



Dispute between BT and Sky in relation to BT's historical charges for SFIs and TRCs

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Provisional
Conclusions
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About this document

This document sets out for comment Ofcom's proposal for resolving a dispute between BT and Sky in relation to allegations that BT's Time Related Charges (TRCs) and charges for Special Fault Investigations (SFIs) were not cost oriented during the period from 1 January 2009 to 30 June 2014, as required by Significant Market Power (SMP) obligations imposed on BT.

TRCs apply where Communication Providers (CPs) request BT to carry out engineering work on lines that is not included within their service level agreements with BT. SFIs are services requested by CPs for further investigation of potential broadband faults on lines where no fault has been found using the standard Openreach line test.

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Glossary of terms

2003 Act – the Communications Act 2003.

2003 Of tel Statement – Of tel Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets, 28 November 2003. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/750148/fixednarrowbandstatement.pdf>

2004 WLA Statement – Review of the wholesale local access market, 16 December 2004. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/rwlam/statement/rwlam161204.pdf>.

2009 Narrowband Statement – Review of the fixed narrowband services wholesale markets, 15 September 2009. Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/wnmr_statement_consultation/summary/main.pdf.

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

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

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

2013 FAMR Consultation – Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30. Consultation on the proposed markets, market power determinations and remedies, 3 July 2013. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/fixed-access-market-reviews/summary/fixed-access-markets.pdf>.

2014 FAMR Statement – Fixed access market reviews 2014: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30, 26 June 2014. Available at: <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/specific-conditions-entitlement/market-power/fixed-access-market-reviews-2014/statement/>.

2016 BCMR Statement – Business Connectivity Market Review, 28 April 2016. Available at: <http://stakeholders.ofcom.org.uk/consultations/bcmr-2015/final-statement/>.

AFI - Additional Financial Information provided by BT to Ofcom.

BoE+1% – Bank of England base rate of interest plus 1%.

BT – British Telecommunications Plc.

CAT – Competition Appeal Tribunal.

Cost Orientation Conditions – SMP Conditions FA3, AA3, AAA3, FAA4.1 and AAAA3, each of which is set out in full in Annex 4.

CP – Communications provider.

CRF – Common Regulatory Framework.

DLRIC – Distributed long run incremental cost.

DSAC – Distributed stand alone cost.

Ethernet appeals – The appeals to the Court of Appeal of the CAT's Ethernet Judgment.

Ethernet Determinations – The five determinations issued on 20 December 2012 to resolve disputes between BT and each of CWW, Sky, TalkTalk, Verizon and Virgin concerning BT's charges for wholesale Ethernet services. Available at:

http://stakeholders.ofcom.org.uk/binaries/consultations/ethernet-services/annexes/Ethernet_FD.pdf.

Ethernet Judgment – The CAT's judgment disposing of appeals of the Ethernet Determinations, handed down on 1 August 2014 [2014] CAT 14. Available at:

http://www.catribunal.org.uk/files/1205-7_Ethernets_Judgment_CAT_14_010814.pdf .

FAC – Fully allocated cost. An accounting approach under which all the costs of the company are distributed between its various products and services. The fully allocated cost of a product or service may therefore include some common costs that are not directly attributable to the service.

Gamma Determination – The determination issued on 25 October 2013 to resolve a dispute between Gamma and BT relating to the 'OfTel Interest Rate' contained within BT's Standard Interconnect Agreement (SIA). Available at:

http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01108/CW_011080613.pdf.

Interest Guidance – The guidance set out in Annex 2 to the Gamma Determination regarding Ofcom's approach to interest in the context of resolving disputes involving charges payable under BT's SIA.

Level 3 Determination – The determination issued on 16 May 2014 (corrected on 16 July 2014) to resolve a dispute between Level 3 Communications UK Limited and BT relating to historic PPC charges. Available at:

http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01118/CW1118_final_determination.pdf.

LLU – Local loop unbundling.

LRIC – Long run incremental costs.

MPF – Metallic path facility.

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

PPC Determinations – The six determinations issued on 14 October 2009 to resolve disputes between BT and each of Cable & Wireless UK, THUS plc, Global Crossing (UK) Telecommunications Limited, Virgin Media Limited, Verizon UK Limited and COLT Telecommunications concerning BT's charges for PPCs

http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_ppc/PPC_final_determination.pdf.

PPCs – Partial private circuits.

PPC Judgment – The CAT's judgment disposing of BT's appeal of the PPC Determinations, handed down on 22 March 2011 - [2011] CAT 5. Available at:

http://www.catribunal.org.uk/files/1146_BT_Judgment_CAT5_220311.pdf.

PPC Court of Appeal Judgment – The Court of Appeal's judgment in BT's appeal of the PPC Judgment, handed down on 27 July 2012 - [2012] EWCA Civ 1051. Available at:

http://www.catribunal.org.uk/files/1146_BT_Judgment_of_the_Court_of_Appeal_270712.pdf.

Parties – BT and Sky.

Provisional Conclusions – this document.

RFS – BT's Regulatory financial statements. Available at:

<http://www.btplc.com/thegroup/RegulatoryandPublicAffairs/FinancialStatements/index.htm>

Relevant Period – 1 January 2009 to 30 June 2014.

SFIs – Special fault investigation services.

SIA – BT's Standard Interconnection Agreement.

SMP – Significant Market Power.

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

SMPF – Shared metallic path facility.

Sky – Sky UK Limited.

TalkTalk – TalkTalk Telecom Group plc.

TalkTalk Dispute – The dispute between TalkTalk and BT regarding BT's historic charges for SFIs and TRCs (case number CW/01182/05/16). Further details available at:

http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01182/.

TRCs – Time related charges.

WFAEL – Wholesale fixed analogue exchange lines.

WLA – Wholesale local access.

WLR – Wholesale line rental.

Section 1

Summary

- 1.1 This document (the Provisional Conclusions) sets out for comment our provisional assessment of the matters in dispute.
- 1.2 The dispute, brought by Sky UK Limited (Sky) against British Telecommunications plc (BT) (collectively the Parties) relates to BT's charges for special fault investigation services (SFIs) and time related charges (TRCs) (the Dispute).
- 1.3 TRCs apply where communications providers (CPs) request BT to carry out engineering work on lines that is not included within their service level agreements with BT. SFIs are services requested by CPs for further investigation of potential broadband faults on metallic path facility (MPF) and shared metallic path facility (SMPF) lines where no fault has been found using the standard Openreach line test.¹
- 1.4 Sky alleged that BT failed to set its charges for SFIs and TRCs provided in relation to its local loop unbundling (LLU) and wholesale line rental (WLR) services in accordance with cost orientation obligations that applied to the provision of those services during the period 1 January 2009 to 30 June 2014 (the Relevant Period). Sky estimated that as a consequence it had been overcharged around £[x]. BT disagreed that its charges were not cost oriented.
- 1.5 During the Relevant Period, BT was subject to obligations to ensure that its charges for SFIs and TRCs were cost oriented pursuant to SMP conditions imposed in relation to the wholesale local access (WLA) and wholesale fixed analogue exchange line (WFAEL) markets, where those services were reasonably necessary for the use of BT's network access services in the WLA/WFAEL markets, including its LLU, sub-loop unbundling and WLR services. The relevant cost orientation obligations were removed with effect from 26 June 2014.
- 1.6 The Dispute is related to a separate dispute brought against BT by TalkTalk in relation to BT's historic charges for SFIs and TRCs (case number CW/01182/05/16) (the TalkTalk Dispute). We published our provisional conclusions on the TalkTalk Dispute on 12 August 2016.²

Provisional assessment of the matters in dispute

- 1.7 In assessing the cost orientation of the charges levied by BT, we have applied the same analytical framework as that adopted in the TalkTalk Dispute. This involves four steps:

¹ SFI used to be a single service but is now split into several modules across two main variants. The 'Frames Direct' variant is purchased where the CP believes that the fault lies at the local exchange and involves no visit to the end customer premises. The 'End User' variant is purchased where the CP wishes BT to begin the fault investigation at the end customer's premises and is comprised of a series of modules – 'Base', 'Internal Equipment', 'Network', 'Frame', 'Internal Wiring' and 'Coop'.

² Further details of the TalkTalk Dispute are available on Ofcom's website at: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01182/.

- a) **Step 1:** Has BT satisfactorily demonstrated that its relevant charges were cost oriented in accordance with SMP Conditions FA3, AA3, AAA3, FAA4.1 and AAAA3 (together, the Cost Orientation Conditions), as applicable?
 - b) **Step 2:** If BT has not satisfactorily demonstrated compliance, were BT's relevant charges nonetheless below DSAC?
 - c) **Step 3:** Are there any other relevant factors that we need to consider in order to determine whether BT's charges were compliant with the applicable Cost Orientation Conditions?
 - d) **Step 4:** If the charges were not compliant, should we require BT to make repayments and if so what level should the repayments be?
- 1.8 If we conclude that BT has demonstrated that each of its charges was cost oriented, it is unnecessary for us to assess Steps 2-4 of the analytical framework. However, if we conclude that BT has failed to demonstrate that each of the charges was cost oriented then, in order for us to determine whether overcharging has taken place, we need to assess whether the relevant charges were nevertheless cost oriented in line with the requirements of the applicable Cost Orientation Conditions.
- 1.9 We do this through Steps 2 and 3 of our analytical framework. At Step 2 we assess whether the charges were below DSAC, which we consider to be the most appropriate cost benchmark for our assessment of BT's compliance with the Cost Orientation Conditions for the purposes of resolving this Dispute. We then consider other relevant factors at Step 3, to ensure that the DSAC test is not applied in a purely mechanistic manner. The other relevant factors we have considered in the Dispute are the magnitude and duration by which charges exceeded DSAC and whether, and the extent to which, charges exceeded FAC.
- 1.10 If we find that BT has overcharged, we continue to Step 4 to consider whether we should require BT to make repayments, and if so at what level.
- 1.11 Having applied our analytical framework, we provisionally conclude that BT has not demonstrated to our satisfaction that its TRCs and SFI charges were compliant with the applicable Cost Orientation Conditions in the Relevant Period.
- 1.12 On the basis of our own assessment of these charges, we provisionally conclude:
- For SFI services:
 - SFI1:³ BT's charges were not cost oriented for the period 1 January 2009 to 11 March 2011 (when the service was withdrawn).
 - SFI2 'Frame Direct'⁴ variant: BT's charges were not cost oriented for the period 13 March 2010 to 26 June 2014.

³ SFI1 was a single service that covered all work required for fault investigation. In March 2010 BT launched its SFI2 services, which split fault investigation into different modules of work. The SFI1 product was withdrawn in March 2011.

⁴ The SFI2 Frame Direct variant reflects a standard set of tests and checks that are carried out at the local exchange.

- SFI2 'Base'⁵ End User module: BT's charges were cost oriented throughout the Relevant Period.
- SFI2 'Internal Equipment'⁶ End User module: BT's charges were not cost oriented from 13 March 2010 to 31 March 2011. The charges for this module were cost oriented from 1 April 2011 to 26 June 2014.
- SFI2 'Network',⁷ 'Frame'⁸ and 'Internal Wiring'⁹ End User modules: BT's charges were not cost oriented for the period 13 March 2010 to 26 June 2014.
- SFI2 'Coop'¹⁰ End User module: BT's charges were not cost oriented for the period 1 April 2011 to 31 March 2013 but were cost oriented from 1 April 2013 to 26 June 2014.
- For TRC services:
 - Visit charges¹¹ for normal hours: BT's charges were not cost oriented for the period 1 January 2009 to 31 March 2011 and for the period 8 June 2012 to 26 June 2014. In the period 1 April 2011 to 7 June 2012 the charges were cost oriented.
 - Visit charges for other times and Sundays/bank holidays: BT's charges were not cost oriented for the period 1 January 2009 to 26 June 2014.
 - Hourly charges for normal hours, other times and Sundays/bank holidays: BT's charges were not cost oriented for the period 1 January 2009 to 26 June 2014.
 - Supplementary charges (per visit)¹² – all other times except Sundays/bank holidays and Sundays/bank/holidays: BT's charges were not cost oriented for the period 1 January 2009 to 26 June 2014.

⁵ The SFI2 Base module is mandatory for all End User variant SFI orders and reflects a standard set of steps that an engineer will carry out at the end customer's premises in order to try to identify where the problem might be. The other modules are carried out on the basis of the results of the Base tests.

⁶ The SFI2 Internal Equipment module relates to tests and diagnostic checks carried out on the end customer's router and computer if the results of the Base module tests suggest that the customer's equipment might be the cause of the problem.

⁷ The SFI2 Network module relates to checks and engineering work carried out between the end customer's premises and the distribution point for the line if the Base module tests suggest that this might be the cause of the problem.

⁸ The SFI2 Frame module relates to checks and engineering work carried out at the local exchange if the Base module tests suggest that this might be the cause of the problem.

⁹ The SFI2 Internal Wiring module relates to checks and work carried out on wiring within the end customer's premises exchange if the Base module tests suggest that this might be the cause of the problem.

¹⁰ The SFI2 Coop module relates to situations where the tests and checks identify that further information is required from the CP in order to identify the cause of the fault.

¹¹ These charges are raised to cover time spent by engineers repairing faults where this work is not covered under the terms of a service contract with Openreach. A visit charge is incurred on each occasion and covers the cost of the engineer visiting the end customer's premises and carrying out up to one hour's work. Separate hourly charges are incurred if the engineer spends more than one hour repairing the fault.

¹² Supplementary charges are incurred when work is carried out outside normal working hours, in situations where work during normal hours is included within the normal price. This can only be used

- Supplementary charges (per hour or part thereof) – all other times except Sundays/bank holidays and Sundays/bank holidays: BT's charges were not cost oriented for the period 1 January 2009 to 26 June 2014.

1.13 We have identified the amount by which BT has overcharged for each service in each financial year during the Relevant Period and consider it appropriate to direct BT to repay Sky a level of repayment reflecting the full amount of the overcharge for each of these services, plus interest. We do not have the information required to calculate the amount of the overcharge by BT and therefore propose to leave it to the Parties to agree the exact levels of repayment that are due.

Structure of the remainder of this document

1.14 In line with Ofcom's Dispute Resolution Guidelines¹³ this document sets out for comment the main elements of our provisional reasoning and assessment in relation to the matters in dispute.

1.15 We set out the background on the regulatory requirements relevant to the Dispute in **Section 2**. The issues in dispute and Ofcom's duties and powers in resolving disputes are set out in **Section 3**. The analysis underpinning our provisional reasoning and assessment is set out in **Section 4**.

Next steps

1.16 The Parties and other interested parties have until 5pm on 10 October 2016 to comment on the Provisional Conclusions.

1.17 After considering any comments received, Ofcom will make a final determination. Details of how to respond to the Provisional Conclusions are set out in Annexes 1 and 2. Our proposed determination is set out at Annex 3.

in conjunction with a request involving normal list prices or contracted work and is in addition to those charges.

¹³ 'Dispute Resolution Guidelines: Ofcom's guidelines for the handling of regulatory disputes', 7 June 2011. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

Section 2

Background and regulation

Introduction

- 2.1 The Dispute relates to BT's historical charges for TRCs and SFIs in the Relevant Period and the extent to which BT has complied with applicable cost orientation obligations when setting those charges.
- 2.2 In this section, we provide background on the regulatory requirements relevant to the Dispute and the judgments of the Competition Appeal Tribunal (CAT) and Court of Appeal relating to Ofcom's assessment of BT's cost orientation obligations in previous disputes, which we consider relevant to our determination.

Relevant regulatory requirements

- 2.3 The sections below set out the relevant cost orientation obligations which applied to BT's charges for SFIs and TRCs in the WLA and WFAEL markets during the Relevant Period. The relevant SMP conditions are set out in full in Annex 4.

Wholesale local access market

- 2.4 In the period from the start of the Relevant Period to 7 October 2010, BT's provision of services in the WLA market was subject to SMP conditions imposed by Ofcom following a market review conducted in 2004 (the 2004 WLA Statement), which set out Ofcom's finding that BT held SMP in the market for WLA services in the UK excluding the Hull area.¹⁴
- 2.5 The SMP obligations imposed on BT under the 2004 WLA Statement required it, among other things, to provide network access on reasonable request (Condition FA1). BT was required to provide specific forms of network access including LLU services, sub-loop unbundling services and such ancillary services as may be reasonably necessary to use those services (Condition FA9).
- 2.6 The SMP obligations also included obligations on BT to ensure and to be able to demonstrate that its charges for network access were cost oriented (Condition FA3.1):

“Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition FA1 and/or Condition FA9 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.”

¹⁴ 'Review of the wholesale local access market', 16 December 2004. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/rwlam/statement/rwlam161204.pdf>.

- 2.7 Ofcom published its second review of the WLA market on 7 October 2010 (the 2010 WLA Statement), which set out Ofcom's finding that BT continued to hold SMP in the market for wholesale local access services in the UK excluding the Hull area.¹⁵ Ofcom imposed a new set of SMP obligations on BT in place of those imposed under the 2004 WLA Statement. BT continued to be subject to requirements, among other things, to provide network access on reasonable request (Condition FAA1), to provide LLU services, sub-loop unbundling services and such ancillary services as may be reasonably necessary to use those services (Conditions FAA9 and FAA10), and to ensure and to be able to demonstrate that its charges for network access were cost oriented (Condition FAA4.1).¹⁶
- 2.8 TRCs and SFIs are ancillary services which, under both sets of SMP conditions, BT was required to provide where they were reasonably necessary for the use of BT's LLU services or sub-loop unbundling services (under Conditions FA9/FAA9/FAA10), or otherwise for the provision of network access under Conditions FA1/FAA1. BT's charges for SFIs and TRCs were therefore subject to the cost orientation obligations under Conditions FA3.1/FAA4.1, as applicable, where they were purchased in relation to BT's network access services in the WLA market, including its LLU and sub-loop unbundling services, and could be considered reasonably necessary for the use of those services.

Wholesale fixed analogue exchange lines market

- 2.9 In the period from the start of the Relevant Period until 15 September 2009, BT's provision of services in the WFAEL market was subject to SMP conditions originally imposed by Oftel following a market review published in 2003 (the 2003 Oftel Statement), which set out Oftel's finding that BT held SMP in several markets relating to wholesale services provided over fixed narrowband networks, including the WFAEL market, in the UK excluding the Hull area.¹⁷
- 2.10 The SMP obligations imposed on BT in those markets required it, among other things, to provide network access on reasonable request (Condition AA1) and to provide specific forms of network access, including WLR services (Condition AA10). The SMP obligations also included obligations on BT to ensure and to be able to demonstrate that its charges for network access were cost oriented (Condition AA3.1):

"Unless the Director directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of the Director, that each and every charge offered, payable or proposed for Network Access covered by Condition AA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed."

¹⁵ 'Review of the wholesale local access market', 7 October 2010. Available at:

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

¹⁶ The cost orientation obligation imposed on BT under Condition FAA4.1 was equivalent to that under Condition FA3.1. The relevant SMP conditions are set out in full in Annex 4.

¹⁷ Oftel, 'Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets', 28 November 2003. Available at:

<http://stakeholders.ofcom.org.uk/binaries/consultations/750148/fixednarrowbandstatement.pdf>.

- 2.11 On 15 September 2009, Ofcom published its review of the wholesale fixed narrowband markets (the 2009 Narrowband Statement) which set out Ofcom's findings that BT continued to hold SMP in certain wholesale fixed narrowband services markets in the UK excluding the Hull area, including the WFAEL market.¹⁸ Ofcom imposed a new set of SMP obligations on BT in place of those imposed under the 2003 Oftel Statement in relation to these markets. BT continued to be subject to obligations requiring it, among other things, to provide network access on reasonable request (Condition AAA1), to provide WLR services (Condition AAA10), and to ensure and to be able to demonstrate that its charges for network access were cost oriented (Condition AAA3.1).
- 2.12 Ofcom published a further review of the WFAEL markets on 20 December 2010 (the 2010 WFAEL Statement).¹⁹ Ofcom again found that BT continued to hold SMP in the WFAEL market in the UK excluding the Hull area and imposed a new set of SMP obligations on BT in place of those imposed under the 2009 Narrowband Statement. BT continued to be subject to obligations requiring it, among other things, to provide network access on reasonable request (Condition AAAA1), to provide WLR services (Condition AAAA10), and to ensure and to be able to demonstrate that its charges for network access were cost oriented (Condition AAAA3.1).²⁰
- 2.13 BT's charges for SFIs and TRCs were subject to the cost orientation obligations under Conditions AA3.1/AAA3.1/AAAA3.1, as applicable, where they were purchased in relation to BT's network access services in the WFAEL market, including its WLR services, and were reasonably necessary for the use of those services.²¹

Fixed Access Markets

- 2.14 In June 2014, Ofcom published its 2014 Fixed Access Market Reviews (the 2014 FAMR Statement).²² Ofcom found that BT continued to have SMP in the provision of WLA and WFAEL services and again imposed a number of SMP obligations on BT. In relation to BT's SFIs and TRCs, Ofcom removed the cost orientation obligations under Conditions FAA4.1 and AAAA3.1 with effect from 26 June 2014 and instead imposed charge controls on each service, which apply in the period following the Relevant Period of this dispute.

¹⁸ 'Review of the fixed narrowband services wholesale markets', 15 September 2009. Available at: http://stakeholders.ofcom.org.uk/binaries/consultations/wnmr_statement_consultation/summary/main.pdf.

¹⁹ 'Review of the wholesale fixed analogue exchange lines markets', 20 December 2010. Available at: <http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/statement/statement.pdf>.

²⁰ The wording of Conditions AAA3.1 and AAAA3.1 was equivalent to the wording of Condition AA3.1. The relevant SMP conditions are set out in full in Annex 4.

