it under section 151(3) of the Communications Act 2003.

Network termination point (NTP): the point of demarcation between a communications provider's network and the end user's premises.

PSTN: Public Switched Telephone Network

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.

SMP: The Significant Market Power test is set out in European Directives.

Wholesale line rental (WLR): allows alternative suppliers to rent access lines on wholesale terms from BT, and resell the lines to customers, providing a single bill that covers both line rental and telephone calls.

Annex 2 – MPF New Provide Process Chart (CONFIDENTIAL) [X]

Annex 3

Responding to this consultation

How to respond

- A3.1 Ofcom invites written views and comments on the issues raised in this document, to be made **29 November 2007**.
- A3.2 Ofcom strongly prefers to receive responses using the online web form at http://www.ofcom.org.uk/consult/condocs/cwa_dispute, 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.
- A3.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email **andrew.dixon@ofcom.org.uk** attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A3.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.

Andrew Dixon
 Floor 4
 Competition Group
 Riverside House
 2A Southwark Bridge Road
 London SE1 9HA

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

Further information

- A3.5 If you want to discuss the issues raised in this consultation, or need advice on the appropriate form of response, please contact Andrew Dixon on 020 7783 4517.

Confidentiality

- A3.6 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.
- A3.7 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.

- A3.8 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/account/disclaimer/>

Next steps

- A3.9 Following the end of the consultation period, Ofcom intends to publish a statement shortly thereafter.
- A3.10 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

- A3.11 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 4.
- A3.12 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.
- A3.13 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

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Annex 4

Ofcom's consultation principles

- A4.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

- A4.2 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

- A4.3 We will be clear about who we are consulting, why, on what questions and for how long.
- A4.4 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 version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
- A4.5 We will normally allow ten weeks for responses to consultations on issues of general interest.
- A4.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.
- A4.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

- A4.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 5

Consultation response cover sheet

- A5.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A5.2 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.
- A5.3 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.
- A5.4 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/.
- A5.5 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	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	<input type="checkbox"/>

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)