²¹ In contrast to the relevant SMP conditions for LLU services, the SMP conditions imposed on BT in the WFAEL market did not explicitly require BT to provide ancillary services relating to BT's WLR services until an amendment was made to Condition AAAA10 under Ofcom's 2012 statement on the charge control review for LLU and WLR services (2012 LLU/WLR Statement). However, Ofcom explained in the 2012 LLU/WLR Statement that this amendment did not constitute a policy change, but rather was intended to clarify the status of WLR ancillary services and to ensure consistency with the LLU SMP conditions (see for example paragraph 5.18 of the 2012 LLU/WLR Statement).

²² 'Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30', 26 June 2014. Available at: <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/specific-conditions-entitlement/market-power/fixed-access-market-reviews-2014/statement/>.

The PPC and Ethernet cases

- 2.15 On 22 March 2011 the CAT issued its judgment (the PPC Judgment)²³ disposing of BT's appeal of Ofcom's 2009 determinations (the PPC Determinations)²⁴ of disputes about the pricing of Partial Private Circuits (PPCs). The CAT dismissed BT's appeal and upheld Ofcom's PPC Determinations, concluding that BT's charges for certain PPCs, namely 2Mbit/s PPC trunk services, were in breach of its relevant cost orientation obligation. BT had therefore overcharged for those PPCs and was required to repay to the other parties in dispute the sums they had overpaid.
- 2.16 BT appealed the PPC Judgment to the Court of Appeal and on 27 July 2012 the Court of Appeal handed down judgment dismissing BT's appeal (the PPC Court of Appeal Judgment).²⁵
- 2.17 On 1 August 2014, the CAT issued its judgment (the Ethernet Judgment)²⁶ disposing of three appeals lodged by BT, by Sky and TalkTalk (jointly) and by CWW, Virgin and Verizon (jointly) in relation to Ofcom's determinations (the Ethernet Determinations) of disputes about the pricing of wholesale Ethernet services.²⁷ The CAT substantially upheld Ofcom's decision that BT's charges for certain wholesale Ethernet services were in breach of its relevant cost orientation obligation, but remitted two issues to Ofcom for determination.
- 2.18 In August 2015, Ofcom was notified that the Court of Appeal had granted BT permission to appeal the CAT's Ethernet Judgment. Ofcom was notified that TalkTalk had been granted permission to appeal by the Court of Appeal in November 2015. The appeals are currently scheduled to be heard by the Court of Appeal in March 2017.
- 2.19 The wording of each of the Cost Orientation Conditions is equivalent to the cost orientation obligations (Condition H3.1 and Condition HH3.1) considered by the CAT in the PPC Judgment and the Ethernet Judgment and by the Court of Appeal in the PPC Court of Appeal Judgment. We therefore consider that the PPC Judgment, the Ethernet Judgment and the PPC Court of Appeal Judgment are relevant to our determination of the Dispute and refer to them in the Provisional Conclusions, as relevant. BT's pending appeal of the CAT's Ethernet Judgment is also relevant to our consideration of any repayment(s), as explained in Section 4.

²³ *British Telecommunications plc v Office of Communication* [2011] CAT 5. Available at: www.catribunal.org.uk/files/1146_BT_Judgment_CAT5_220311.pdf.

²⁴ 'Determination to resolve disputes between each of Cable & Wireless, THUS, Global Crossing, Verizon, Virgin Media and COLT and BT regarding BT's charges for partial private circuits', 14 October 2009. Available at:

http://stakeholders.ofcom.org.uk/binaries/consultations/draft_deter_ppc/PPC_final_determination.pdf.

²⁵ Case no: C3/2011/1683 *British Telecommunications plc v Office of Communications* [2012] EWCA Civ 1051. Available at:

http://www.catribunal.org.uk/files/1146_BT_Judgment_of_the_Court_of_Appeal_270712.pdf.

²⁶ *British Telecommunications PLC v Office of Communications; (1) British Sky Broadcasting Limited and (2) TalkTalk Group PLC v Office of Communications; (1) Cable & Wireless Worldwide PLC, (2) Virgin Media Limited and (3) Verizon UK Limited v Office of Communications* [2014] CAT 14.

Available at: http://www.catribunal.org.uk/files/1205-7_Ethernets_Judgment_CAT_14_010814.pdf.

²⁷ 'Disputes between each of Sky, TalkTalk, Virgin Media, Cable & Wireless and Verizon and BT regarding BT's charges for Ethernet services', 20 December 2012. Available at:

http://stakeholders.ofcom.org.uk/binaries/consultations/ethernet-services/annexes/Ethernet_FD.pdf.

The Communications Act 2003

- 2.20 The dispute resolution provisions of the EU common regulatory framework (CRF) are reflected in sections 185 to 191 of the Communications Act 2003 (the 2003 Act). We discuss these provisions in relation to the Dispute referred to us in Section 3.
- 2.21 The 2003 Act sets out the statutory duties and Community obligations that Ofcom must ensure consistency with when carrying out its functions.
- 2.22 Our principal duty in carrying out our functions, as set out in section 3 of the 2003 Act, is 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. We assess the consistency of our proposed resolution of the Dispute with this and our other duties in Section 4.

Section 3

The Dispute

Issues in dispute

Submissions from Sky

- 3.1 Sky referred the Dispute to Ofcom on 22 June 2016. It alleged that BT had failed to set its charges for SFIs and TRCs provided in relation to its LLU and WLR services in accordance with the cost orientation obligations that applied to the provision of these services during the Relevant Period. As a consequence, Sky claimed that it had been overcharged by BT during the Relevant Period.
- 3.2 Sky explained that, due to the lack of publicly available information about BT's costs and revenues, it had not been able to calculate exactly the amount by which it had been overcharged by BT, but estimated it to be around £[<].²⁸
- 3.3 Specifically, Sky argued in its dispute submission that there is strong evidence to suggest that BT's TRCs and SFIs charges were not cost oriented. It noted that under the 2014 FAMR Statement Ofcom had ordered a number of one off price reductions "so that prices reflected Ofcom's estimates of costs such that they were not excessive".²⁹
- 3.4 Sky considered that Ofcom's intervention in the 2014 FAMR Statement, and the findings underpinning that intervention, suggested that BT's prices may not have been cost oriented.
- 3.5 Sky referred, in particular, to the following as the basis for its concerns:³⁰
 - 3.5.1 Statements made by Ofcom in the 2014 FAMR Statement regarding the weakness of the competitive constraints exerted on TRC and SFI services provided by Openreach;³¹
 - 3.5.2 Ofcom's finding that "TRC prices (and revenues) are likely to be in excess of FAC";³² and
 - 3.5.3 Ofcom's view that "BT does appear to be billing more than the actual time worked by its engineers, which suggests there is a risk of cost over-recovery as a result of its billing approach".³³
- 3.6 Sky further argued that due to the nature of TRC and SFI services, DSAC is likely to be very similar to FAC for TRC/SFI services as they are essentially engineering costs and as such cause little or no fixed and common network costs.³⁴

²⁸ Sky submission dated 22 June 2016 (the Sky submission), paragraph 1.17.

²⁹ Sky submission paragraph 2.7.

³⁰ Sky submission paragraphs 2.8-2.10.

³¹ Sky referred to paragraph 18.38 of the 2014 FAMR Statement.

³² 2014 FAMR Statement, paragraph 18.89.

³³ 2014 FAMR Statement, paragraph 18.132.

³⁴ Sky submission, paragraphs 2.16 and 2.17.

- 3.7 In its submission Sky asked Ofcom to use its powers under section 190(2) of the 2003 Act to declare that BT had failed to comply with its relevant cost orientation obligations and had overcharged Sky for the provision of TRCs and SFIs in the Relevant Period. Sky further asked Ofcom to determine the level of charges during the period and to direct BT to pay Sky the sum overpaid with interest. Sky also requested that Ofcom join its dispute to the TalkTalk Dispute.³⁵

Submissions from BT

- 3.8 We provided BT with a copy of Sky's dispute submission on 23 June 2016 and invited BT to comment.
- 3.9 BT provided initial comments on Sky's dispute submission on 29 June 2016. BT argued that Sky's submission was unclear, groundless and unsubstantiated, and rejected Sky's claim that BT failed to provide TRC and SFI services in compliance with its regulatory obligations during the Relevant Period. BT therefore submitted that Ofcom should not accept the dispute. BT also considered that it would be inappropriate to join it to the TalkTalk Dispute.
- 3.10 BT provided a further submission on 29 July 2016, again rejecting Sky's claim that BT's TRC and SFI charges were not cost oriented in the Relevant Period. BT argued that:
- 3.10.1 BT's methodology for calculating TRC and SFI prices in the Relevant Period was consistent with case law and Ofcom commentary:
- a) It used an appropriate cost standard, DSAC, as sanctioned by the CAT.
 - b) BT was not required to set prices at FAC to comply with its cost orientation obligations.
 - c) Cost orientation obligations give BT flexibility in price setting and should not be applied mechanistically, especially regarding historical claims.
 - d) There is no basis for an assumption that prices set for a charge control should be the same as those that would comply with a cost orientation obligation, noting various Ofcom statements since 2010 which BT said made it clear that the change to the charge control in the 2014 FAMR Statement was a deliberate change in how prices should be set and the level of those prices, with no judgement on whether previous prices complied with the cost orientation obligations.
- 3.10.2 Ofcom had previously identified that BT's margins for TRCs before 2012 were in line with what it would expect based on Openreach's normal returns. When revising charges for TRCs and SFIs in 2012 and 2013, BT assessed the proposed charges and satisfied itself that they were in line with the EBIT margin Ofcom reviewed in the statement on the charge control review for LLU and WLR services (2012 LLU/WLR Statement), as well as below the relevant DSAC estimate.

³⁵ Further details available on Ofcom's website at:
http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01182/.

- 3.10.3 FAC and DSAC are not the same. BT's analysis in pricing papers and published information for similar services demonstrates that DSAC is always higher than FAC for TRCs and SFIs.
 - 3.10.4 Sky's claim raises policy risks in that it is effectively seeking to apply retroactively a charge control to a period when BT was subject only to cost orientation obligations.
 - 3.10.5 Ofcom does not, in any event, have the power to order retroactive payments in disputes.
- 3.11 BT requested that Ofcom reject Sky's claim, and declare that BT had complied with the Cost Orientation Conditions in relation to charges for SFIs and TRCs during the Relevant Period and that it had not overcharged Sky.

Ofcom's duty to handle disputes

- 3.12 Ofcom has the power to resolve the following types of disputes referred to it by one or more of the parties:
- a) a dispute relating to the provision of network access (section 185(1) of the 2003 Act);
 - b) a dispute relating to entitlements to network access that a CP is required to provide by or under a condition imposed on him under section 45 of the 2003 Act between that CP and a person who is identified, or is a member of a class identified, in the relevant condition (section 185(1A) of the 2003 Act); and
 - c) a dispute between CPs, which is not an 'excluded dispute', relating to rights or obligations conferred or imposed by or under a condition set under section 45 of the 2003 Act or any of the enactments relating to the management of the radio spectrum (section 185(2) of the 2003 Act).
- 3.13 Section 186(1) and (2) of the 2003 Act provides that where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle the dispute. Section 186(3) provides that Ofcom must decide that it is appropriate for it to handle a dispute falling within section 185(1A) or section 185(2) unless there are alternative means available for resolving the dispute which would be consistent with the requirements of section 4 of the 2003 Act and would be likely to result in prompt and satisfactory resolution.

Ofcom's powers when determining a dispute

- 3.14 Ofcom's powers in relation to making a dispute determination are limited to those set out in section 190 of the 2003 Act. Except in relation to disputes relating to the management of the radio spectrum, Ofcom's main power is to do one or more of the following:
- a) make a declaration setting out the rights and obligations of the parties to the dispute (section 190(2)(a));
 - b) give a direction fixing the terms or conditions of transactions between the parties to the dispute (section 190(2)(b));

- c) give a direction imposing an obligation on the parties to enter into a transaction between themselves on the terms and conditions fixed by Ofcom (section 190(2)(c)); and
- d) give a direction requiring the payment of sums by way of adjustment of an underpayment or overpayment, in respect of charges for which amounts have been paid by one party to the dispute, to the other (section 190(2)(d)).

3.15 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute (section 190(8)).

Ofcom's duties when determining a dispute

3.16 When resolving a dispute under the provisions set out in sections 185 to 191 of the 2003 Act, Ofcom is exercising one of its regulatory functions. As a result, when Ofcom resolves disputes it must do so in a manner which is consistent with both Ofcom's general duties in section 3 of the 2003 Act, and (pursuant to section 4(1)(c) of the 2003 Act) the six Community requirements set out in section 4 of the 2003 Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive.³⁶

Accepting the Dispute

3.17 Having considered Sky's submission and BT's response, we were satisfied that the Dispute fell within section 185(1A) of the 2003 Act. Therefore, on 18 July 2016 we informed the Parties of our decision that it was appropriate for us to handle the Dispute for resolution in accordance with section 186(3) of the 2003 Act. The scope for the Dispute was published on the Competition and Consumer Enforcement Bulletin on 18 July 2016.³⁷

3.18 We did not consider it appropriate to join this Dispute to the pre-existing TalkTalk Dispute, as the scope of that dispute does not cover all the issues raised by Sky in its submission. However, given the significant overlap in the issues raised by Sky and TalkTalk we intend to adopt a consistent approach for the purposes of resolving each dispute, including by using the same analytical framework.

Scope of the Dispute

3.19 We set out the following scope for the Dispute:

"1) Whether the amount that BT charged Sky for TRCs and SFIs in the relevant period was compliant with Conditions AA3, FA3, AAA3, FAA4.1 and AAAA3, as applicable; and

2) If not, in order to resolve the dispute between the parties, what amount BT should have charged Sky for TRCs and SFIs in the relevant period and whether any repayments should be made."

3.20 Reflecting Sky's submission, the Relevant Period for the Dispute is 1 January 2009 to 30 June 2014. However, as explained in Section 2 above, the relevant cost orientation obligations were removed with effect from 26 June 2014. When we come

³⁶ Directive 2002/21/EC of 7 March 2002 (as amended).

³⁷ See http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01185/.

to consider whether BT's charges were compliant with the Cost Orientation Conditions in Section 4 below, we therefore consider the period from 1 January 2009 to 26 June 2014.

3.21 We sought clarification from Sky as to exactly which TRC and SFI services it was in dispute about with BT. Tables 3.1 and 3.2 below summarise our understanding of the TRC and SFI services that Sky identified, alongside the relevant charges in the Relevant Period.³⁸

Table 3.1: TRC services and charges in dispute, £ nominal

Financial year	2008/09	2009/10		2010/11	2011/12	2012/13		2013/14	2014/15
Price periods	1 Jan 2009 – 31 March 2009	1 Apr 2009 – 16 Oct 2009	17 Oct 2009 – 31 Mar 2010	1 Apr 2010 – 31 Mar 2011	1 Apr 2011 – 31 Mar 2012	1 Apr 2012 – 7 Jun 2012	8 Jun 2012 – 31 Mar 2013	1 Apr 2013 – 31 Mar 2014	1 Apr 2014 – 26 Jun 2014
TRCs									
Hourly charge – normal working days	55	55	55	55	50	50	57	60	60
Hourly charge – other times ex Sunday/BH	85	85	85	85	85	85	85.50	90	90
Hourly charge – Sundays and BH	100	100	100	100	100	100	114	120	120
Visit charge – normal working days	85 ³⁹	85	105	105	105	105	115	120	120
Visit charge – other times ex Sunday/BH	110	110	130	130	130	130	143.50	150	150
Visit charge – Sundays and BH	130	130	150	150	150	150	172	180	180
Supplementary charges – visit other times ex Sunday/BH	25	25	25	25	25	25	28.5	30	30
Supplementary Charges – Visit Sundays and BH	45	45	45	45	45	45	57	60	60
Supplementary charges – per hour other times ex Sunday/BH	30	30	30	30	35	35	28.5	30	30
Supplementary charges – per hour Sundays and BH	45	45	45	45	50	50	57	60	60

³⁸ Based on Sky's dispute submission of 22 June 2016 (as clarified by Sky's email to Ofcom dated 12 August 2016) and BT response of 1 September 2016 to the section 191 notice in the Dispute. We understand that BT's stores charges and Internal NTE Shifts or External Shift or Rearrangement of Line-plant from the Distribution Point charges are not in dispute.

³⁹ In its section 191 response dated 1 September BT explained that before 17 October 2009 TRCs were charged as a visit charge and then hourly charges. From 17 October 2009 the visit charge and first hour of work were combined (i.e. the TRC visit charge covered the visit element and first hour of work).

Source: Ofcom, based on Sky submission on 22 June 2016, Sky clarification by e-mail on 12 August 2016 and BT response of 1 September 2016 to the section 191 notice in the Dispute.

Table 3.2: SFI services and charges in dispute, £ nominal

Financial year	2008/09	2009/10		2010/11		2011/12	2012/13		2013/14	2014/15
Price periods	1 Jan 09 – 31 March 09	1 Apr 09 – 12 Mar 10	13 Mar 10 – 31 Mar 10	1 Apr 10-31 Jul 10	1 Aug 10 – 31 Mar 11	1 Apr 11 – 31 Mar 12	1 Apr 12 – 7 Jun 12	8 Jun 12 – 31 Mar 13	1 Apr 13 – 31 Mar 14	1 Apr 14 – 26 Jun 14
SFI charges										
SFI1	144 ⁴⁰	144	144	144	160 ⁴¹					
Frame Direct			95	95	95	105	105	115	120	120
End User modules										
- Base			95	95	95	105	105	125	130	134.25
- Network			95	95	95	75	75	75	80	80
- Frame			65	65	65	75	75	70	70	70
- Internal Wiring			50	50	50	50	50	40	40	40
- Internal Equipment			50	50	50	25	25	20	20	20
- Coop			35	35	35	25	25	20	15	0

Source: Ofcom, based on Sky submission on 22 June 2016, Sky clarification by e-mail on 12 August 2016 and BT response of 1 September 2016 to the section 191 notice in the Dispute.

Interested Parties

3.22 Vodafone and Verizon have expressed an interest in the outcome of the Dispute.

Information relied on in resolving the Dispute

3.23 In resolving the Dispute, we have relied on:

- 3.23.1 Sky's submission dated 22 June 2016 (and email of 12 August clarifying the services under dispute);
- 3.23.2 BT's submissions dated 29 June 2016 and 29 July 2016;
- 3.23.3 BT's responses (and subsequent clarifications) dated 19 August,⁴² 1 September, 5 September and 14 September 2016 to Ofcom's section 191 notice dated 15 August 2016;
- 3.23.4 BT responses (and subsequent clarifications) to Ofcom's first section 191 notice dated 15 June 2016 in the TalkTalk Dispute (the 1st section 191 notice);
- 3.23.5 BT responses (and subsequent clarifications) to Ofcom's second section 191 notice dated 15 July 2016 in the TalkTalk Dispute (the 2nd section 191 notice); and

⁴⁰ In its response dated 1 September to the section 191 notice in the Dispute, BT explained that SFI1 was a single item that covered all work required for fault investigation and that at the request of CPs, BT broke this out into different modules (from 13 March 2010).

⁴¹ The SFI 1 product was withdrawn on 12 March 2011.

⁴² In this response BT confirmed that information provided by BT for the purposes of the TalkTalk Dispute can also be used to resolve this dispute.

- 3.23.6 BT's responses to the provisional conclusions in the TalkTalk Dispute dated 5 September and BT's further submission dated 15 September 2016.
- 3.24 In addition to information provided by the Parties, our analysis refers to:
 - 3.24.1 Ofcom's provisional conclusions on the TalkTalk Dispute issued on 12 August;
 - 3.24.2 previous Ofcom dispute determinations and relevant case law as cited in these Provisional Conclusions; and
 - 3.24.3 data previously provided to Ofcom by BT in connection with the 2014 FAMR Statement and the 2016 BCMR Statement.
- 3.25 As well as BT, other stakeholders have also provided responses to the provisional conclusions in the TalkTalk Dispute, which we will take into account in reaching a final determination in that dispute. To the extent necessary we may also take those responses into account in reaching a final determination in this Dispute.

Section 4

Analysis and provisional conclusions

- 4.1 In this Section we first set out the analytical framework which we propose to use to assess BT's compliance with the Cost Orientation Conditions. We then apply this analytical framework to the facts of the case and set out the provisional conclusions we have reached as to whether BT's charges for the services in dispute were cost oriented during the Relevant Period and, if they were not cost oriented, whether we should exercise our discretion to require BT to make a repayment to Sky.

Analytical framework

The Parties' views

- 4.2 Sky submitted that during the Relevant Period, BT's charges for TRCs and SFIs were subject to the Cost Orientation Conditions and that in the past Ofcom had assessed BT's compliance with similar conditions by comparing charges with DSAC or FAC. Sky did not indicate which cost standard Ofcom should apply to resolve the Dispute, but considered that in this case "*a choice between DSAC and FAC may have limited practical significance because the DSAC and FAC for TRCs and SFIs are likely to be similar*".⁴³
- 4.3 Sky claimed that Ofcom's one-off adjustment in the 2014 FAMR Statement and the findings underpinning that statement suggested that BT's prices may not have been cost oriented during the Relevant Period. Sky considered, on the basis of statements made by Ofcom in the 2014 FAMR Statement,⁴⁴ that "*there is strong evidence to suggest that BT's TRCs and SFIs charges during the Relevant Period were not compliant with the cost orientation obligations*".
- 4.4 BT noted that "*the specific basis of charges obligation does not stipulate the cost standard that a dominant provider should use when setting relevant prices*"⁴⁵ and submitted that the cost orientation obligations provided BT with a degree of flexibility when setting its charges.
- 4.5 BT argued that DSAC is the appropriate cost measure for Ofcom to use in resolving the Dispute, in line with Ofcom's approach in previous disputes and the findings of the CAT in the PPC Judgment and the Ethernet Judgment. BT stated that this was the basis on which it had set charges for TRCs and SFIs during the Relevant Period.⁴⁶ BT considered that Sky's claim mischaracterised the cost orientation obligations by effectively arguing that BT's compliance should be assessed by reference to a FAC cost standard.⁴⁷
- 4.6 BT further noted that it was important that the DSAC test was not applied mechanistically and that "*Ofcom must be particularly alert to the risk of a mechanistic*

⁴³ Sky submission, paragraph 2.21.

⁴⁴ Sky referred to paragraphs 18.38, 18.87, 18.89, 18.91, 18.97, 18.132, 18.142 and 18.153 as well as Table 18.7 in Section 18 of the 2014 FAMR Statement. See Sky submission, paragraphs 2.7–2.10.

⁴⁵ BT submission dated 29 July 2016, paragraph 36.

⁴⁶ BT submission dated 29 July 2016, paragraphs 3, 37, 38, 41 and 53.

⁴⁷ BT submission dated 29 July 2016, paragraph 53.

application of a basis of charges obligation when considering historical compliance".⁴⁸ BT referred to the PPC Judgment in which the CAT stated that:

"[When] retrospectively seeking to determine compliance with [a basis of charges obligation], it would not be right for Ofcom to apply DSAC (or, no doubt, any test for the allocation of common costs) in a mechanistic way. That would overlook the fact that it is hard in practice for the regulated firm to comply absolutely with whatever test is being used to determine the appropriate allocation of common costs.

*In other words, when retrospectively assessing compliance with Condition H3.1, OFCOM must guard against the possible injustices of a mechanistic application of a test for the allocation of common costs."*⁴⁹

Ofcom's provisional view

- 4.7 As noted in Section 2, this is not the first dispute that Ofcom has been asked to resolve in relation to cost orientation obligations imposed on BT in markets in which it has SMP. The wording of these obligations is broadly similar and Ofcom has developed an analytical framework that it has consistently used when assessing BT's compliance with these obligations.⁵⁰
- 4.8 Given the clear similarities and overlaps between the issues in the Dispute and those considered in the PPC Determinations, the Ethernet Determinations and the TalkTalk Dispute, we consider that it would be appropriate to adopt the same analytical framework for the purposes of determining the Dispute.⁵¹ This framework is consistent with the approach that we said we would take to assessing compliance with BT's cost orientation obligation in the 2010 WLA Statement,⁵² the 2010 WFAEL Statement⁵³ and previous guidance on cost orientation set out in Oftel's 2001 network charge control guidelines.⁵⁴

⁴⁸ BT submission dated 29 July 2016, paragraph 35

⁴⁹ *British Telecommunications plc v Office of Communication* [2011] CAT 5 (PPC Judgment) paragraphs 304 and 305: http://www.catribunal.org.uk/files/1146_BT_Judgment_CAT5_220311.pdf.

⁵⁰ The CAT upheld Ofcom's use of this analytical framework for the purposes of assessing BT's compliance with cost orientation conditions in both the PPC Judgment, paragraphs 277-307; and the Ethernet Judgment, paragraphs 120-195.

⁵¹ In addition to the PPC Determinations and Ethernet Determinations referred to in Section 2, we applied the same analytical framework in determining a dispute between Level 3 Communications UK Limited and BT relating to the cost orientation of BT's charges for PPCs (the Level 3 Determination). Available at: http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01118/CW1118_final_determination.pdf.

⁵² In the 2010 WLA Statement we stated that "*Our interpretation of the basis of charges obligation is that BT's prices must, as a first-order test, be between DLRIC and DSAC*" – see paragraphs 5.58, 5.79 and 6.135.

⁵³ In the WFAEL Statement we explained that "*pricing between DSAC and DLRIC is a first order test for cost orientation*" – see paragraph 5.55.

⁵⁴ *Guidelines on the Operation of the Network Charge Controls from October*, 5 December 2001, http://www.ofcom.org.uk/static/archive/oftel/publications/ind_guidelines/pcrg1201.pdf.

4.9 Our proposed analytical framework involves four steps:

- Step 1: Has BT satisfactorily demonstrated that its relevant charges were cost oriented in accordance with the applicable Cost Orientation Conditions?⁵⁵
- Step 2: If BT has not satisfactorily demonstrated compliance, were BT's relevant charges nonetheless below DSAC?
- Step 3: Are there any other relevant factors that we need to consider in order to determine whether BT's charges were compliant with the applicable Cost Orientation Conditions?
- Step 4: If the charges were not compliant, should we require BT to make repayments and if so what level should the repayments be?

4.10 The charges in dispute in this case were subject to the Cost Orientation Conditions (as applicable), which each required "*each and every charge*" to be cost oriented. We therefore propose to consider BT's charges for TRCs and SFIs on a disaggregated basis, i.e. to consider whether BT secured that each and every disputed charge was cost oriented.⁵⁶

4.11 If we conclude at the first stage of our analytical framework that BT has demonstrated that each of its charges was cost oriented, it is unnecessary for us to assess Steps 2-4. However, if we conclude that BT has failed to demonstrate that each of the charges was cost oriented then, in order for us to determine whether overcharging has taken place, we need to assess whether the relevant charges were nevertheless cost oriented in line with the requirements of the applicable Cost Orientation Conditions.

4.12 We do this through Steps 2 and 3 of our analytical framework. At Step 2 we assess whether the charges were below DSAC, which we consider to be the most appropriate cost benchmark for our assessment of BT's compliance with its cost orientation obligations for the purposes of resolving this Dispute. In addition to the statements we made in the 2010 WLA Statement,⁵⁷ the 2010 WFAEL Statement⁵⁸ and the 2012 LLU/WLR Statement⁵⁹ – which explained that we would apply DSAC as a first order test for assessing BT's compliance with the cost orientation condition – we consider that the considerations we have set out in previous disputes⁶⁰ also support the use of DSAC for the purposes of resolving this Dispute. These include the need for a regulatory balance to be struck between providing the regulated firm with enough pricing flexibility to recover its costs, including its common costs, in an economically efficient manner and ensuring that this flexibility is sufficiently bounded to prevent the regulated firm from exploiting its market power to set anti-competitive,

⁵⁵ Although in its initial dispute submission Sky only made reference to SMP Conditions FA3, FAA4.1 and AAAA3, Sky subsequently clarified that its dispute also related to BT's compliance with SMP Conditions AA3 and AAA3 (emails from Sky to Ofcom dated 5 July 2016 and 13 July 2016).

⁵⁶ The wording of each of the Cost Orientation Conditions is equivalent to that of the SMP Conditions which were considered in the PPC Judgment and the Ethernet Judgment (Condition H3.1 and HH3.1, respectively). In the PPC Judgment and the Ethernet Judgment the CAT found that in assessing BT's compliance with those SMP Conditions Ofcom was correct to consider, discretely, the charges for each relevant service offered by BT: PPC Judgment, paragraphs 209-228; Ethernet Judgment, paragraphs 81-101.

⁵⁷ See footnote 52 above.

⁵⁸ See footnote 53 above.

⁵⁹ 2012 LLU/WLR Statement, paragraph 5.22.

⁶⁰ See for example the Level 3 Determination, paragraphs 3.10-3.13.

exploitative or otherwise unreasonable charges. We also need to regulate in a stable and consistent way over time.

- 4.13 At Step 3 of our framework we consider other relevant factors, to ensure that the DSAC test is not applied in a purely mechanistic manner. The specific factors to be taken into account beyond DSAC are dependent on the details of the case under consideration. We set out in paragraphs 4.155 to 4.176 the additional factors which we consider are relevant to the Dispute.
- 4.14 If we find that BT has overcharged, we continue to Step 4 to consider whether we should require BT to make repayments, and if so at what level.

Appropriate data for our analysis

- 4.15 Each year BT is required to publish detailed Regulatory Financial Statements (RFS). In many cases we have utilised data contained in the RFS, including revenues, volumes and cost calculations, to assess whether products and services were compliant with cost orientation obligations. For example, in the Ethernet Determinations, we explained that in general we would rely on the published RFS for the purposes of determining historical disputes. This is because we would normally expect the RFS to constitute the best available information for us to use in fulfilling our regulatory functions, including dispute resolution.⁶¹
- 4.16 However, in other cases it might be necessary and appropriate to make adjustments to the data published in BT's RFS for resolving cost orientation disputes to ensure that, as far as possible, we accurately reflect BT's costs and revenues.⁶²
- 4.17 In reaching our provisional assessment of whether BT's charges for TRCs and SFIs were cost oriented, we have started by looking at BT's published RFS data for those services. To the extent that the RFS data is incorrect or obviously inappropriate, or where data is not available, we have considered making adjustments to the RFS data or using alternative data sources. This is explained in the relevant sections below, in which we apply our analytical framework to the facts of the case and set out our provisional conclusions.

Step 1: Has BT satisfactorily demonstrated that its relevant charges are compliant with the Cost Orientation Conditions?

- 4.18 The Cost Orientation Conditions required that BT secure and be able to demonstrate to Ofcom's satisfaction the cost orientation of each and every relevant charge for network access in the WLA and WFAEL markets.
- 4.19 We therefore asked BT to provide any evidence that it considered "*demonstrates that BT has complied with SMP conditions FA3, FAA4.1, AA3, AAA3 and AAAA3, as applicable in relation to TRCs and SFI charges during the period 1 January 2009 to 30 June 2014*". When doing so we also asked BT to "*include any justification for the recovery of any common costs in charges for these products and services or for the*

⁶¹ Ethernet Determinations, paragraph 11.22.

⁶² For example, in the PPC Determinations we made adjustments to RFS data in order to: (i) correct for volume errors; (ii) modify assumptions in the RFS that were not appropriate for the services in dispute; (iii) ensure that the revenues of a service were appropriately matched with the costs of the service; and (iv) exclude costs not relevant to the provision of the services in dispute.

attribution of common costs in the fully allocated costs ("FAC") and distributed standalone costs ("DSAC") of these products and services in the relevant period".⁶³

BT's justification for its charges

- 4.20 BT referred to its submission of 29 July 2016, which stated that "*Openreach set its TRC and SFI prices for relevant WLA and WLR services in compliance with its basis of charges obligation. Ofcom assessed that margins for TRCs prior to 2012 (which had been in place since October 2009) were in line with what it would expect i.e. ~20%. When Openreach reviewed the price for TRCs and SFIs in 2012 and 2013, the proposed prices were below the relevant DSAC and the EBIT margin assessed in each pricing paper was in line with the EBIT margin Ofcom reviewed in the March 2012 Statement [2012 LLU/WLR Statement] (~20%).*"⁶⁴
- 4.21 BT also stated that its forthcoming response to the TalkTalk Dispute provisional conclusions was likely to include further submissions demonstrating compliance with the Cost Orientation Conditions and that these were likely to be of relevance also to this Dispute.⁶⁵ In that response, received by Ofcom on 5 September 2016, BT stated that "*[c]ontemporaneous evidence demonstrates that BT followed a reasonable process and made due efforts to ensure compliance with SMP condition FAA4.1 as it was generally understood at that point in time*".⁶⁶
- 4.22 BT provided a series of internal governance pricing papers to Ofcom which set out how changes to its prices for TRCs and SFIs were approved within BT in the Relevant Period.⁶⁷
- 4.23 BT specifically relied on two pricing papers, dated 27 February 2012 (the February 2012 pricing paper) and 17 December 2012 (the December 2012 pricing paper). BT appeared to argue that it set prices by (i) assessing whether they were below DSAC, and (ii) assessing whether the EBIT margin was around 20%. As explained further below, BT told us that the cost data included in the February 2012 pricing paper was based on the data from the 2010/11 RFS and that cost data in the December 2012 pricing paper was based on the 2011/12 RFS.⁶⁸ In these papers, BT appears to compare the prices as at 31 March 2011 and 7 June 2012 with the FAC and DSAC data from the February 2012 pricing paper, and the prices as at 7 June 2012 (again) and 31 March 2013 with the FAC and DSAC from the December 2012 pricing paper.⁶⁹
- 4.24 Tables 4.1 to 4.4 below summarise the price, FAC, DSAC, DSAC test result and implied FAC EBIT margin⁷⁰ for TRC and SFI services included in the February 2012 and December 2012 pricing papers. The DSAC test is the ratio of price to DSAC, so a percentage over 100% implies that price is above DSAC and a percentage below 100% implies that price is below DSAC. The other pricing papers provided by BT did not contain an assessment of the prices against DSAC.

⁶³ Email from Ofcom to BT dated 15 August 2016.

⁶⁴ BT submission dated 29 July 2016, paragraph 2.

⁶⁵ Email from BT on 1 September enclosing its response to the section 191 notice in the Dispute.

⁶⁶ BT's response of 5 September 2016 to the TalkTalk Dispute provisional conclusions, paragraph 5.

⁶⁷ BT's response dated 1 September 2016 to the section 191 notice in the Dispute and its response dated 29 June 2016 to the 1st section 191 notice in the TalkTalk Dispute.

⁶⁸ BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute.

⁶⁹ BT submission dated 29 July 2016, paragraphs 48-51.

⁷⁰ We assume that price less FAC is broadly equal to the EBIT margin for these services as we understand that there is minimal capital employed associated with TRCs and SFIs.

Table 4.1: TRC data derived from BT's February 2012 pricing paper

Price from:	Price £	DSAC £	FAC, £	DSAC test	EBIT margin
TRC visit element (normal days)					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
TRC per hour (normal days)					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Source: Ofcom - derived from BT's February 2012 pricing paper.

Table 4.2: SFI data derived from BT's February 2012 pricing paper

Price from:	Price, £	DSAC, £	FAC, £	DSAC test	EBIT margin
SFI Base					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
SFI frames					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
SFI network					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
SFI Internal Wiring					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
SFI Internal Equipment					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
SFI Co Op					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
SFI Frames Direct					
1 April 2011	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
8 June 2012	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Source: Ofcom - derived from BT's February 2012 pricing paper. Note: Page 9 of BT's February 2012 pricing paper proposed a price of [redacted] for SFI Coop but the actual price implemented was [redacted], as set out on page 3 of the February 2012 pricing paper.

Table 4.3: TRC data derived from BT's December 2012 pricing paper

Price from:	Price £	DSAC £	FAC, £	DSAC test	EBIT margin
TRC visit element (normal days)					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]
TRC per hour (normal days)					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]

Source: Ofcom – derived from BT's December 2012 pricing paper.

Table 4.4: SFI data derived from BT's December 2012 pricing paper

Price from:	Price, £	DSAC, £	FAC, £	DSAC test	EBIT margin
SFI Base					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]
SFI Frames					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]
SFI Network					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]
SFI Internal Wiring					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]
SFI Internal Equipment					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]
SFI Co Op					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]
SFI Frames Direct					
8 June 2012	[X]	[X]	[X]	[X]	[X]
1 April 2013	[X]	[X]	[X]	[X]	[X]

Source: Ofcom – derived from BT's December 2012 pricing paper.

4.25 BT said that the cost data included in the February 2012 and December 2012 pricing papers was derived from the RFS. We have therefore assessed the appropriateness of that RFS data. In doing so, we first set out what cost information on TRCs and

SFIs was included in the RFS during the Relevant Period before setting out BT's explanation of how it used the RFS data to derive cost data in the pricing papers.

Reporting of TRCs and SFIs in the RFS during the Relevant Period

- 4.26 BT did not report cost data for each of the individual TRC and SFI services in its RFS.⁷¹ Until the 2014/15 RFS, costs for TRC and SFI services were reported within Wholesale Residual in the RFS.⁷² BT informed us that this meant that the service costs would not have been subject to the same level of audit review and audit opinion as other regulated markets.⁷³ The 2014/15 RFS reported costs for TRCs in the WLA and wholesale fixed analogue exchange line (WFAEL) markets and for SFIs in the WLA market.
- 4.27 During the Relevant Period,⁷⁴ all SFI variants were included in two services within the RFS: (i) internal SFIs, and (ii) external SFIs.⁷⁵ Until the 2014/15 RFS all TRCs were included in one service in the RFS. In 2014/15 four services were reported relating to the TRCs (internal WLA TRCs, external WLA TRCs, internal WLR TRCs and external WLR TRCs).⁷⁶
- 4.28 Table 4.5 summarises the unit FAC and unit DSAC data reported in the RFS during the period 2011/12 to 2014/15 that are relevant to the Dispute.

Table 4.5: Unit FAC and DSAC for SFI and TRC services reported in the RFS 2011/12 – 2014/15, £ nominal

	FAC £				DSAC £			
	2011/12	2012/13	2013/14	2014/15	2011/12	2012/13	2013/14	2014/15
SFIs								
External SFI	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Internal SFI	[X]	[X]	[X]	[X]	[X]	[X]	[X]	[X]
TRCs	[X]	[X]	[X]					
Openreach TRCs	[X]	[X]	[X]		[X]	[X]	[X]	
WLA TRCs external				[X]				[X]
WLA TRCs internal				[X]				[X]
WLR TRCs external				[X]				[X]
WLR TRCs internal				[X]				[X]

Source: BT's response dated 6 July 2016 to question 5a of the 1st section 191 notice in the TalkTalk Dispute. The 2011/12, 2012/13 and 2013/14 data is based on the restated RFS rather than the originally published RFS for those years (with the exception of the TRC data in 2013/14 which is from the originally published RFS).

⁷¹ BT response dated 1 September 2006 to question 3 of Annex B of the section 191 notice in the Dispute.

⁷² BT response dated 6 July 2016 to question 5 of the 1st section 191 notice in the TalkTalk Dispute.

⁷³ BT response dated 6 July 2016 to question 5 of the 1st section 191 notice in the TalkTalk Dispute.

⁷⁴ Except 2008/09 where BT did not report SFI services in the RFS.

⁷⁵ BT response dated 1 September 2016 to question 4 of the section 191 notice in the Dispute.

⁷⁶ BT response dated 6 July 2016 to question 4 of the 1st section 191 notice in the TalkTalk Dispute. An internal residual TRC service was also included in the RFS.

- 4.29 BT told us that there were a number of factors that meant that the unit cost data from the RFS could not be reliably compared across years and urged caution in using the data. These factors included changing policies in relation to SFI volumes, 'anomalies' in relation to SFI volumes in certain years and a lack of routinely reported volume data for TRCs in the regulatory reporting system.⁷⁷
- 4.30 BT did not provide unit costs for individual TRC and SFI services for the period 2008/09 to 2010/11 as it was unable to verify the relevant volume data for each service.⁷⁸ Instead, BT provided FAC and DSAC information on a total cost basis. Table 4.6 sets out the total FAC and DSAC provided by BT covering the period 2008/09 to 2010/11.

Table 4.6: Total FAC and DSAC for SFI and TRC services reported in the RFS 2008/09–2010/11, £k nominal

	Total FAC (£)			Total DSAC (£)		
	2008/09	2009/10	2010/11	2008/09	2009/10	2010/11
SFIs						
External SFI		[X]	[X]		[X]	[X]
Internal SFI		[X]	[X]		[X]	[X]
TRCs						
Openreach TRCs	[X]	[X]	[X]	[X]	[X]	[X]

Source: BT's response dated 1 September 2016 to question 4a of the section 191 notice in the Dispute.

- 4.31 Table 4.7 shows the DSAC/FAC ratio for each service reported in the RFS during the Relevant Period.

Table 4.7: DSAC/FAC ratios for SFI and TRC services reported in the RFS

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
SFIs							
External SFI		[X]	[X]	[X]	[X]	[X]	[X]
Internal SFI		[X]	[X]	[X]	[X]	[X]	[X]
TRCs							
Openreach TRCs	[X]	[X]	[X]	[X]	[X]	[X]	
WLA TRCs – external							[X]
WLA TRCs – internal							[X]
WLR TRCs – external							[X]
WLR TRCs – internal							[X]

Source: Ofcom, information relating to 2011/12 -2014/15 is derived from BT's response dated 6 July 2016 to question 5 of the 1st section 191 notice in the TalkTalk Dispute. The 2008/09, 2009/10 and 2010/11 data is from BT response dated 1 September 2016 to question 4 of the section 191 notice in the Dispute. Consistent with Table 4.5, the 2011/12, 2012/13 and 2013/14 data is from the restated RFS rather than the originally published RFS for those years (with the exception of the TRC data in 2013/14 which is from the originally published RFS).

⁷⁷ BT response dated 6 July 2016 to question 5a of the 1st section 191 notice in the TalkTalk Dispute.

⁷⁸ BT response dated 1 September 2016 to question 4a of the section 191 notice in the Dispute.

- 4.32 The DSAC/FAC ratio for TRCs was over 3 in most years and the ratio for external SFIs was significantly lower at between [\approx 1.1-1.8].⁷⁹ We understand that one reason for the difference in the DSAC/FAC ratios is that SFI services are included within the 'access' increment in BT's LRIC model while TRC services are included in the 'other' increment.⁸⁰
- 4.33 In the next sub-section we set out BT's explanation as to how it used the RFS cost data in its pricing papers.

February 2012 pricing paper

- 4.34 BT told us that the FAC and DSAC data for SFI modules in the February 2012 pricing paper was estimated using FAC and DSAC data from the SFI cost component Special Fault Investigation (CO989) reported in the 2010/11 RFS.⁸¹ BT estimated the FAC and DSAC for each module by applying volume and duration information for each module to the RFS information.⁸²
- 4.35 BT was unable to locate the precise calculations used to support its estimates of FAC and DSAC for TRCs in the February 2012 pricing paper.⁸³ However, it said that if the methodology followed a similar approach to that used in the December 2012 paper, the FAC and DSAC estimates were likely to have been based on (i) FAC and DSAC for the component Time Related Charges (CK981) from the 2010/11 RFS; (ii) breaking down these RFS costs between visit and hours-related elements, and (iii) deriving unit costs by reference to relevant volumes.⁸⁴
- 4.36 BT said that the DSAC/FAC ratio for TRC charges used in its pricing paper was [\approx 1.2-1.4] which is consistent with the DSAC/FAC ratio for the component Special Fault Investigations from the 2010/11 RFS.⁸⁵

December 2012 pricing paper

- 4.37 BT was unable to locate the precise calculations used to support its FAC estimates for SFIs in the December 2012 pricing paper, although it said this was likely to have been derived in a similar way to that in the February 2012 pricing paper. However, BT said that the DSAC/FAC ratio of [\approx 1.2-1.4] used in the paper was derived from the component Special Fault Investigations from the 2011/12 RFS. This appears

⁷⁹ We have used the DSAC/FAC ratios for external SFI services reported in the RFS since we consider that that these are more relevant for the purposes of resolving this dispute.

⁸⁰ See for examples pages 7 to 9 of BT's 2014 LRIC Relationships and Parameters document: <http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2014/LRICModelRelationshipsandParameters2014.pdf>. In BT's LRIC model costs that are common across all increments are attributed wholly to each increment. Therefore, if the 'other' increment is relatively small compared to the access increment (which seems likely since fewer services are associated with this increment according to BT's documentation) then the common costs and hence the DSAC are likely to be relatively large compared to the FAC of the relevant services.

⁸¹ BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute.

⁸² BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute.

⁸³ BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute.

⁸⁴ BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute.

⁸⁵ BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute.

consistent with Table 4.7 which shows that the DSAC/FAC ratio for the SFI services reported in the RFS in 2011/12 was [\times 1.2-1.4].⁸⁶

- 4.38 BT said it had traced the calculations used to derive the unit FAC for TRC hours but had not been able to locate the calculations used for the unit FAC for the visit element of the TRC visit charge.
- 4.39 BT said the TRC hourly unit FAC was derived from the component Time Related Charges in the 2011/12 RFS. BT said that it analysed the FAC from the RFS between 'visit related costs' and 'hourly costs' based on management judgement.⁸⁷ BT said it then analysed the hourly cost FAC estimate between time taken on TRC visits, TRC hourly costs and volume deals in order to obtain a FAC estimate for the hourly costs. It divided this hourly cost by the volume of TRC hours to derive the unit FAC.
- 4.40 BT said that the DSAC was estimated by multiplying the unit FAC estimate by a DSAC/FAC ratio of [\times 1.2-1.4], the same ratio as used for SFI services (and which was derived from the Special Fault Investigation component from the 2011/12 RFS).

Other pricing papers

- 4.41 In its initial response, BT has not relied on pricing papers that were produced earlier than the February 2012 pricing paper. BT said that it reviewed TRC and SFI prices against DSAC in 2012 and 2013 and that it took "*comfort from the assessment made by Ofcom in the [2012 LLU/WLR Statement] that the prices for TRCs and SFIs prior to June 2012 (as they applied since October 2009) were consistent with Openreach's basis of charges obligation*".⁸⁸
- 4.42 BT provided us with pricing papers dated October 2007 and March 2008 in response to our information request as well as referencing pricing papers already provided as part of its responses to the TalkTalk Dispute.⁸⁹ These papers are related to TRCs and SFIs, but do not appear to contain any FAC or DSAC data.

Sky's views on the justifications put forward by BT

- 4.43 In its submission, Sky noted that in correspondence between the Parties prior to Sky referring the Dispute to Ofcom it had sought comfort from BT that its charges complied with BT's SMP obligations. Sky stated that, without providing any evidence, BT had pointed to the fact that it had undertaken internal analysis which showed that its charges for SFIs and TRCs were below the DSAC ceiling. For the period prior to 2012, BT had sought to rely on the 2012 LLU/WLR Statement, in which Ofcom reviewed Openreach's returns for TRCs and indicated that they were in line with its normal expectations.
- 4.44 Sky stated that this did not address its concerns, noting that it had concerns regarding the reliability of the data used for BT's internal analysis and therefore was not content to rely on BT's internal assessment of its costs and revenues to

⁸⁶ The SFI service in 2011/12 was made up of two cost components: Special Fault Investigation and Openreach Sales Product Management. The Special Fault Investigation component referenced by BT represented almost all of the unit cost of the SFI services reported in the RFS.

⁸⁷ BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute, page 5.

⁸⁸ BT submission dated 29 July 2016, paragraph 49.

⁸⁹ BT response dated 1 September 2016 to question 1 of the section 191 notice in the Dispute.

determine compliance with its cost orientation obligations. In particular, Sky noted that:

“Ofcom had significant concerns about the reliability of BT’s aggregate TRCs and SFIs data – as expressed by Ofcom in paragraphs 18.81 onwards of the 2014 FAMR Statement... In particular, Ofcom was concerned about the consistency and reliability of both the underlying absolute figures and any trends inferred from this data.”

“As a result of these significant problems, Ofcom did not use Openreach’s cost and revenue data to set the charge control. Instead, Ofcom derived its own estimate of underlying costs in setting the charge control.”⁹⁰

- 4.45 In relation to Ofcom’s “high level statements” about Openreach’s TRCs returns, Sky noted that *“Ofcom made clear in the 2014 FAMR Statement that its 2012 LLU/WLR Charge Control Statement did not go into a significant amount of detail in relation to TRC data and that it was not appropriate to rely on the Earnings Before Interest and Tax (“EBIT”) of TRCs in 2012”*.⁹¹

Ofcom’s provisional view

Assessment against DSAC

- 4.46 As explained above, we agree that DSAC is the appropriate cost standard to use for the purposes of assessing BT’s compliance with its cost orientation obligations. However, we note that even on the face of its pricing papers BT has failed to demonstrate that each of its charges for TRCs and SFIs were below DSAC for the whole of the Relevant Period. Both pricing papers show that the prices for [§<] were above BT’s estimate of DSAC before the introduction of the pricing changes assessed in those papers.⁹²
- 4.47 In any event, we do not consider that the DSAC tests set out in the two pricing papers referred to by BT (as shown in Tables 4.1 to 4.4 above) are sufficient to satisfactorily demonstrate that BT complied with its applicable cost orientation obligations throughout the Relevant Period for the following reasons, which we discuss in more detail below:
- The RFS cost data does not appear robust;
 - The pricing papers do not cover the whole of the Relevant Period; and
 - The pricing papers do not include costs for each and every TRC and SFI charge in dispute.

The RFS cost data does not appear robust

- 4.48 As set out above, BT told us that the FAC and DSAC information included in the pricing papers was derived from cost data reported in the 2010/11 and 2011/12 RFS,

⁹⁰ Sky submission, paragraphs 2.13-2.15.

⁹¹ Sky submission, paragraph 2.13.

⁹² £[§<] price vs £[§<] DSAC in the February 2012 pricing paper and £[§<] price vs £[§<] DSAC in the December 2012 pricing paper.

although it was unable to explain in all cases how the calculations were performed. Our starting point for assessing compliance with cost orientation obligations is normally BT's view of its costs as published in its RFS, since we would expect the RFS to contain the best available information for resolving disputes.

- 4.49 However, in the 2014 FAMR Statement we reviewed BT's volume, revenue and FAC data for TRCs and SFIs in the period 2009/10 to 2012/13, which includes data from the 2010/11 and 2011/12 RFS that BT relied on in its pricing papers. Following analysis of the RFS cost information in these years we found "*significant concerns with the reliability of this data*".⁹³ We said that we had "*identified various (and in some cases counter-intuitive) trends in both BT's cost and revenue data which BT has been unable to fully explain*", which meant that we had "*concerns with both the underlying absolute figures and the reliability of any trends inferred from this data*".⁹⁴
- 4.50 We have revisited the analysis carried out for the purposes of the 2014 FAMR Statement and for the reasons given in the 2014 FAMR Statement, we do not consider that the underlying RFS FAC data for 2010/11 and 2011/12, on which the FAC estimates in the pricing papers are based, are robust. We therefore consider that it would be inappropriate to rely on these FAC estimates for the purposes of resolving the Dispute.
- 4.51 In addition, we note that the relationship between FAC and DSAC in the RFS for TRC and SFI services, as shown in Table 4.7, appears inconsistent and counterintuitive. BT has told us that the underlying labour costs for TRC and SFI services are the same (see paragraph 4.85) and given this, the significant difference in DSAC/FAC ratios between TRC and SFI services derived from RFS data does not appear credible. We noted above that one reason for the difference in the DSAC/FAC ratios is that SFI services are included within the 'access' increment in BT's LRIC model while TRC services are included in the 'other' increment. This treatment has been in place since the SFI component was created in 2009/10.⁹⁵
- 4.52 Given that both TRCs and SFIs are network access services, it is not clear to us why they are included in different increments in BT's LRIC model. BT was unable to explain the rationale for this treatment of TRC and SFI components.⁹⁶ However, we recognise that in its pricing papers BT applied the DSAC/FAC ratio for SFIs to both TRC and SFI services when estimating DSAC. This would appear reasonable given that the DSAC/FAC ratio for SFIs was derived from the access increment of BT's LRIC model.
- 4.53 As explained further in Step 2 of our analysis below, while we do not consider that the FAC estimates in BT's pricing papers are robust, we consider that the DSAC/FAC ratios which BT has used in those papers to derive DSAC estimates do appear broadly reasonable.

Pricing papers do not cover the whole Relevant Period

- 4.54 The two pricing papers relied on by BT are dated 27 February 2012 and 17 December 2012 and relate to the price changes made on 8 June 2012 and 1 April

⁹³ 2014 FAMR Statement, paragraph 18.81.

⁹⁴ 2014 FAMR Statement, paragraph 18.82.

⁹⁵ BT response dated 1 September 2016 to question 2a (Annex C) of the section 191 notice in the Dispute.

⁹⁶ BT response dated 1 September 2016 to question 2a-b (Annex C) of the section 191 notice in the Dispute.

2013. However, they do not enable an assessment to be made as to whether BT's charges in effect from the start of the Relevant Period (1 January 2009) to 27 February 2012 (the date of the February 2012 pricing paper), or from 1 April 2013 to the end of the Relevant Period, were cost oriented.

- 4.55 The pricing papers that BT provided which covered the period prior to 27 February 2012 either did not compare the relevant prices against costs at all or, where some form of cost analysis was presented, did not compare the prices against DSAC and did not explain how the cost estimates had been calculated. These pricing papers therefore did not demonstrate that BT's prices were below DSAC in the period prior to 27 February 2012. BT also made changes to its prices for the SFI Base and Coop modules on 1 April 2014. BT provided a pricing paper dated 2 December 2013 relating to these price changes, however the pricing paper did not present any cost analysis to support the changes.
- 4.56 Therefore, even if we considered that the cost estimates included in the February 2012 pricing paper and the December 2012 pricing paper were reliable (which for the reasons set out above is not the case), we would not consider that BT had demonstrated that the TRC and SFI charges were cost oriented over the whole of the Relevant Period.

Pricing papers do not include costs for each and every TRC and SFI charge in dispute

- 4.57 BT told us that it did not produce RFS information for each TRC and SFI product and service during the Relevant Period although the pricing papers attempt to estimate costs for some individual services, as explained above. The February 2012 and December 2012 pricing papers appear to include estimates of FAC and DSAC for each SFI charge but not all TRC charges. In particular, they include estimates of FAC and DSAC for TRC hourly and visit charges for normal working days but do not appear to include cost information for TRC hourly and visit charges outside normal working days (e.g. Sundays and bank holidays), or for supplementary charges. The pricing papers therefore do not enable us to assess whether each and every TRC and SFI charge was cost oriented during the Relevant Period.

EBIT margins

- 4.58 BT said it had *"taken comfort that TRC and SFI prices complied with the basis of charges obligation from Ofcom's consideration of TRC and SFI prices during the relevant period, (i.e. in the 2012 Charge Control where Ofcom observed, in relation to the prices that applied from October 2009, that Openreach's returns were 'in line with our normal expectation for Openreach services, suggesting that they are not overcharging for TRCs')"*.⁹⁷
- 4.59 BT argued that it *"was entitled to rely on this [statement] and set prices consistently with the margins that Ofcom has endorsed"* and noted that the EBIT margin assessed in both the February 2012 and December 2012 pricing papers was *"in line with the EBIT margin Ofcom reviewed in the March 2012 statement (~20%)"*.⁹⁸

⁹⁷ BT submission dated 29 July 2016, paragraph 4.

⁹⁸ BT submission dated 29 July 2016, paragraphs 48-50.

4.60 BT's submission referred to Ofcom's 2012 LLU/WLR Statement, in which Ofcom set new charge controls for LLU and WLR services to apply from 1 April 2012.⁹⁹ As part of its review, Ofcom considered arguments from CPs, including Sky, that BT's TRCs and SFIs should be included within the scope of the LLU charge control. In the 2012 LLU/WLR Statement, we set out our reasoning for deciding that regulation of LLU TRCs and SFIs through cost orientation rather than a charge control remained appropriate at that time.¹⁰⁰

4.61 In relation to LLU TRCs, we explained:

"4.334 We note that the cross-market nature of TRCs and the nature of the service itself means that a charge control (by way of a basket or other means) may not be a sufficiently targeted intervention. For example, TRCs can be provided in the Leased Lines and WFAEL markets (in addition to the WLA market), making it difficult to identify robustly all LLU TRC costs (which are reasonably necessary for the use of LLU services). As noted in the March 2011 Consultation, we do not consider that separate reporting arrangements in Openreach's regulatory accounts would be appropriate or proportionate. Further, the structure of the charges, given the nature of the service, also means that charges can be variable. For example, TRC charges can vary depending on when the work takes place (i.e., on a weekday or during business hours or outside normal business hours).

...

4.336 We recognise that LLU (and WLR) TRCs can represent a significant item of spend for CPs (although we note that 2009/10 industry spend on LLU and WLR TRCs is likely to be approximately at least 30% less than what TTG stated in its March 2011 Consultation response for 2009/2010).

4.337 However, we have reviewed Openreach's overall returns (which are commercially confidential) for TRCs. We consider that these are in line with our normal expectations for Openreach services, suggesting that they are not overcharging for TRCs by Openreach."¹⁰¹

4.62 During the Relevant Period the applicable Cost Orientation Conditions imposed ongoing obligations on BT to secure and be able to demonstrate that each of its relevant charges for network access was reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

4.63 We do not accept that BT can demonstrate compliance with this requirement by showing that its overall EBIT margins for TRCs and SFIs were at or around a particular level, on the basis of the above statements by Ofcom. The context in which these statements were made was Ofcom's consideration of whether to impose a

⁹⁹ Charge controls for these services were imposed as a consequence of Ofcom's 2010 reviews of the WLA and Wholesale Fixed Analogue Exchange Line markets.

¹⁰⁰ 2012 LLU/WLR Statement, paragraphs 4.322-4.369.

¹⁰¹ Ofcom did not consider BT's returns on SFI services in the 2012 LLU/WLR Statement.

charge control on BT's TRCs, rather than a review of whether BT's charges for those services were cost oriented. The statements therefore cannot be understood as a finding by Ofcom that BT's individual charges for TRCs at the time of the 2012 LLU/WLR Statement were consistent with BT's cost orientation obligation (and Ofcom did not even consider BT's returns on SFIs).

4.64 Indeed, we note that elsewhere in its submission BT argued that:

“Ofcom’s discussion in various consultations and market review statements since 2010 make it clear that, in relation to TRCs and SFI, the change to a charge control obligation [in the 2014 FAMR Statement] represented a deliberate change in how prices should be set and the level of those prices, with no judgment being made on whether previous prices complied with the basis of charges obligation.”¹⁰² (emphasis added)

4.65 BT therefore appears to accept that statements by Ofcom regarding the need (or otherwise) for the imposition of a charge control condition do not imply any judgment by Ofcom on BT's compliance with its cost orientation obligations in relation to the charges in question.

4.66 Furthermore, Ofcom's statements related to the overall level of returns which Openreach was making for TRCs. We consider that it would have been clear to BT at the time that an assessment of these returns would not be sufficient to establish compliance with the applicable Cost Orientation Conditions. As noted above, we set out in the 2010 WLA Statement and the 2010 WFAEL Statement that we would assess BT's compliance with its cost orientation obligations by assessing whether, as a first order test, BT's charges were between DLRIC and DSAC, and the 2012 LLU/WLR Statement was published following the PPC Judgment in which the CAT confirmed that DSAC was an appropriate test for these purposes.¹⁰³ It is clear from the 2012 LLU/WLR Statement that Ofcom did not consider whether or not BT's TRC charges were above or below DSAC.

4.67 Finally, we note that it is unclear to what extent BT placed reliance on Ofcom's statements in the 2012 LLU/WLR Statement in making pricing decisions. BT states that it 'reasonably relied' on Ofcom's statements in assessing compliance in June 2012 and March 2013.¹⁰⁴ However, it appears that the DSAC test was used as the primary basis for assessing compliance with the cost orientation condition in both the February 2012¹⁰⁵ and December 2012 pricing papers, with an assessment against margins used as a 'further basis' for assessing compliance.¹⁰⁶

Provisional conclusion

4.68 For the reasons above we provisionally conclude that BT has not demonstrated to our satisfaction that its TRC and SFI charges were compliant with the applicable Cost Orientation Conditions for the Relevant Period.

¹⁰² BT submission dated 29 July 2016, paragraph 3(d).

¹⁰³ See paragraph 4.7 and footnote 50 above.

¹⁰⁴ BT submission dated 29 July 2016, paragraph 51(b).

¹⁰⁵ We note that the February 2012 pricing paper, on the basis of which the June 2012 pricing changes were assessed, pre-dates the 2012 LLU/WLR Statement, although Ofcom had published a draft Statement on 3 February 2012 which contained the same wording as that referred to by BT. The February 2012 pricing paper refers [3<].

¹⁰⁶ BT submission dated 29 July 2016, paragraph 50(b).

Step 2. If BT has not satisfactorily demonstrated compliance, were BT's relevant charges nonetheless below DSAC?

The Parties' views

4.69 Sky considered that *"there is strong evidence to suggest that BT's TRCs and SFIs charges during the Relevant Period were not compliant with the cost orientation obligations"* and that in 2014 Ofcom found *"these charges to be excessive and ordered a number of one-off price reductions for TRCs and SFIs charges so that prices reflected Ofcom's estimates of costs such that they were not excessive"*.¹⁰⁷

4.70 In its submission Sky referred to the 2014 FAMR Statement, in which Ofcom found evidence that BT's revenues for TRCs appeared to be above FAC in 2012/13 and 2013/14.¹⁰⁸ Sky submitted that in 2014 Ofcom *"concluded that TRCs and SFIs charges were significantly above FAC"*.¹⁰⁹

4.71 Sky further argued that *"because of the nature of TRCs and SFIs the level of DSAC is likely to be similar to that of FAC"*.¹¹⁰ Sky stated that:

*"This is because in calculating FAC, fixed and common wholesale network costs are attributed once, whereas in DSAC they are attributed more than once (leading to DSAC in totality being higher than FAC). For a particular product there will be a difference between DSAC and FAC, if the product's cost stack includes an attribution of fixed and common wholesale network costs. However, TRC/SFI services are essentially engineering labour and as such cause little or no fixed and common network costs to be incurred and therefore should include little or no allocation of fixed and common network costs. Therefore, there should be little difference between FAC and DSAC for TRCs and SFIs."*¹¹¹

4.72 BT argued in response that it had used an appropriate cost standard, DSAC, to set its charges during the Relevant Period. It considered that Sky was incorrectly claiming that BT was required to set prices at FAC, and that this effectively amounted to seeking to have a charge control retroactively applied to a period when BT was only subject to cost orientation obligations. BT considered that this gave rise to important policy risks.¹¹²

4.73 BT further rejected Sky's claim that FAC costs and DSAC costs are similar for TRCs and SFIs. BT stated that:

*"The analysis in the pricing papers from 2012 and a review of published information for similar services demonstrates that it is always the case that DSAC is clearly higher than FAC for TRCs and SFIs."*¹¹³

¹⁰⁷ Sky submission, paragraph 2.7.

¹⁰⁸ 2014 FAMR Statement, paragraphs 18.90-18.94.

¹⁰⁹ Sky submission, paragraph 2.10.

¹¹⁰ Sky submission, paragraph 2.16.

¹¹¹ Sky submission, paragraph 2.17.

¹¹² BT submission dated 29 July 2016, paragraphs 5 and 6.

¹¹³ BT submission dated 29 July 2016, paragraph 5.

- 4.74 To evidence its view that DSAC costs are higher than FAC costs, BT pointed to its assessment in the February 2012 pricing paper, in which the ratio of DSAC to FAC was approximately [\geq 1.2-1.4]. BT also provided a selection of higher DSAC/FAC ratios which related to copper provision and maintenance services in the three years preceding the 2014 FAMR Statement. BT argued that:

“TRC services are similar in nature to the maintenance and provision of copper lines and SFI services and related to the maintenance of copper lines. One would expect the fixed and common cost (“FCC”) of TRC and SFI services to be the same or similar to those of copper provision and maintenance services.”¹¹⁴

Ofcom’s provisional view

- 4.75 As explained above, where BT has failed to demonstrate to our satisfaction that its relevant charges were cost oriented, at Step 2 of our analysis we assess whether the charges were nonetheless below DSAC.
- 4.76 We do not consider that prices being above FAC would be sufficient to find that BT had failed to comply with its cost orientation obligations, unless they were also above DSAC. Sky’s submission did not clearly state whether Sky considered that Ofcom should apply a FAC or DSAC cost standard to resolve the Dispute. Rather, Sky’s position is that a choice between the two cost standards may have limited practical significance in this case because it considers that the DSAC for TRCs and SFIs is likely to be similar to FAC.
- 4.77 In this section we therefore first consider the sources of information available to us in order to establish what the appropriate DSACs for BT’s services were in the Relevant Period, before applying the DSAC test to BT’s charges for TRCs and SFIs.

RFS data

- 4.78 We would normally consider that the DSAC figures reported in the RFS are the starting point for assessing BT’s compliance with the cost orientation obligation.
- 4.79 However, in this case we have concerns that the RFS data underpinning the FAC information in BT’s pricing papers, and on which its DSAC estimates in those pricing papers were based, are not reliable.¹¹⁵ As noted in paragraph 4.29 above, BT informed us that there were a number of factors that meant that the RFS unit cost data could not be reliably compared across years and urged caution in using the data. In addition, the RFS data are aggregated which does not allow Ofcom to assess whether each separate charge is cost oriented.
- 4.80 Although BT was able to provide total cost data for TRC and SFI services reported in the RFS, BT was unable to provide us with unit FAC or DSAC costs for those services in 2008/09, 2009/10 or 2010/11 due to i) SFIs not being reported in 2008/09 and ii) its inability to identify volume data for TRCs in the period 2008/09 to 2010/11 and for SFIs in 2009/10 and 2010/11. We are therefore unable to rely on the RFS costs in those years.

¹¹⁴ BT submission dated 29 July 2016, paragraphs 44-47.

¹¹⁵ See paragraphs 4.48 to 4.53 above.

- 4.81 For these reasons, we do not consider that it would be appropriate to use the FAC or DSAC data reported in the RFS (or set out in BT's pricing papers) to assess whether TRC and SFI charges were cost oriented.¹¹⁶
- 4.82 While we have adjusted RFS data in previous disputes to address particular concerns, the concerns we have identified in this case relate to the overall robustness and reliability of the data for TRC and SFI services. In the absence of reliable RFS data, we have considered alternative sources of financial information that we can use to inform our view on BT's compliance with cost orientation. We discuss these below.

Alternative cost information

- 4.83 One alternative source of cost data that we could use is Openreach's management accounts. In the 2014 FAMR Statement we set a charge control for TRC services based on our FAC estimate of the underlying hourly costs using information sourced from Openreach's management accounts uplifted to allow for an estimate of overhead costs.¹¹⁷
- 4.84 We also used management accounts data to set the charge control for TRCs in the 2016 BCMR Statement.¹¹⁸ Since we relied on Openreach's management accounts data in the last two charge control decisions relating to TRCs, we consider it is reasonable to consider management accounts data as the basis for resolving the Dispute. BT has agreed in the context of the TalkTalk Dispute that it was appropriate for Ofcom to use the management accounts information.¹¹⁹
- 4.85 We asked BT to provide cost information from its management accounts for each TRC and SFI service during the Relevant Period. BT responded that it was not possible to provide disaggregated cost information for each TRC and SFI product.¹²⁰ BT said that "*the vast majority of copper TRCs and SFIs are undertaken by B grade engineers. There is no distinction between the particular products or services and therefore the costs cannot be split by reference to [each TRC and SFI service].*"¹²¹ BT provided a breakdown of the hourly cost stack applicable to both TRC and SFI services, as shown in Table 4.8.

¹¹⁶ As noted above and explained further below, we consider that the DSAC/FAC ratios reported in the RFS for SFI services may be a reasonable basis on which to estimate DSACs once we have reliable FAC estimates.

¹¹⁷ 2014 FAMR Statement, paragraph 18.102.

¹¹⁸ 2016 BCMR Statement, Volume II, paragraph 8.86.

¹¹⁹ Paragraph 11, BT response to the provisional conclusions in the TalkTalk Dispute.

¹²⁰ BT response dated 8 July 2016 to question 7d of the 1st section 191 notice in the TalkTalk Dispute.

¹²¹ BT response dated 8 July 2016 to question 7 of the 1st section 191 notice in the TalkTalk Dispute.

Table 4.8: Hourly cost stack for TRC and SFI services from management accounts, £ nominal

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Salary	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Allowances	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Overtime	[X]	[X]	[X]	[X]	[X]	[X]	[X]
NI	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Pension	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Engineering Pay cost B2	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Engineering Pay cost C1	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Weighted engineering pay cost Pay Cost¹	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Vehicle hire cost	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Travel & subsistence	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Tools	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Mobile	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Training	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Engineering variable cost	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Band 1 manager	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Band 2 manager	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Controls & direct desk support	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total Support costs	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Total hourly cost	[X]	[X]	[X]	[X]	[X]	[X]	[X]

Source: BT response dated 8 July 2016 to question 7a-c of the 1st section 191 notice in the TalkTalk Dispute and BT response dated 27 July 2016 to question 3 of the 2nd section 191 notice in the TalkTalk Dispute. The 2008/09, 2009/10 and 2010/11 data is from BT responses dated 1 September and 14 September 2016 to question 5 of the section 191 notice in the Dispute.

Note: ¹ In its 27 July 2016 response, BT said that its analysis of the engineering split in June 2016 suggested that the majority ([X]) of TRC and SFI work was carried out by B2 engineers with the rest carried out by C1 engineers.

4.86 BT said that it was unable to locate pay costs for the years 2008/09 to 2010/11 to the same level of granularity as the years 2011/12 to 2013/14. Therefore, to estimate pay costs for 2008/09 to 2010/11 BT said that it applied the average percentage pay awards in those years, adjusted for average efficiency improvements made in the period 2011/12 to 2013/14.¹²² For 2008/09 to 2010/11 BT said it also needed to estimate the engineering variable costs and support costs, extrapolating data in later years by a combination of i) the ratio of these costs to pay, ii) the average productivity change in the period 2011/12 to 2014/15, and iii) the average percentage pay awards.¹²³

4.87 One advantage of using the data shown in Table 4.8 is that the hourly cost is reasonably stable over time, unlike the cost trends derived from the RFS data. The

¹²² BT response dated 1 September 2016 to question 5 of the section 191 notice in the Dispute.

¹²³ BT further response dated 15 September 2016 to question 5 of the section 191 notice in the Dispute.

hourly cost in Table 4.8 increased by an average of 2% in each year 2008/09 to 2014/15. We would expect the hourly cost of labour to be relatively stable over time, with annual changes largely reflecting wage inflation and efficiencies.¹²⁴

- 4.88 Given our concerns regarding the reliability of BT's RFS data, we consider that the management accounts data represents the best information available to us to assess whether BT's charges for SFIs and the hourly and visit charges for TRCs were cost oriented in the Relevant Period. As explained below, we used the management accounts data to obtain DSAC estimates for these services by first deriving FAC estimates and then applying DSAC/FAC ratios based on BT's RFS data to derive DSAC estimates. We then used these estimates to apply the DSAC test to BT's charges.

FAC estimates

- 4.89 There are some issues with using the management accounts data to derive FAC estimates, but we consider that the data can be adjusted to address many of these issues:

- The data only reflects hourly costs;
- The data does not include all relevant costs;
- The data may include overtime costs associated with charges for work outside normal hours;
- The data reflects billed hours rather than actual hours worked; and
- The data does not reflect the modular cost of SFI services.

The data only reflect hourly costs

- 4.90 The management accounts data reflects the hourly costs for TRC and SFI services. We therefore considered how best to use this information to estimate the costs of the various services in dispute.
- 4.91 SFI services are charged on a modular basis but, as described below, module costs are a function of hourly charge multiples. We therefore consider that hourly charges can be adjusted using these multiples and used as a basis for assessing whether SFI services were cost oriented.
- 4.92 In relation to the TRC hourly charge, we consider that the management accounts data can be used to assess cost orientation since these costs are on an hourly basis.¹²⁵
- 4.93 Since 17 October 2009, the TRC visit charge has included an hour of engineering time but is also intended to cover the costs of the engineer getting to the end customer's premises. In the 2014 FAMR Statement the visit element of the charge

¹²⁴ The vehicle element of the hourly cost may also reflect changes in fuel costs.

¹²⁵ We describe below some adjustments to the data we have made in order to estimate FAC for hourly charges for (i) normal hours, (ii) other times except Sunday and bank holidays, and (iii) Sundays and bank holidays.

was treated as equivalent to an hour of engineering time.¹²⁶ As BT has not provided any separate cost information on the visit element of the charge, we have used a consistent approach with that adopted in the 2014 FAMR Statement and assumed that the cost of the visit element of the charge is equivalent to the hourly cost, i.e. that the visit charge since 17 October 2009 effectively represents two hours of engineering time.¹²⁷ Prior to 17 October 2009 the visit charge only reflected the costs of the engineer getting to the end customer's premises and did not include an additional hour of engineering time.¹²⁸ Consistent with the approach adopted in the 2014 FAMR Statement, we have assumed that the visit charge prior to 17 October 2009 represents one hour of engineering time.

The data does not include all relevant costs

4.94 The management accounts data does not include the following costs:

- Certain engineering variable costs and support costs;
- General overheads; and
- Return on capital employed.

4.95 We explain the adjustments we propose to make for these costs below in deriving our FAC estimates.

Certain engineering variable costs and support costs

4.96 BT said that some variable engineering costs and support costs were either understated or missing in certain years in the management accounts data.

4.97 Under variable engineering costs, BT said that mobile costs were not available for years before 2014/15.¹²⁹ However, the cost estimates it provided appear to include a small allowance for mobile costs in years before 2014/15.¹³⁰ On this basis we have not made any adjustment for mobile costs.

4.98 BT also said that: (i) training costs could be understated since the costs in the management accounts only related to external training and did not include internal training costs, and (ii) no allowance had been included for Service Management Centre costs. BT said this was consistent with the data it submitted on TRCs for the 2016 BCMR Statement.¹³¹ While these costs may be relevant to the provision of TRC and SFI services during this period, we have not made a specific adjustment for these costs since it is not clear how material these costs could be and we do not have any data with which to make a reasonable adjustment. These costs may also be included in the allowance for general overhead costs that we describe below.

¹²⁶ 2014 FAMR Statement, paragraph 18.121.

¹²⁷ However, as explained further below, the adjustment we make for billed hours only applies to the hourly element of the visit charge, consistent with the approach used in the 2014 FAMR Statement.

¹²⁸ BT response dated 1 September 2016 to question 1 of the section 191 notice in the Dispute.

¹²⁹ BT response dated 8 July 2016 to question 7b of the 1st section 191 notice in the TalkTalk Dispute.

¹³⁰ BT response dated 27 July 2016 to question 3 of the 2nd section 191 notice in the TalkTalk Dispute.

¹³¹ BT response dated 8 July 2016 to question 7b of the 1st section 191 notice in the TalkTalk Dispute. BT's cost estimates provided on 27 July 2016 to question 3 of the 2nd section 191 notice in the TalkTalk Dispute do however appear to include an allowance for internal 'coaching' costs.

General overheads

- 4.99 BT said that no allocation had been made in the management accounts for general overheads such as Group Finance and Group HR costs.¹³² We consider that it would be reasonable to include an allowance for general overhead costs since these would be expected to be common across a number of services and the cost orientation obligations allow for an appropriate mark up for common costs. This would also be consistent with the approach in both the 2014 FAMR Statement and 2016 BCMR Statement where an allowance for general overheads was included when estimating FAC for these services.¹³³
- 4.100 The information available to enable us to estimate an appropriate allowance for general overheads is limited and it either i) relates to 2014/15, which only represents three months of the dispute period, or ii) relates to a high level analysis of costs reported in the RFS. We also note that BT's approach to attributing certain types of overhead in its RFS changed during the dispute period,¹³⁴ which may mean it is difficult to extrapolate the observations we can make over the whole period. Nevertheless, we have considered the following sources of evidence:
- Overhead analysis from BT used in the 2016 BCMR Statement;
 - Analysis provided by BT in response to the provisional conclusions in the TalkTalk Dispute¹³⁵; and
 - Analysis of general management and general support costs in the RFS.

Overhead analysis from BT used in the 2016 BCMR Statement

- 4.101 For the purposes of the 2016 BCMR Statement, BT provided a breakdown of overheads associated with TRC services provided in relation to BT's WLA and WFAEL services in 2014/15.¹³⁶ In the 2016 BCMR Statement we estimated overheads associated with Ethernet TRCs by starting with BT's estimate of WLA/WFAEL TRC overheads and (i) uplifting pay related overheads on the basis of the percentage difference in salary between WLA/WFAEL TRCs and Ethernet TRCs; (ii) removing overheads we thought inappropriate or not relevant for Ethernet TRCs; (iii) accepting those overheads we thought reasonable; and (iv) deflating overheads attributed using pay plus return on assets (Pay and ROA) to reflect the base year adjustment we made to corporate overheads (activity group AG112).¹³⁷
- 4.102 In order to estimate an uplift for overheads for the purposes of resolving the Dispute, we have considered BT's breakdown of overheads associated with WLA/WFAEL TRCs that it provided for the 2016 BCMR Statement. We have made the same

¹³² BT response dated 8 July 2016 to question 7b of the 1st section 191 notice in the TalkTalk Dispute.

¹³³ 2016 BCMR Statement, Volume II, paragraph 8.96; 2014 FAMR Statement, paragraphs 18.102-18.112.

¹³⁴ See for example paragraphs 2.8 to 2.20 of Annex 28 of the 2016 BCMR Statement which discuss historical changes to the way BT attributed certain types of general overheads.

¹³⁵ Other stakeholders also made submissions in response to the provisional conclusions in the TalkTalk Dispute regarding the appropriate overheads uplift which Ofcom should apply. As set out in Section 3, we will take these submissions into account in reaching a final determination in the TalkTalk Dispute. To the extent necessary we may also take those submissions into account in our final determination in this Dispute.

¹³⁶ 2016 BCMR Statement, Volume II, paragraph 8.95.

¹³⁷ 2016 BCMR Statement, Volume II, footnote 498.

adjustment to remove inappropriate overheads, but not the other adjustments.¹³⁸ The overheads that were excluded in the 2016 BCMR Statement were [x%], on the basis that it was not clear how these related to the provision of TRCs. These two categories of excluded overheads represented [x%] of BT's estimate of TRC overheads associated with WLA/WFAEL TRCs in 2014/15.

- 4.103 BT told us that its analysis of WLA/WFAEL TRC overheads for the 2016 BCMR Statement was derived from 2014/15 RFS data for regulated TRC services but that an adjustment had been made to remove any overheads that had also been included as 'indirect costs' in the management accounts cost stack.¹³⁹ We estimate that [x%] of overheads associated with regulated TRC services in the RFS were excluded in BT's analysis.
- 4.104 As a proportion of 2014/15 SFI and TRC costs for normal working hours (as amended as described in this section), the estimated overheads uplift using this approach is [x%].¹⁴⁰

BT analysis in response to TalkTalk provisional conclusions

- 4.105 In 2014/15 there were six TRC services; four regulated (WLR and WLA internal and external) and two unregulated. The majority of costs relating to these services is attributed from cost component CK981 (Openreach Time Related Charges) and in 2014/15 BT said that the costs from this component were attributed to the six TRC services on the basis of revenue.¹⁴¹ BT said that its analysis for the 2016 BCMR Statement was based on the costs attributed to regulated TRC services in the 2014/15 RFS.
- 4.106 BT considered that its approach in the RFS of attributing costs from the TRC component to TRC services on the basis of revenues understated the costs related to regulated TRC services. BT provided an alternative version of the analysis for the 2016 BCMR Statement which did the following:
- Replaced the attribution of costs from TRC components to TRC services based on revenue by one that it considered more closely reflected the way that costs were attributed to TRC components;
 - In particular, direct pay and non-pay costs were identified for regulated and unregulated TRC services from an analysis of classes of work. This analysis indicated that most pay costs related to regulated TRC services while most non-

¹³⁸ We have not made any of the adjustments specifically relating to Ethernet TRCs as we are considering TRCs for LLU and WLR services in this Dispute. We have also not made any of the adjustments to overheads attributed using the Pay and ROA methodology to reflect the base year adjustment which we made to corporate overheads. This is because this adjustment was made to reflect Ofcom's 2015 review of BT's cost attribution methodology and we do not consider that it would be appropriate to apply those changes for the purposes of estimating an appropriate overheads uplift to use in deriving FAC estimates for the Relevant Period, which pre-dated Ofcom's cost attribution review.

¹³⁹ BT response to question 4ii dated 15 September 2016 to Ofcom questions dated 6 September 2016. BT noted in its response that it is difficult to accurately match costs between the REFINE system used to prepare the RFS and the management accounts.

¹⁴⁰ This is calculated as follows. BT's response to the 2016 BCMR Statement estimated overheads at £[x] per hour. Of this, Ofcom excluded £[x], giving £[x]. This represents [x%] of 2014/15 direct and indirect labour costs of £[x] (see Table 4.8).

¹⁴¹ Paragraph 24, BT's response to the TalkTalk provisional conclusions.

pay costs related to unregulated services. BT said this was because non-pay included the cost of contractors which were primarily used to provide unregulated services.¹⁴²

- Indirect costs were analysed based on the attribution rule used to attribute costs from organisational unit codes (OUCs) or from activity groups.¹⁴³ BT identified that indirect costs were broadly attributed using three main attribution bases: i) pay, ii) total costs or iii) revenue, with the majority using a pay cost driver.¹⁴⁴ Since regulated TRC services included more direct pay costs than unregulated TRC services (which included more non-pay contractor costs) BT's alternative approach led to a greater proportion of overheads being attributed to regulated TRC services.
- BT provided two versions of the analysis. The first version was consistent with the approach described above, with adjustments also being made to correct certain errors identified by BT.¹⁴⁵ The second version made some amendments to attribute certain overheads from the TRC component to TRC services on the basis of pay costs rather than total costs (for example motor transport costs).¹⁴⁶

4.107 BT's revised 2014/15 analysis increased its estimate of the overheads relating to regulated TRC services provided to support the 2016 BCMR Statement by between [x]% and [x]% (to between £[x] per hour and £[x] per hour depending on which version of its revised analysis was used).

4.108 As a proportion of 2014/15 SFI and TRC costs for normal working hours (as amended as described in this section), the estimated overheads uplift using this approach is [x]% to [x]%. However, after removing the two categories of overheads excluded in the 2016 BCMR Statement the overhead uplift range reduces to around [x]% to [x]%.¹⁴⁷

Analysis of general management and general support costs in the RFS

4.109 We also considered the operating costs reported as being 'General Support' and 'General Management' in the RFS in the Relevant Period. We consider that these categories can give a reasonable estimate of 'general overheads', though they may include some types of costs that may not be considered overheads and exclude others that could be considered as overheads. These categories of cost could also include some of the 'indirect costs' included in the management accounts data used to derive our hourly cost estimate and also some of the overhead costs that were

¹⁴² Page 3 of BT's submission dated 15 September 2016.

¹⁴³ See section 5.2 of BT's 2015 Accounting Methodology Document:

<http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2015/AccountingMethodologyDocument201415.pdf>. In BT's cost allocation system costs are attributed to different cost pools, ultimately ending up in a number of cost components and services, using a combination of different attribution rules.

¹⁴⁴ Some overheads were attributed using a 'pay and return on assets' methodology but since few assets are associated with TRCs BT assumed that these overheads were attributed using pay only.

¹⁴⁵ BT said that i) some classes of work were incorrectly associated with TRCs in the 2014/15 RFS and this would have had a secondary impact on the amount of overheads attributed to TRCs, and ii) some pay costs associated with non-regulated TRC services had been excluded from the TRC cost stack in the 2014/15 RFS.

¹⁴⁶ BT response to question 4iii dated 15 September 2016 to Ofcom questions dated 6 September 2016.

¹⁴⁷ Estimated by reducing the percentages by [x]%, as per paragraph 4.102.

excluded for the purposes of the analysis in the 2016 BCMR Statement. For this reason, we would expect these estimates to represent a higher bound for the appropriate overheads uplift for the purposes of resolving the Dispute.

- 4.110 We have considered the implied uplift on operating costs for General Support and General Management for the following: i) TRC and SFI-specific components,¹⁴⁸ ii) the WLA and WFAEL markets, and iii) Openreach overall.
- 4.111 Table 4.9 shows the implied uplift on operating costs for General Support and General Management costs over the period 2008/09 to 2014/15.¹⁴⁹ For TRC and SFI component costs we only have data from the AFI information provided by BT for 2012/13 to 2014/15.

Table 4.9: Implied uplift on operating costs for General Support and General Management costs

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
TRC component					[x]	[x]	[x]
SFI component					[x]	[x]	[x]
WFAEL market	[x]	[x]	[x]	[x]	[x]	[x]	[x]
WLA market	[x]	[x]	[x]	[x]	[x]	[x]	[x]
Openreach	[x]	[x]	[x]	[x]	[x]	[x]	[x]

Source: TRC and SFI component costs are derived from AFI4 in the relevant years while WFAEL, WLA and Openreach costs are derived from the published RFS in the relevant years.

- 4.112 While the TRC component implied uplift is reasonably stable at around [x]% and consistent with the broader uplifts derived from the WLA market, WFAEL market and Openreach, the SFI component implied uplift is very volatile over the three years of data available, ranging from [x]% to [x]%. For this reason, we do not consider that the SFI component provides a reliable basis to estimate a reasonable overhead uplift.
- 4.113 For the remaining estimates, the implied uplift broadly lies in the range of [x]% to [x]%.¹⁵⁰ The implied uplift for the specific TRC component is towards the top of this range although we note that we only have this information for three years and not for the whole dispute period. This range is also broadly consistent with the uplift of [x]% we applied to TRCs in the 2014 FAMR Statement, which was also based on an analysis of RFS data in the period 2009/10 to 2011/12.¹⁵¹
- 4.114 However, as noted above, these estimates derived from the RFS do not take into account i) costs that may already be included in the 'indirect costs' from the management accounts data, or ii) overhead categories that were excluded for the purposes of the analysis in the 2016 BCMR Statement. In 2014/15 these adjustments removed around [x]% and [x]% of costs respectively. If these two adjustments were applied historically then the implied overhead uplift range would reduce from [x]% to [x]% to approximately 25% to 35%. We consider it is likely to be appropriate to make these two adjustments over the period of the Dispute but it is not clear whether

¹⁴⁸ CK981 (Openreach time related charges) and CO989 (special fault investigations) respectively.

¹⁴⁹ We incorrectly calculated the uplift in paragraphs 4.101 of the TalkTalk provisional conclusions. This has been corrected in Table 4.9.

¹⁵⁰ More than 80% of observations lie in this range.

¹⁵¹ See paragraphs 18.102 to 18.110, 2014 FAMR Statement.

the magnitude of the adjustment in prior years would be similar to that made in 2014/15.

Provisional conclusion on overhead uplift

- 4.115 Given that the hourly cost of TRCs and SFIs using management accounts data is relatively stable year on year (as shown in Table 4.8 above) we consider that a single annual percentage uplift for general overheads would be appropriate for the purposes of resolving the Dispute.
- 4.116 As described above, the analysis that BT provided for WLA/WFAEL TRCs for the 2016 BCMR Statement, as adjusted by Ofcom for the purposes of that statement, would support an overhead uplift of around 30%. The analysis provided by BT is based on the attribution bases used to prepare the 2014/15 RFS, which attributed costs from TRC components to TRC services on the basis of revenue. BT has argued that this attribution basis is inappropriate and that an alternative approach, replacing an attribution based on revenue with an attribution largely based on pay costs, would support a higher overhead uplift in the region of [x]% (after removing overheads excluded in the 2016 BCMR Statement).
- 4.117 While the 2014/15 analysis of TRC overheads prepared by BT for the 2016 BCMR Statement is the most detailed analysis available to us, it is only one piece of evidence we have relied upon to estimate an uplift. We have also considered RFS data from across the dispute period which, while less detailed, has the advantage of being contemporaneous with the dispute period and will also reflect the overhead allocations used in the RFS at the time. As set out above, an analysis of RFS data would support an uplift of broadly 25% to 35%, after adjusting for i) costs that may already be included in the 'indirect costs' from the management accounts data, and ii) overhead categories that were excluded from the analysis in the 2016 BCMR Statement. The size of the adjustment is based on analysis from 2014/15.
- 4.118 The fact that the 25% to 35% range derived from the RFS overlaps with the range informed by BT's analysis of 2014/15 overheads of [x]% to [x]% gives us comfort that the range overall is broadly reasonable. We have also placed weight on this range since it is derived from RFS data which covers the whole dispute period and which reflects BT's approach to allocating overheads at the time. This RFS data would have formed the basis of FAC (and DSAC) estimates during the dispute period, which in turn we would have expected to form the basis of cost oriented TRC and SFI charges.
- 4.119 Within this range, on balance we consider that for the purposes of resolving this dispute an uplift of 30% is appropriate. An uplift of 30% lies in the middle of the range and we do not consider that there is compelling evidence that it would be more appropriate to apply an uplift at the higher or lower end of this range.
- 4.120 In particular, whilst BT has proposed a change to its 2014/15 analysis which would imply an uplift towards the top end of this range, we do not consider this justifies applying a higher uplift than 30%. This is because:
- 4.120.1 BT's alternative attribution rule results in a relatively small increase to the implied uplift to TRC costs in 2014/15 compared to its analysis for the 2016 BCMR Statement, from around [x]% to [x]%. However, we are mindful that the additional analysis provided by BT has only reviewed part of an allocation rule that affects a number of stages in BT's cost attribution system and we are not in a position to assess fully the appropriateness of

the analysis undertaken and revised allocations made by BT in the time available in the dispute time period.

- 4.120.2 The period covered by BT's analysis (2014/15) incorporates only three of the 66 months of the Relevant Period and it may not follow that any revised overhead uplift calculated for 2014/15 should be applied to all periods of the Dispute, especially given that BT's approach to attributing overheads has changed over time, as noted above.
- 4.120.3 In any event, BT's analysis for the purposes of the 2016 BCMR Statement is only one piece of evidence which we use to estimate an appropriate uplift. As explained above, we also consider data derived from the RFS which has the advantage of being contemporaneous with the Relevant Period.

Return on capital employed

- 4.121 The management accounts cost stack does not include an allowance for return on capital employed. From the RFS information provided by BT it appears that the capital employed by TRC and SFI services is minimal and in many cases negative.¹⁵² Given the low levels of capital employed for these services we do not propose to make an adjustment to the management accounts data to include a return on capital employed in our FAC estimate. We do not consider this would materially affect our assessment.

The data may include overtime costs associated with charges for work outside normal hours

- 4.122 The management accounts data includes overtime costs. BT told us that this includes overtime for normal working days as well as bank holidays and weekends.¹⁵³ This is relevant because, as shown in Table 3.1, there are different hourly TRC charges for (i) normal working days, (ii) all other times except Sundays and bank holidays and (iii) Sundays and bank holidays. We understand that the overtime costs included in the management accounts data represents all overtime divided by all hours.
- 4.123 Ideally we would assess each of these three TRC hourly charges against a separate cost stack. However, the management accounts data provided by BT does not identify overtime or other costs related to different days. We understand that overtime can relate to normal hours working where an engineer is required to work outside of their scheduled hours. We consider that it is reasonable to assume that most work

¹⁵² BT response dated 6 July 2016 to question 5b of the 1st section 191 notice in the TalkTalk Dispute. BT's response indicated that return on capital employed represented between [x] % and [x] % of FAC for SFI services and between [x] % and [x] % of FAC for TRC services. In the 2014 FAMR Statement we also noted that these services had low levels of capital employed (see for example paragraph 18.75).

¹⁵³ Email from BT to Ofcom dated 14 July 2016.

relates to normal hours though BT has not been able to provide information on hours worked at different times.¹⁵⁴ [redacted]¹⁵⁵

4.124 Supplementary charges are another type of charge that reflects out of hours work. BT explained that the pricing principle has been to set prices equal to the [redacted].¹⁵⁶

4.125 We have estimated FAC costs for each type of charge as follows:

- In order to estimate the cost stack for normal working days we have assumed that the hourly overtime cost from the management accounts is a reasonable estimate of the overtime associated with normal working hours.
- In relation to (i) all other times except Sundays and bank holidays and (ii) Sundays and bank holidays, we have assumed that the difference in charges for these days reflects differences in labour rates for working outside of normal hours. In order to estimate the cost stack for these charges, we have therefore uplifted our estimate of FAC (after the overheads adjustment described above) by the ratio of the relevant charge to the normal hours charge.¹⁵⁷ However, for this purpose we have excluded the hourly overtime cost from the management accounts. This is because we consider that including an explicit allowance for overtime as well as multiplying FAC by the ratio of charges risks double-counting the additional labour rates associated with work outside of normal hours.
- We estimated the cost of supplementary charges to [redacted], which is consistent with BT's explanation of how these charges are set.

The data reflect billed hours rather than actual hours worked

4.126 Our analysis in the 2014 FAMR Statement identified that, on average, BT appeared to be billing for more hours than the actual hours worked by engineers for TRCs.¹⁵⁸ We considered that this risked BT over recovering its costs and applied an 18% reduction to TRC visit and hourly charges.¹⁵⁹ We asked BT to provide us with the ratio of actual engineering time spent working on TRCs to billed time for each year in the Relevant Period. At this stage BT has been unable to provide this analysis.

¹⁵⁴ Page 135 of the 2014/15 RFS has an analysis of TRC hours between normal hours, other hours and Sundays and bank holidays. We note that in this analysis BT says that it is not possible to split TRC hours between these different categories.

¹⁵⁵ BT response dated 1 September 2016 to Annex C, question 1 to the section 191 notice in the Dispute.

¹⁵⁶ BT response dated 1 September 2016 to Annex C, question 1b of the section 191 notice in the Dispute.

¹⁵⁷ For example, in 2011/12 the hourly charge for Sunday hours was £100 compared to £50 for normal working hours; a ratio of 2. To estimate the 2011/12 FAC associated with Sunday charges we therefore uplifted our 2011/12 FAC estimate for normal working hours by a multiple of 2.

¹⁵⁸ 2014 FAMR Statement, paragraph 18.132. This analysis was based on a sample of data from January to March 2014.

¹⁵⁹ Paragraph 18.146, 2014 FAMR Statement.

- 4.127 Consistent with our analysis in the 2014 FAMR Statement, we have therefore applied an annual 18% reduction to TRC hourly costs, but we have not applied this adjustment to (i) the visit element of the visit charge¹⁶⁰ or (ii) SFI costs.¹⁶¹

Revised FAC data

- 4.128 Table 4.10 summarises the revised cost data for standard hourly TRCs and SFIs, applying the adjustments described above. We consider that these cost data represent acceptable estimates for the hourly FAC for TRCs and SFIs.

Table 4.10: Estimate of TRC and SFI hourly FAC, £ nominal

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Hourly costs per BT	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Add: Overheads (30% uplift)	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Estimated hourly FAC for SFIs and visit element of visit charge	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Subtract: Overbilling adjustment	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Estimated hourly FAC for hourly TRCs	[X]	[X]	[X]	[X]	[X]	[X]	[X]

Source: Ofcom.

- 4.129 Table 4.11 shows the same estimates for the TRC hourly charges for (i) all other times except Sunday and bank holidays (other times charge) and (ii) Sundays and bank holidays (Sunday/BH charge).

Table 4.11: Estimate of TRC hourly FAC for other times and Sunday/BH, £ nominal

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Hourly costs per BT	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Subtract: overtime	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Add: Overheads (30% uplift)	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Estimated hourly FAC	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Subtract: Overbilling adjustment	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Estimated hourly FAC for hourly TRCs	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Hourly multiplier for other times	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Estimated other times hourly FAC	[X]	[X]	[X]	[X]	[X]	[X]	[X]

¹⁶⁰ Paragraph 18.144 of the 2014 FAMR Statement states that the billing adjustment was made to the hourly charge in the visit charge and to the additional hour charge. Footnote 1362 explains that the visit element of the visit charge was only subject to the cost adjustment and not the billing adjustment. Consistent with this approach, we have not applied the billing adjustment to the visit charge prior to 17 October 2009.

¹⁶¹ In paragraph 18.168, footnote 1381 of the 2014 FAMR statement we said that we did not consider that SFIs suffered from the same billing issue.

Hourly multiplier for Sunday/BH	[x]	[x]	[x]	[x]	[x]	[x]	[x]
Estimated Sunday/BH hourly FAC	[x]	[x]	[x]	[x]	[x]	[x]	[x]

Source: Ofcom.

4.130 Table 4.12 includes the estimates of the FAC for hourly supplementary charges, calculated as a difference between hourly FAC for normal working hours and FAC for other times or Sundays/bank holidays.

Table 4.12: Estimate of supplementary charges hourly FAC, £ nominal

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Other times	[x]	[x]	[x]	[x]	[x]	[x]	[x]
Sunday/BH	[x]	[x]	[x]	[x]	[x]	[x]	[x]

Source: Ofcom.

4.131 Table 4.13 shows the estimated FAC for the TRC visit charge. As explained above, prior to 17 October 2009 the visit charge is assumed to represent one hour of engineering time. Consistent with the 2014 FAMR Statement we exclude the billing adjustment for the hour of engineering time associated with the visit element. From 17 October 2009 (when the visit charge included an additional hour of engineering time), we assume that the visit charge consists of one hour of time excluding the billing adjustment and one hour of time including the billing adjustment. For the visit charge in normal hours we have estimated the FAC by adding together the hourly costs with and without the billing adjustment from Table 4.10. For the other times and Sunday/BH visit charges, we have estimated FAC by adding together the hourly costs with and without the billing adjustment from Table 4.11 (before applying the hourly multiplier) and multiplying the result by the ratio of other times and Sunday/BH visit charges to the normal hours visit charge.¹⁶²

Table 4.13: Estimate of FAC for TRC visit charge, £ nominal

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Pre 17 October 2009							
Normal hours	[x]	[x]					
Other times	[x]	[x]					
Sunday/BH	[x]	[x]					
Post 17 October 2009							
Normal hours		[x]	[x]	[x]	[x]	[x]	[x]
Other times		[x]	[x]	[x]	[x]	[x]	[x]
Sunday/BH		[x]	[x]	[x]	[x]	[x]	[x]

Source: Ofcom.

4.132 Table 4.14 shows the estimated FAC for supplementary charges per visit. The estimates are based on the difference between the FAC for TRC visit charges during normal hours and the FAC for other times or Sunday/bank holiday.

Table 4.14: Estimate of FAC for supplementary visit charge, £ nominal

	2008/09	2009/10		2010/11	2011/12	2012/13	2013/14	2014/15
		1/04/09-16/10/09	17/10/09-31/03/09					

¹⁶² For example, in 2011/12 the visit charge in normal hours was £105 and the visit charge for other times was £130, giving a ratio of 1.24.

Other times	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Sunday/BH	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

Source: Ofcom.

The data does not reflect the modular cost of SFI services

4.133 BT's SFI2 services are priced by module and we understand that each module is a multiple of hourly costs. BT provided us information on the hourly multiples for the years 2011/12–2014/15, which are shown in Table 4.15. BT was unable to identify the multiples for the earlier years. In the absence of other information, we have assumed that the multiples for the years 2009/10 and 2010/11 were the same as the multiples in the nearest year for which data is available, i.e. 2011/12.

Table 4.15: SFI2 labour hours per module

Module	2011/12	2012/13	2013/14	2014/15
Base	[redacted]	[redacted]	[redacted]	[redacted]
Network	[redacted]	[redacted]	[redacted]	[redacted]
Frame	[redacted]	[redacted]	[redacted]	[redacted]
Internal Wiring	[redacted]	[redacted]	[redacted]	[redacted]
Internal Equipment	[redacted]	[redacted]	[redacted]	[redacted]
Coop	[redacted]	[redacted]	[redacted]	[redacted]
Frame Direct	[redacted]	[redacted]	[redacted]	[redacted]

Source: BT response dated 27 July 2016 to question 3 of the 2nd section 191 notice in the TalkTalk Dispute.

4.134 BT has not provided an hourly multiple for the SFI1 product for 2008/09 to 2010/11. We have therefore relied on information contained in BT's internal pricing papers to estimate an appropriate multiple. A pricing paper from October 2007 refers to an average duration of an LLU SFI of [redacted].¹⁶³ Another paper from 2009 says that SFI is a 'circa [redacted] job'.¹⁶⁴ Two other papers from 2009 and 2010 indicate that an SFI job is composed of a [redacted].¹⁶⁵ The pricing papers referred to above cover the period up to February 2010. The SFI1 product was withdrawn in March 2011. We consider that it is reasonable to assume that the nature of the job was the same until the product was withdrawn. We therefore assumed that a relevant multiple for SFI1 is [redacted] in each year of the Relevant Period until the product was withdrawn.

4.135 We applied the relevant multiples to standard hourly FAC from Table 4.10 in each year of the Relevant Period in order to estimate the FAC per SFI module. The resulting FAC estimates are shown in Table 4.16.

Table 4.16: SFI FAC per module, £ nominal

Module	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
SFI 1	[redacted]	[redacted]	[redacted]	N/A	N/A	N/A	N/A
Base	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Network	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]
Frame	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

¹⁶³ Pricing paper, 24 October 2007, page 3.

¹⁶⁴ Pricing paper 6 July 2009, page 5.

¹⁶⁵ Pricing paper 28 July 2009, page 6 and February 2010, page 5.

Internal Wiring	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Internal Equipment	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Coop	[X]	[X]	[X]	[X]	[X]	[X]	[X]
Frame Direct	[X]	[X]	[X]	[X]	[X]	[X]	[X]

Source: Ofcom.

DSAC estimates

- 4.136 At this stage we have an estimate of the TRC visit, hourly and supplementary charges FAC and SFI modular FAC but in order to assess BT's compliance with the Cost Orientation Conditions we require estimates of DSAC.
- 4.137 We have considered estimating DSAC by either (i) requiring BT to re-run its LRIC model, or (ii) applying DSAC/FAC ratios to our FAC estimates.¹⁶⁶ Consistent with previous disputes, we do not consider it would be practicable or proportionate to require BT to re-run its LRIC model in order to resolve the Dispute.¹⁶⁷ We have therefore estimated DSAC by applying an appropriate DSAC/FAC ratio to the FAC estimates.
- 4.138 In order to estimate an appropriate DSAC/FAC ratio we have considered the following:
- Similarity of DSAC to FAC;
 - RFS data;
 - BT's pricing papers; and
 - Other sources of information.

Similarity of DSAC to FAC

- 4.139 As set out above, Sky argued that DSAC for TRCs and SFIs should be very similar to FAC. This was on the basis of its view that SFIs and TRCs are essentially engineering labour and therefore should cause little or no fixed and common network costs to be incurred. On the other hand, BT argued that DSAC and FAC are not the same.
- 4.140 In the 2013 FAMR Consultation we recognised that few common costs were likely to be associated with TRC and SFI services. We said that *"the costs of TRCs and SFIs are largely incremental in nature. So, unlike some other access products (for example, those which use duct and copper), we would expect that the allocation of*

¹⁶⁶ This is consistent with the approach taken in previous disputes. See, for example, paragraph 4.64 of the Level 3 Determination.

¹⁶⁷ Issues with re-running the LRIC model include (i) mapping our estimates of FAC onto appropriate cost components during the Relevant Period of the dispute and adjusting the costs of other components accordingly; (ii) re-running the LRIC model for all of BT and not just the services in dispute; (iii) re-running the LRIC model for seven separate years; (iv) a timing issue where BT would not be able to re-run the model until we had concluded on the appropriate level of FAC, delaying the final determination and; (v) BT may not have the data or parameter information needed to re-run the model in all years.

*common costs would only have a small impact on TRCs and SFIs.*¹⁶⁸ We did however recognise that the costs of TRCs and SFIs would include a number of indirect costs such as “*vehicles, service centre costs, training, and general overheads*”¹⁶⁹ and we considered that some of these, in particular general overheads, would be common across a number of services.

- 4.141 On the basis that there are some common costs associated with TRC and SFI services we would expect DSAC to exceed FAC, but only by a relatively small margin given that there are relatively few common costs compared to other types of access services.¹⁷⁰

Pricing papers

- 4.142 BT told us that the DSAC/FAC ratio used for TRCs and SFIs in the February 2012 pricing paper was [\times 1.2-1.4] and in the December 2012 pricing paper it was [\times 1.2-1.4].¹⁷¹ BT said that the DSAC/FAC ratios of [\times 1.2-1.4] and [\times 1.2-1.4] were consistent with the DSAC/FAC ratio of the Special Fault Investigation component (CO989) reported in the 2010/11 and 2011/12 RFS respectively.

RFS data

- 4.143 As set out in Table 4.7 above, the DSAC/FAC ratio for TRCs was over 3 in most years of the Relevant Period and the ratio for external SFIs was significantly lower at between [\times 1.1-1.4] between 2009/10 and 2013/14, before increasing markedly in 2014/15 to [\times 1.6-1.8]. We note that BT could not provide us with unit DSAC and FAC data for TRCs and SFIs covering the period 2008/09 to 2010/11. BT provided total FAC and DSAC costs for TRCs in the period 2008/09 to 2010/11 and for SFIs in 2009/10 and 2010/11. We have used this data to derive DSAC/FAC ratios for these years.
- 4.144 We explain above that one reason for the difference in the DSAC/FAC ratios is that SFI services are included within the ‘access’ increment in BT’s LRIC model while TRC services are included in the ‘other’ increment. Given that both TRCs and SFIs are network access services, we do not consider that it would be appropriate to rely on the DSAC/FAC ratios for TRCs reported in the RFS since these were not

¹⁶⁸ 2013 FAMR Consultation, paragraph 12.75.

¹⁶⁹ 2013 FAMR Consultation, paragraph 12.74.

¹⁷⁰ DSACs are calculated using BT’s LRIC model. At a high level, DSACs are calculated on the basis of distributing the standalone cost of a broad increment (for example the access increment) across the services within that increment. As such, certain common costs that would be allocated to all the services provided by the firm under a FAC methodology are allocated to a smaller set of services under a DSAC methodology. On that basis, we would typically expect the DSAC for an individual service to be greater than the FAC for that service. Where the amount of common cost to be allocated is relatively small, we would expect the difference between DSAC and FAC to be correspondingly smaller than for other services which incur a larger number of common costs. See further Annex 11 of the PPC Determinations and Section 12 of the Ethernet Determinations. Section 3.4 of BT’s 2015 LRIC Relationships and Parameters document explains the calculation of DSAC in the LRIC model (available at:

<https://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2015/LRICModelRelationshipsandParameters201415.pdf>).

¹⁷¹ BT response dated 22 July 2016 to question 1 of the 2nd section 191 notice in the TalkTalk Dispute.

estimated by reference to the access increment and are not consistent with our view that DSAC would only exceed FAC by a relatively small margin.

- 4.145 On the other hand, we consider that the DSAC/FAC ratios for external SFIs of between [§< 1.1-1.4] reported in the RFS between 2009/10 and 2013/14 align with our expectation that DSAC would exceed FAC but only by a relatively small margin.¹⁷² We also consider it relevant that BT used the DSAC/FAC ratios associated with SFIs in its pricing papers for both TRC and SFI services. Therefore, for 2009/10 to 2013/14 we have used the DSAC/FAC ratios for SFI services reported in the RFS to derive our DSAC estimates for both TRCs and SFIs. As there was no SFI data available for 2008/09 and we have no evidence that TRC and SFI costs were likely to have changed significantly between 2008/09 and 2009/10, we consider that it is reasonable to apply the same DSAC/FAC ratio in 2008/09 as in 2009/10.
- 4.146 For 2014/15, we consider that the DSAC/FAC ratio of [§< 1.6-1.8] for SFIs is somewhat of an outlier compared to the DSAC/FAC ratio in earlier years and it does not align with our expectation that DSAC would exceed FAC by a relatively small margin. For these reasons we do not consider that it would be appropriate to use the SFI DSAC/FAC ratio of [§< 1.6-1.8] for 2014/15, and we have therefore instead used the average DSAC/FAC ratio during the period 2011/12 to 2013/14 of [§< 1.2-1.4], consistent with our approach in the TalkTalk Dispute.¹⁷³ Again we apply this ratio to derive our DSAC estimates for both TRCs and SFIs.

Other sources

- 4.147 BT said that TRC services are similar in nature to the maintenance and provision of copper lines and SFI services are related to the maintenance of copper lines. Therefore, it said it would expect the fixed and common costs, and the DSAC/FAC ratios, of TRC and SFI services to be similar to those of copper provision and maintenance services.¹⁷⁴
- 4.148 BT provided DSAC/FAC ratios for the years 2011/12, 2012/13 and 2013/14 for MPF new provides, MPF rental, WLR basic rental and WLR basic connection services. The DSAC/FAC ratios for these services in this period ranged from 1.37 to 2.16 and averaged 1.67. We have not placed any weight on these ratios because (i) they do not directly relate to TRCs and SFIs (and we have estimates of the TRC and SFI DSAC/FAC ratios from the RFS), and (ii) while these services may be broadly similar to TRCs and SFIs in that they largely represent engineering labour activities, it is possible that the non-labour activities are dissimilar to TRC and SFIs, affecting the DSAC/FAC ratios.¹⁷⁵

¹⁷² We recognise that it is difficult to assess what a 'relatively small margin' may be since DSAC/FAC ratios can vary significantly by service in the reported RFS. However, between 2009/10 and 2013/14 the average DSAC/FAC ratio for WLA and WFAEL services reported in the RFS was between 1.45 and 1.80 and we note that the reported DSAC/FAC ratios for external SFIs of between [§< 1.1-1.4] are below these averages

¹⁷³ This is the average of the DSAC/FAC ratios in 2011/12, 2012/13 and 2013/14 of [§< 1.2-1.4], [§< 1.2-1.4] and [§< 1.2-1.4] respectively. We consider that the average DSAC/FAC ratio over the previous three years gives a reasonable estimate of the DSAC/FAC ratio in 2014/15.

¹⁷⁴ BT submission dated 29 July 2016, paragraph 45.

¹⁷⁵ In addition, the MPF and WLR rental services include costs associated with access duct which, being a common cost shared across many different services, is likely to mean the DSAC/FAC ratios for such services would be relatively higher than those services which did not use access duct, such as TRCs and SFIs.

Provisional conclusion on estimating DSAC

4.149 Based on the analysis set out above we have used (i) the DSAC/FAC ratios for SFI services from the RFS in 2009/10 to 2013/14, (ii) the same ratio in 2008/09 as derived from the 2009/10 RFS, and (iii) for 2014/15, the average DSAC/FAC ratio for these services over the period 2011/12 to 2013/14, to derive DSAC estimates for each SFI and TRC service. The relevant ratios are summarised in Table 4.17.

Table 4.17: Proposed DSAC/FAC ratios

	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
DSAC/FAC ratio	[\times 1.2-1.4]	[\times 1.2-1.4]	[\times 1.2-1.4]	[\times 1.2-1.4]	[\times 1.2-1.4]	[\times 1.2-1.4]	[\times 1.2-1.4]

Source: Ofcom, based on information from the RFS for SFI services

4.150 Table 4.18 shows the TRC and SFI unit DSAC estimates which we derive by applying the DSAC/FAC ratios from Table 4.17 to our FAC estimates.

Table 4.18: Unit DSACs for TRCs and SFIs, £ nominal

	2008/09	2009/10		2010/11	2011/12	2012/13	2013/14	2014/15
		1/04/09-16/10/09	17/10/09-31/03/09					
Hourly TRC	40.83	40.52	40.52	43.49	48.07	47.07	48.56	51.11
Other times hourly TRC	57.26	56.85	56.85	60.91	74.07	65.27	67.10	71.61
Sunday/BH hourly TRC	67.37	66.88	66.88	71.66	87.14	84.94	89.46	95.48
Visit TRC	49.79	49.42	89.94	96.52	106.68	104.46	107.77	113.43
Other times visit TRC	58.48	58.05	101.08	108.31	119.73	117.45	124.10	132.45
Sunday/BH visit TRC	69.11	68.61	116.63	124.97	138.14	139.81	148.92	158.94
Supplementary hourly charge – other times ex Sunday/BH	16.44	16.33	16.33	17.42	26.00	18.21	18.54	20.50
Supplementary hourly charge – Sundays and BH	26.54	26.36	26.36	28.17	39.07	37.87	40.91	44.37
Supplementary visit charge – other times ex Sunday/BH	8.69	8.64	11.15	11.78	13.04	12.99	16.34	19.02
Supplementary visit charge – Sundays and BH	19.32	19.19	26.70	28.45	31.46	35.35	41.16	45.51
SFI1	99.58	98.83	98.83	106.07	N/A	N/A	N/A	N/A
Base	111.52	110.69	110.69	118.79	131.30	129.59	140.62	148.01
Network	58.81	58.37	58.37	62.65	69.24	54.87	50.63	53.29
Frame	28.16	27.94	27.94	29.99	33.15	29.32	20.18	21.24
Internal Wiring	9.82	9.74	9.74	10.46	11.56	11.90	14.80	15.58
Internal Equipment	26.98	26.77	26.77	28.73	31.76	31.10	32.08	33.77
Coop	13.04	12.94	12.94	13.89	15.35	14.27	15.60	16.42
Frame Direct	78.63	78.04	78.04	83.76	92.57	93.62	100.66	105.96

Source: Ofcom.

Application of the DSAC test

4.151 Table 4.19 shows the results of the DSAC test for the TRC visit, hourly and supplementary charges and each SFI charge. The DSAC test shows the ratio of price to DSAC so a percentage above 100% indicates that price exceeded DSAC while a

percentage below 100% indicates that price was below DSAC. We have assessed each charge against our estimate of DSAC in the corresponding financial year.

Table 4.19: Results of the DSAC test for TRC and SFI charges, £ nominal

Financial year	2008/09	2009/10			2010/11		2011/12	2012/13		2013/14	2014/15
Price periods	1 Jan 2009-31 Mar 2009	1 Apr 2009-16 Oct 2009	17 Oct 2009-12 Mar 2010	13 Mar 2010 - 31 Mar 2010	1 Apr 2010 – 31 Jul 2010	1 Aug 2010-31 Mar 11	1 Apr 2011 – 31 Mar 2012	1 Apr 2012 – 7 Jun 2012	8 Jun 2012 – 31 Mar 2013	1 Apr 2013 – 31 Mar 2014	1 Apr 2014 – 26 Jun 2014
TRC hourly charge											
Price	55	55	55	55	55	55	50	50	57	60	60
DSAC	40.83	40.52	40.52	40.52	43.49	43.49	48.07	47.07	47.07	48.56	51.11
Price / DSAC	134.7%	135.7%	135.7%	135.7%	126.5%	126.5%	104.0%	106.2%	121.1%	123.6%	117.4%
Other times hourly TRC											
Price	85	85	85	85	85	85	85	85	85.50	90	90
DSAC	57.26	56.85	56.85	56.85	60.91	60.91	74.07	65.27	65.27	67.10	71.61
Price / DSAC	148.4%	149.5%	149.5%	149.5%	139.5%	139.5%	114.8%	130.2%	131.0%	134.1%	125.7%
Sunday/BH hourly TRC											
Price	100	100	100	100	100	100	100	100	114	120	120
DSAC	67.37	66.88	66.88	66.88	71.66	71.66	87.14	84.94	84.94	89.46	95.48
Price / DSAC	148.4%	149.5%	149.5%	149.5%	139.5%	139.5%	114.8%	117.7%	134.2%	134.1%	125.7%
Visit TRC											
Price	85	85	105	105	105	105	105	105	115	120	120
DSAC	49.79	49.42	89.94	89.94	96.52	96.52	106.68	104.46	104.46	107.77	113.43
Price / DSAC	170.7%	172.0%	116.7%	116.7%	108.8%	108.8%	98.4%	100.5%	110.1%	111.3%	105.8%
Other times visit TRC											
Price	110	110	130	130	130	130	130	130	143.50	150	150
DSAC	58.48	58.05	101.08	101.08	108.31	108.31	119.73	117.45	117.45	124.10	132.45
Price / DSAC	188.1%	189.5%	128.6%	128.6%	120.0%	120.0%	108.6%	110.7%	122.2%	120.9%	113.2%
Sundays visit TRC											
Price	130	130	150	150	150	150	150	150	172	180	180
DSAC	69.11	68.61	116.63	116.63	124.97	124.97	138.14	139.81	139.81	148.92	158.94
Price / DSAC	188.1%	189.5%	128.6%	128.6%	120.0%	120.0%	108.6%	107.3%	123.0%	120.9%	113.2%
Supplementary hourly charge – other times ex Sunday/BH											
Price	30	30	30	30	30	30	35	35	28.50	30	30
DSAC	16.44	16.33	16.33	16.33	17.42	17.42	26.00	18.21	18.21	18.54	20.50
Price / DSAC	182.5%	183.7%	183.7%	183.7%	172.2%	172.2%	134.6%	192.2%	156.5%	161.8%	146.3%
Supplementary hourly charge – Sundays and BH											
Price	45	45	45	45	45	45	50	50	57	60	60
DSAC	26.54	26.36	26.36	26.36	28.17	28.17	39.07	37.87	37.87	40.91	44.37
Price / DSAC	169.5%	170.7%	170.7%	170.7%	159.7%	159.7%	128.0%	132.0%	150.5%	146.7%	135.2%
Supplementary visit charge – other times ex Sunday/BH											

Provisional conclusions to resolve a dispute regarding BT's historical charges for SFIs and TRCs

Price	25	25	25	25	25	25	25	25	28.50	30	30
DSAC	8.69	8.64	11.15	11.15	11.78	11.78	13.04	13.04	12.99	16.34	19.02
Price / DSAC	287.7%	289.5%	224.3%	224.3%	212.2%	212.2%	191.7%	191.7%	219.4%	183.7%	157.7%
Supplementary visit charge – Sundays and BH											
Price	45	45	45	45	45	45	45	45	57	60	60
DSAC	19.32	19.19	26.70	26.70	28.45	28.45	31.46	31.46	35.35	41.16	45.51
Price / DSAC	232.9%	234.5%	168.6%	168.6%	158.2%	158.2%	143.0%	143.0%	161.2%	145.8%	131.8%
SFI1											
Price	144	144	144	144	144	160	N/A	N/A	N/A	N/A	N/A
DSAC	99.58	98.83	98.83	98.83	106.07	106.07	N/A	N/A	N/A	N/A	N/A
Price / DSAC	144.6%	145.7%	145.7%	145.7%	135.8%	150.8%					
Base											
Price	N/A	N/A	N/A	95	95	95	105	105	125	130	134.25
DSAC	N/A	N/A	N/A	110.69	118.79	118.79	131.30	129.59	129.59	140.62	148.01
Price / DSAC	N/A	N/A	N/A	85.8%	80.0%	80.0%	80.0%	81.0%	96.5%	92.4%	90.7%
Network											
Price	N/A	N/A	N/A	95	95	95	75	75	75	80	80
DSAC	N/A	N/A	N/A	58.37	62.65	62.65	69.24	54.87	54.87	50.63	53.29
Price / DSAC	N/A	N/A	N/A	162.7%	151.6%	151.6%	108.3%	136.7%	136.7%	158.0%	150.1%
Frame											
Price	N/A	N/A	N/A	65	65	65	75	75	70	70	70
DSAC	N/A	N/A	N/A	27.94	29.99	29.99	33.15	29.32	29.32	20.18	21.24
Price / DSAC	N/A	N/A	N/A	232.6%	216.7%	216.7%	226.3%	255.8%	238.7%	346.9%	329.6%
Internal Wiring											
Price	N/A	N/A	N/A	50	50	50	50	50	40	40	40
DSAC	N/A	N/A	N/A	9.74	10.46	10.46	11.56	11.90	11.90	14.80	15.58
Price / DSAC	N/A	N/A	N/A	513.2%	478.1%	478.1%	432.6%	420.1%	336.1%	270.2%	256.7%
Internal Equipment											
Price	N/A	N/A	N/A	50	50	50	25	25	20	20	20
DSAC	N/A	N/A	N/A	26.77	28.73	28.73	31.76	31.10	31.10	32.08	33.77
Price / DSAC	N/A	N/A	N/A	186.7%	174.0%	174.0%	78.7%	80.4%	64.3%	62.3%	59.2%
Coop											
Price	N/A	N/A	N/A	35	35	35	25	25	20	15	0
DSAC	N/A	N/A	N/A	12.94	13.89	13.89	15.35	14.27	14.27	15.60	16.42
Price / DSAC	N/A	N/A	N/A	270.4%	252.0%	252.0%	162.8%	175.2%	140.2%	96.2%	N/A
Frame Direct											
Price	N/A	N/A	N/A	95	95	95	105	105	115	120	120
DSAC	N/A	N/A	N/A	78.04	83.76	83.76	92.57	93.62	93.62	100.66	105.96
Price / DSAC	N/A	N/A	N/A	121.7%	113.4%	113.4%	113.4%	112.2%	122.8%	119.2%	113.3%

Source: Ofcom.

4.152 The results of the DSAC test show that:

- For TRC charges:
 - TRC visit charges, hourly charges and supplementary charges were above DSAC throughout the Relevant Period, with the exception of the TRC visit charge in normal hours from 1 April 2011 to 7 June 2012;
- For SFI charges:

- SFI1 charges were above DSAC until withdrawn in March 2011;
- SFI2 Network, Frame, Frame Direct and Internal Wiring module charges were above DSAC from their introduction on 13 March 2010 throughout the remainder of the Relevant Period;
- SFI2 Coop module charges were above DSAC in 2009/10, 2010/11, 2011/12 and 2012/13 but below DSAC in 2013/14 and 2014/15;
- SFI2 Base module charges were below DSAC throughout the Relevant Period; and
- SFI2 Internal Equipment module charges were above DSAC in 2009/10 and 2010/11 but below DSAC in 2011/12, 2012/13, 2013/14 and 2014/15.

4.153 On the basis of the analysis that we have carried out above, we provisionally conclude that certain of BT's TRC and SFI charges exceeded DSAC during the Relevant Period.¹⁷⁶

4.154 In Step 3 we consider whether there are any other relevant factors that we need to take into consideration in assessing whether BT's charges were compliant with the applicable Cost Orientation Conditions.

Step 3. Are there any other relevant factors that we need to consider in order to determine whether BT's charges were compliant with the Cost Orientation Conditions?

4.155 For the services and years in which we have found BT's charges to have exceeded DSAC, we consider under Step 3 other factors that might indicate these charges were nonetheless cost oriented. We then conclude whether overcharging has occurred.

4.156 The additional factors which we consider to be relevant in this case are:

- The magnitude and duration by which charges exceeded DSAC; and
- Whether, and the extent to which, charges exceeded FAC.

4.157 We consider these factors for each of the services we have found to be in excess of DSAC for at least part of the Relevant Period under Step 2, namely the TRC hourly and visit charges, TRC supplementary charges, SFI1 charges and the following SFI2 modular charges: Frame Direct, Network, Frame, Internal Wiring, Internal Equipment and Coop.

4.158 We cannot assess the return on capital employed (ROCE) as we often do in such assessments because, as set out above, these services are associated with low levels of capital employed and we have not included an estimate of ROCE in our

¹⁷⁶ While we find that BT's charges for certain services exceeded DSAC throughout the Relevant Period, as explained in Section 2 BT's TRC and SFI services ceased to be subject to cost orientation obligations from 26 June 2014, shortly before the end of the Relevant Period. We take this into account when we reach our provisional conclusion on whether and for what period BT has overcharged for these services below.

FAC estimates. Given this, reliable ROCE estimates are not available for the TRC and SFI services in question.

- 4.159 As noted above, BT argued that its charges were compliant with the applicable cost orientation obligations on the basis that its EBIT margins for TRCs and SFIs were consistent with the level which Ofcom considered as part of the 2012 LLU/WLR Statement. We do not consider that a consideration of BT's EBIT margins is relevant to determining whether BT's charges were cost oriented, and for the reasons set out in paragraphs 4.58 to 4.67 we do not consider that BT could place reliance on the statements made by Ofcom in the 2012 LLU/WLR Statement in relation to Openreach's returns on TRCs and SFIs. We therefore have not considered BT's EBIT margins further at Step 3 of our analysis.

Magnitude and duration by which charges exceeded DSAC

TRC hourly charges

- 4.160 TRC hourly charges for normal working hours exceeded DSAC by between 4% and 36% during the Relevant Period, with the excess reducing between 1 April 2010 to 7 June 2012 before generally increasing over the remainder of the Relevant Period. BT reduced prices once (1 April 2011) before increasing charges twice; by 14% on 8 June 2012 and by 5% on 1 April 2013.
- 4.161 Although the charges between 1 April 2011 and 7 June 2012 were above DSAC by a relatively small margin (4% to 6%), we note that DSAC was relatively stable during this period and BT has not provided evidence that it reviewed prices against DSAC during this period except for the February 2012 pricing paper, which it used to support a subsequent increase in prices on 8 June 2012. This price increase expanded the difference between prices and DSAC to over 20%. On this basis we consider that BT's hourly TRC charges for normal hours were not cost oriented throughout the Relevant Period.
- 4.162 TRC hourly charges for other times exceeded DSAC by between 15% and 50% during the period. BT reviewed these charges twice during the period, increasing the charges by 0.6% on 8 June 2012 and by 5% on 1 April 2013. On the basis that charges were persistently and significantly above DSAC we consider that BT's hourly TRC charges for other times were not cost oriented throughout the Relevant Period.
- 4.163 TRC hourly charges for Sunday/BH exceeded DSAC by between 15% and 50% during the period. BT reviewed these charges twice during the period, increasing the charges by 14% on 8 June 2012 and by 5% on 1 April 2013. On the basis that charges were persistently and significantly above DSAC we consider that BT's hourly TRC charges for Sunday/BH were not cost oriented throughout the Relevant Period.

TRC visit charges

- 4.164 BT increased its visit charges in normal hours three times; by 24% on 17 October 2009 (when it changed its charging policy to include an hour of engineering time in the visit charge), by 10% on 8 June 2012 and by 4% on 1 April 2013. TRC visit charges for normal working hours were above DSAC by 9% to 72% between 2008/09 and 2010/11, below DSAC in 2011/12, but then exceeded DSAC again for the rest of the period: by 0.5% between 1 April 2012 and 7 June 2012 and by 6% to 11% between 8 June 2012 and 26 June 2014.

- 4.165 The excess of price over DSAC in the two-month period between 1 April 2012 and 7 June 2012 was only 0.5%. During this period, the price was unchanged from the previous period at £105 but DSAC reduced marginally, resulting in a small excess. Given the short period of the excess and the fact that it was caused by a reduction in DSAC rather than an increase in price, we consider that BT's charges were cost oriented during this period.
- 4.166 However, for the rest of the Relevant Period, from 1 January 2009 to 31 March 2011 and from 8 June 2012 and 26 June 2014, BT's charges were persistently in excess of DSAC by 6% to 72%. Therefore, we consider that BT's TRC visit charges for normal hours were not cost oriented for the period 1 January 2009 to 31 March 2011 and 8 June 2012 to 26 June 2014.
- 4.167 TRC visit charges for other times exceeded DSAC by between 9% and 90% during the Relevant Period and TRC visit charges for Sunday/BH exceeded DSAC by between 7% and 90%. BT increased the other times visit charges by 18% on 17 October 2009, by 10% on 8 June 2012 and by 5% on 1 April 2013. It increased the Sunday/BH charges by 15% on 17 October 2009, by 15% on 8 June 2012 and by 5% on 1 April 2013.
- 4.168 The charges for these services exceeded DSAC by 20% to 90% between 1 January 2009 and 30 March 2011. Following this, the charges for these services were above DSAC by 7% to 11% between 1 April 2011 and 7 June 2012. However, we note that DSAC was relatively stable during this period and BT has not provided evidence that it reviewed prices against DSAC during this period except for the February 2012 pricing paper, which it used to support subsequent increases in prices for these charges on 8 June 2012. These price increases expanded the difference between prices and DSAC to around 20%. On this basis we consider that BT's TRC visit charges for other times and Sunday/BH were not cost oriented throughout the Relevant Period.

TRC supplementary charges

- 4.169 TRC supplementary hourly charges for other times exceeded DSAC by between 35% to 84% during the Relevant Period. BT increased the charge by 17% on 1 April 2011 and reduced it by 19% on 8 June 2012 before increasing it by 5% on 1 April 2013. TRC supplementary hourly charges for Sundays and bank holidays exceeded DSAC by between 28% to 71% during the Relevant Period and BT increased charges three times during the period; by 11% on 1 April 2011, by 14% on 8 June 2012 and by 5% on 1 April 2013. During the period supplementary hourly charges were persistently and significantly above DSAC. On this basis we consider that TRC supplementary charges were not cost oriented throughout the Relevant Period.
- 4.170 TRC supplementary visit charges for other times exceeded DSAC by between 58% and 189% during the Relevant Period. BT increased charges twice during the period; by 14% on 8 June 2012 and by 5% on 1 April 2013. TRC supplementary visit charges for Sundays and bank holidays exceeded DSAC by between 32% and 135% and BT increased prices twice during the period; by 27% on 8 June 2012 and by 5% on 1 April 2013. During the period supplementary visit charges were persistently and significantly above DSAC. On this basis we consider that these charges were not cost oriented throughout the Relevant Period.

SFI charges

- 4.171 SFI1 charges were above DSAC from 1 January 2009 to March 2011 by between 36% to 51%. BT reviewed the charges once during this period when it increased the price by 14% on 1 August 2010 before the service was withdrawn in March 2011. On the basis that charges were persistently and significantly above DSAC we consider that BT's SFI1 charges were not cost oriented during the period before the service was withdrawn.
- 4.172 SFI2 modular charges for Frame Direct, Network, Frame and Internal Wiring exceeded DSAC from their introduction in March 2010 throughout the remainder of the Relevant Period, by 8% to 413%. BT reviewed these charges twice during this period, although in some cases (for example Network and Frame) BT only changed prices once during the period. On the basis that charges were persistently and significantly above DSAC we consider that BT's SFI2 module charges for Network, Frame, Internal Wiring and Frame Direct were not cost oriented during the Relevant Period.
- 4.173 With regards to the SFI2 Internal Equipment module, the price exceeded DSAC from 13 March 2010 to 31 March 2011 by between 74% to 87%. From 1 April 2011, when the price was reduced, the internal wiring module was priced below DSAC. We therefore find that BT's charges for charges for the SFI2 Internal Equipment module were not cost oriented from 13 March 2010 to 31 March 2011.
- 4.174 The Coop module charge was significantly above DSAC from 13 March 2010 to 31 March 2013, by between 40% and 170%. It was below DSAC in 2013/14 and in 2014/15 (although the price appears to have been set at zero from 1 April 2014). BT reduced the price of the Coop module four times during the period. The price change on 1 April 2013 reduced the charge from £20 to £15, putting it below our estimate of DSAC in 2013/14 (£15.60). On this basis, we consider that BT's SFI Coop module charges were not cost oriented for the period 13 March 2011 to 31 March 2013, i.e. the period when charges were above DSAC.

The extent to which charges exceed FAC

- 4.175 As a cross check, we have also considered the extent to which charges exceeded FAC for those services where prices were above DSAC for part of the Relevant Period. In each case, TRC and SFI charges that were above DSAC were also significantly above FAC in the Relevant Period.
- 4.176 However, we do not place any weight on this assessment in this case, given that our estimates of DSAC are based on DSAC/FAC ratios which are greater than 1 and therefore charges which we find to be above DSAC will automatically also exceed FAC.

Ofcom's provisional conclusion on whether BT's historical TRCs and charges for SFIs were cost oriented in line with the requirements of the Cost Orientation Conditions

4.177 Based on the evidence available to us our provisional conclusions are that:

- For SFI services:
 - SFI1: BT's charges were not cost oriented for the period 1 January 2009 to March 2011, when the product was withdrawn.

- SFI2 Frame Direct module: BT's charges were not cost oriented for the period 13 March 2010 to 26 June 2014.
- SFI2 Base module: BT's charges were cost oriented for the period 13 March 2010 to 26 June 2014.
- SFI2 Internal Equipment module: BT's charges were not cost oriented in the period 13 March 2010 to 31 March 2011 but were cost oriented between 1 April 2011 to 26 June 2014.
- SFI2 Network, Frame and Internal Wiring modules: BT's charges were not cost oriented for the period 13 March 2010 to 26 June 2014.
- SFI2 Coop module: BT's charges were not cost oriented for the period 13 March 2010 to 31 March 2013 but were cost oriented from 1 April 2013 to 26 June 2014.
- For TRC services:
 - BT's visit charges for normal hours were not cost oriented for the periods 1 January 2009 to 31 March 2011 and 8 June 2012 to 26 June 2014, but were cost oriented between 1 April 2011 to 7 June 2012.
 - BT's visit charges for other times and Sunday/BH were not cost oriented for the period 1 January 2009 to 26 June 2014.
 - BT's hourly charges for normal working hours, other times excluding Sunday/bank holidays and Sundays/bank holidays were not cost oriented for the period 1 January 2009 to 26 June 2014.¹⁷⁷
 - BT's supplementary charges for other times excluding Sunday/bank holidays and Sundays/bank holidays were not cost oriented for the period 1 January 2009 to 26 June 2014.

4.178 It is our provisional view that Sky was overcharged for TRC and SFI services for those periods over which we have found the above charges were not cost oriented, to the extent that those services were reasonably necessary for the use of BT's network access services including LLU and/or WLR services.¹⁷⁸

Step 4: Should we require BT to make repayments and if so what level should the repayments be?

4.179 In Step 3, we provisionally conclude that BT has overcharged for certain of its TRCs and SFI services in the Relevant Period.

4.180 Where Ofcom has made a determination of the proper amount of a charge in respect of which amounts have been paid by one of the Parties to the other, section 190(2)(d) of the 2003 Act gives us the power to give a direction, enforceable by the

¹⁷⁷ Note, as explained above we provisionally conclude that the overcharge for each relevant service ended on 26 June 2014 as the relevant cost orientation obligations on BT ceased to apply with effect from that date (see Section 2).

¹⁷⁸ We consider that any charges between DLRIC and DSAC would be compliant with the applicable cost orientation obligations and on this basis, any charges that exceed DSAC will have resulted in an overcharge.

party to whom the sums are to be paid, requiring the payment of sums by way of an adjustment of an underpayment or an overpayment.

- 4.181 In the remainder of this section we consider whether we should exercise our discretion to require BT to make a repayment to Sky, and if so, what the level of any such repayment should be.
- 4.182 In reaching our provisional conclusion, we have been guided by our duties and Community obligations under sections 3, 4 and 4A of the 2003 Act (as amended). We have also taken account of submissions from the Parties and the findings of the CAT and the Court of Appeal in relation to Ofcom's power under section 190(2)(d) to require repayments in previous judgments.

Parties' views

- 4.183 Sky is seeking a repayment of around £[§<] for overpayment for TRCs and SFIs purchased from BT between 1 January 2009 and 30 June 2014.
- 4.184 Due to the lack of publicly available information Sky estimated the overcharge on the basis of the one off adjustments ordered by Ofcom in the 2014 FAMR Statement. However, Sky noted that:

"For the avoidance of doubt, while they are informative Sky does not assert that the levels to which charges were reduced in 2014 necessarily reflect the appropriate cost oriented level for the purposes for assessing this dispute or in considering whether BT complied with its regulatory obligations with respect to the TRCs and SFI charges from 1 July 2014. Given the difficulties in assessing reliable cost data from BT and significant concerns with respect to the 'overbilling' of worked hours that led Ofcom to rely on its own cost estimates, Sky considers it possible that the actual cost oriented level could be lower."¹⁷⁹

- 4.185 BT argued that Ofcom "does not have...the power to order retroactive payments in dispute resolution proceedings, because the CRF does not permit the NRAs to order administrative payments as a remedy for past breaches."¹⁸⁰ BT referred to the pending Ethernet appeals before the Court of Appeal (see Section 2 above).
- 4.186 In relation to Sky's estimate of the amount of the overpayment, BT argued that Sky's approach effectively amounted to asking Ofcom to retroactively apply the charge control condition applied by Ofcom under the 2014 FAMR Statement. BT considered that this was wholly inappropriate and gave rise to serious legal and policy issues.¹⁸¹
- 4.187 In its response to the provisional conclusions in the TalkTalk Dispute, BT has argued that in assessing the price to DSAC ratio for SFI2 modules in order to estimate the level of any overcharge, Ofcom should combine each of the Network, Internal Equipment, Internal Wiring and Frames modules with the Base module. This is because these 'bolt on' modules are always purchased with a Base module and costs necessary for the execution of the modules are recovered in the Base module.

¹⁷⁹ Sky submission, paragraph 1.18.

¹⁸⁰ BT submission dated 29 July 2016, paragraph 7.

¹⁸¹ BT submission dated 29 July 2016, paragraph 20.

BT argues that this would be a more appropriate and fairer assessment of the amount CPs might have been overcharged.

Provisional view on whether BT should make repayments to Sky

4.188 Ofcom has the power pursuant to section 190(2)(d) of the 2003 Act to direct that one party to a dispute should pay a sum to another party by way of an adjustment of an overpayment. In assessing whether it is appropriate for us to order BT to make repayments to Sky in this case we have given consideration to the impact of BT's overcharging for TRC and SFI services on competition and the impact that allowing BT to retain profits realised from overcharging might have on incentives for future compliance with SMP obligations.

4.189 We do not agree with BT's argument that Ofcom does not have the power to order repayments in this case. In fact, Ofcom's powers to order repayment in circumstances where overcharging in breach of an SMP condition has occurred have been explicitly addressed in previous cases. For example, in the PPC Court of Appeal Judgment, the Court of Appeal considered Ofcom's power under section 190(2) to require repayments and stated that:

*"The starting point must be, in a case of overcharging in breach of an SMP condition, to order repayment of the amount of the excess charge. If, however, the payee can show some good reason why a lesser repayment or no repayment at all would better achieve the objectives of the Act and the CRF then that would provide a principled basis for Ofcom to give a direction for only a partial repayment or to make no direction for repayment at all."*¹⁸²

4.190 The Court of Appeal Judgment concluded that Ofcom's discretion under section 190 of the 2003 Act was:

*"a discretion to make such order for repayment as will best achieve the objectives of the [2003] Act and the CRF on the particular facts of the case."*¹⁸³

4.191 The Court held that the discretion under section 190 "must be exercised in a principled way with a view to achieving those objectives".¹⁸⁴

4.192 Overcharging for WLA/WFAEL services, including TRCs and SFIs, distorts competition between BT and its competitors, which is ultimately detrimental to consumers. We therefore believe it would be appropriate, in light of our duties to further the interests of consumers, where appropriate by promoting competition, in the Dispute to require repayments.

4.193 Further, if we were not to require repayments, BT would be able to unfairly retain the gains from overcharging, and this could provide a disincentive for it to comply with its regulatory obligations. The incentives and regulatory signals that determinations in disputes send to CPs as to how we interpret regulatory obligations, and are likely to assess future conduct, are important.

¹⁸² PPC Court of Appeal Judgment, paragraph 85.

¹⁸³ PPC Court of Appeal Judgment, paragraph 83.

¹⁸⁴ PPC Court of Appeal Judgment, paragraph 84.

- 4.194 We consider that to require BT to repay Sky promotes the interests of consumers and competition, by ensuring that the SMP obligations imposed on BT are enforced. The enforcement of BT's SMP obligations protects consumers, enables other providers to compete with BT and helps to level the playing field for BT's competitors, leading to downward pressure on prices, availability of a wider range of services and improved quality of service.
- 4.195 In light of our assessment, we provisionally conclude that it is appropriate and proportionate for Ofcom to exercise its powers under section 190(2)(d) of the 2003 Act to direct BT to make repayments.

Provisional view on amount of repayment

- 4.196 We provisionally agree with Sky that repayment of BT's overcharge for TRCs and SFIs during the Relevant Period would be appropriate in this case.
- 4.197 We consider that any charges between DLRIC and DSAC would be compliant with the cost orientation obligation. We therefore propose to apply the same approach to the level of repayments in the Dispute as we have applied in previous disputes relating to BT's cost orientation obligations, which is to base the level of repayments on the difference between the level of each charge and the relevant DSAC.
- 4.198 As noted above, in its response to the provisional conclusions in the TalkTalk Dispute, BT has argued that Ofcom should assess any overcharge for SFI2 modules by combining 'bolt on' modules with the Base module. We are currently considering BT's arguments in this respect and will adopt a consistent approach in determining the TalkTalk Dispute and this Dispute.

Assessment of the amount of repayments

- 4.199 In order to estimate the amount of the required repayments we have calculated the difference between price and DSAC for each of the TRC and SFI services for which we provisionally concluded BT had overcharged in paragraph 4.152. Table 4.20 sets out the overcharge for each relevant TRC and SFI charge in each year.

Table 4.20: Overcharge for each TRC, £ nominal

Financial year	2008/09	2009/10			2010/11		2011/12	2012/13		2013/14	2014/15
Price periods	1 Jan 2009-31 Mar 2009	1 Apr 2009-16 Oct 2009	17 Oct 2009-12 Mar 2010	13 Mar 2010 - 31 Mar 2010	1 Apr 2010 - 31 Jul 2010	1 Aug 2010 - 31 Mar 2011	1 Apr 2011 - 31 Mar 2012	1 Apr 2012 - 7 Jun 2012	8 Jun 2012 - 31 Mar 2013	1 Apr 2013 - 31 Mar 2014	1 Apr 2014 - 26 Jun 2014
TRC charges											
Hourly charge - normal working days	14.17	14.48	14.48	14.48	11.51	11.51	1.93	2.93	9.93	11.44	8.89
Hourly charge - other times ex Sunday/BH	27.74	28.15	28.15	28.15	24.09	24.09	10.93	19.73	20.23	22.90	18.39
Hourly charge - Sundays and BH	32.63	33.12	33.12	33.12	28.34	28.34	12.86	15.06	29.06	30.54	24.52
Visit charge - normal working days	35.21	35.58	15.06	15.06	8.48	8.48			10.54	12.23	6.57
Visit charge - other times ex Sunday/BH	51.52	51.95	28.92	28.92	21.69	21.69	10.27	12.55	26.05	25.90	17.55
Visit charge - Sundays and BH	60.89	61.39	33.37	33.37	25.03	25.03	11.86	10.19	32.19	31.08	21.06

Supplementary hourly charge – other times ex Sunday/BH	13.56	13.67	13.67	13.67	12.58	12.58	9.00	16.79	10.29	11.46	9.50
Supplementary hourly charge – Sundays and BH	18.46	18.64	18.64	18.64	16.83	16.83	10.93	12.13	19.13	19.09	15.63
Supplementary visit charge – other times ex Sunday/BH	16.31	16.36	13.85	13.85	13.22	13.22	11.96	11.96	15.51	13.66	10.98
Supplementary visit charge – Sundays and BH	25.68	25.81	18.30	18.30	16.55	16.55	13.54	13.54	21.65	18.84	14.49
SFI module charges											
SFI1	44.42	45.17	45.17	45.17	37.93	53.93					
Network				36.63	32.35	32.35	5.76	20.13	20.13	29.37	26.71
Frame				37.06	35.01	35.01	41.85	45.68	40.68	49.82	48.76
Internal Wiring				40.26	39.54	39.54	38.44	38.10	28.10	25.20	24.42
Coop				22.06	21.11	21.11	9.65	10.73	5.73		
Frame Direct				16.96	11.24	11.24	12.43	11.38	21.38	19.34	14.04

Source: Ofcom.

4.200 We have identified the amount by which BT has overcharged for each service in each year and consider it appropriate to direct BT to repay Sky a level of repayment reflecting the full amount of the overcharge for each of these services.

4.201 However, we do not have the necessary information to calculate the total amount of the overcharge by BT. In particular:

4.201.1 We do not have sufficient information on the volumes of each service purchased by Sky in the Relevant Period.

4.201.2 As set out in Section 2, BT's charges for TRCs and SFIs were subject to the applicable Cost Orientation Conditions where they were purchased in relation to BT's network access services in the WLA/WFAEL markets and were reasonably necessary for the use of those services. The obligation on BT to repay Sky therefore only applies to TRCs and SFIs purchased by Sky during the relevant periods of overcharge set out above to the extent that these services were reasonably necessary for the use of BT's WLA/WFAEL network access services, including its LLU services and/or WLR services. This is a question of fact, although we note that we concluded in the 2014 FAMR Statement that:

“we would expect a large majority of TRC and SFI services to be reasonably necessary in order for CPs to provide downstream services based on LLU and WLR and, therefore, any such services would fall within the network access requirement we are imposing on BT.”¹⁸⁵

4.202 We therefore propose to leave it to the Parties to agree the exact level of repayment due, based on our calculations of the difference between price and DSAC set out in Table 4.20.

¹⁸⁵ 2014 FAMR Statement, paragraph 18.46.

Interest

- 4.203 We have also considered whether it would be appropriate for us to award interest on the repayment amount. In considering whether it would be appropriate for us to award interest on the repayment amount, we had regard to the Parties' views as well as the Interest Guidance¹⁸⁶ set out in the Gamma Determination.¹⁸⁷
- 4.204 Sky requested repayment with interest without any further submission on how interest should be calculated. BT argued that Ofcom does not have the power to order retrospective payments, however made no specific submissions on interest.
- 4.205 The Interest Guidance contained guidance about our approach to interest in the context of resolving a dispute involving charges payable under BT's Standard Interconnection Agreement (SIA). Although we noted that the scope of the dispute in the Gamma Determination related specifically to repayments directed by Ofcom in relation to charges payable under BT's SIA, we considered that, in principle, the Interest Guidance may also be relevant more generally to repayments directed by Ofcom relating to other products and services.¹⁸⁸
- 4.206 The Interest Guidance explains that in deciding whether interest should be payable and, if so, at what rate, Ofcom will take account of all relevant considerations, with a view to setting an amount of principal plus interest which would best meet our statutory duties and regulatory objectives, in particular, with a main objective of avoiding CPs having incentives to set unduly high charges.¹⁸⁹
- 4.207 However, the Interest Guidance also explains that although we could seek to assess on a case-by-case basis the actual benefit to the overcharging firm as a result of the overcharge in that case, such an in-depth assessment would be complex and is unlikely to be practical. In the Interest Guidance we noted that it is important to adopt an approach which would foster commercial and regulatory certainty and that an appropriate interest rate should be readily calculable using available data.¹⁹⁰
- 4.208 As set out in the Interest Guidance, we consider that the Bank of England base rate plus 1% (BoE+1%)¹⁹¹ is likely to be an appropriate rate to reflect the benefit derived by the overcharging firm from the overcharge in most cases.¹⁹² However, we recognise that, depending on the facts of the case and taking into account any evidence provided by the Parties, it may be appropriate to adopt a different rate in order to ensure that our objectives are met.¹⁹³

¹⁸⁶ On 25 October 2013, Ofcom issued a determination to resolve a dispute between Gamma and BT concerning the interest rate set out in BT's Standard Interconnect Agreement. As part of this determination, Ofcom issued guidance setting out Ofcom's approach to interest (the Interest Guidance).

¹⁸⁷ Dispute between Gamma and BT relating to the 'Ofcom Interest Rate' contained within BT's Standard Interconnect Agreement (SIA), Final Determination, 25 October 2013: http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/closed-cases/all-closed-cases/cw_01108/CW_011080613.pdf.

¹⁸⁸ Gamma Determination, paragraph 4.14.

¹⁸⁹ Gamma Determination, paragraph A2.1.

¹⁹⁰ Gamma Determination, paragraphs A2.9 and A2.10.

¹⁹¹ We noted that this is the rate which has conventionally been adopted by the High Court in commercial cases and by the CAT when awarding interest on penalties on appeal.

¹⁹² Gamma Determination, paragraph A2.12.

¹⁹³ Gamma Determination, paragraph A2.13.

- 4.209 At this stage, the Parties to the Disputes have not put forward arguments as to why we should not follow this approach in this case.
- 4.210 There do not appear to be any distinguishing features of this Dispute which might justify a departure from the Interest Guidance. We therefore provisionally conclude that BT should be required to repay Sky the repayment amount with interest at BoE+1%.
- 4.211 We note that that in its response to the provisional conclusions in the TalkTalk Dispute, TalkTalk has suggested that Ofcom leave the interest rate to be agreed between the Parties as part of the overall settlement of the repayment. If Sky were to make a similar request in its response to the Provisional Conclusions we will give this due consideration in reaching a final determination of the Dispute.

Timing of payments

- 4.212 As set out above, BT is currently appealing the CAT's Ethernet Judgment. One of BT's grounds of appeal relates to whether Ofcom has the power to order retrospective payments in dispute resolution proceedings under section 190 of the 2003 Act. A separate ground of appeal relates to whether Ofcom has the power to award interest when resolving disputes.
- 4.213 We do not agree with BT's view of Ofcom's dispute resolution powers for the reasons set out above. However, in light of the Ethernet appeals, in resolving recent disputes in relation to BT's average porting conveyance charges we determined that BT's repayment of overpayments made by Gamma and Vodafone before the dates on which the disputes were brought to Ofcom, as well as the interest on these repayments, would only have to be paid after the Court of Appeal hands down a judgment in the Ethernet appeals which is unfavourable to BT in relation to these issues.¹⁹⁴
- 4.214 For consistency, we propose to adopt the same approach in relation to this Dispute.¹⁹⁵ Therefore we provisionally conclude that repayment of the overpayments made by Sky for TRCs and SFIs, and the interest on that repayment, shall only be payable if the Court of Appeal hands down a judgment in the Ethernet appeals which confirms Ofcom's powers to direct such repayments.

Provisional Conclusions and next steps

- 4.215 For the reasons set out above, we provisionally conclude that BT has overcharged Sky for TRCs and SFIs during the Relevant Period and that it would be appropriate in this case to order BT to repay the overcharge to Sky, with interest. We consider an appropriate repayment level to be the difference between the level of the charge and DSAC.
- 4.216 We have identified the amount by which BT has overcharged for each service in each year. We do not have accurate information as to the volumes of each service purchased by Sky and therefore propose to leave it to the Parties to agree the exact

¹⁹⁴ 'Disputes between BT and each of Gamma and Vodafone in relation to BT's average porting conveyance charges', 11 November 2015. Available at: http://stakeholders.ofcom.org.uk/binaries/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01161/Final_Determination.pdf.

¹⁹⁵ We have also proposed to adopt this approach in the provisional conclusions in the TalkTalk Dispute.

levels of repayment that are due, based on our calculated unit charges. We note repayment is dependent on the outcome of the Ethernet appeals.

- 4.217 In line with our Dispute Resolution Guidelines, we are allowing two weeks for the Parties and other interested parties to provide any comments on our Provisional Conclusions. The deadline for comments is 5pm on 10 October 2016. Details of how to respond to these Provisional Conclusions are set out in Annexes 1 and 2 below. Our proposed Determination is set out at Annex 3.

Assessment of consistency of Ofcom's provisional conclusions with our statutory duties and Community obligations

- 4.218 In conducting our provisional assessment, we have considered our general duties in section 3 of the 2003 Act and also the six 'Community requirements' set out in section 4 of the 2003 Act, which give effect, among other things, to the requirements of Article 8 of the Framework Directive.
- 4.219 In particular, we have had regard to:
- 4.219.1 our duty 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 3(1)); and
 - 4.219.2 our duty to promote competition (section 4(3)) and to encourage, to the extent Ofcom considers it appropriate, the provision of network access and service interoperability for the purposes of securing efficiency and sustainable competition in communications markets, efficient investment and innovation and the maximum benefit for the customers of communications network and services providers (sections 4(7) and 4(8)).
- 4.220 We consider that our provisional conclusions are consistent with these duties. Ensuring that charges are capped at a cost oriented level and that BT's SMP obligations are enforced serves to promote effective competition, and through this furthers the interests of consumers.
- 4.221 In setting out our provisional assessment, we have also kept in mind our duty under subsection 3(3)(a) of the 2003 Act to ensure our regulatory activities are, among other things transparent, accountable, proportionate and targeted only at cases where action is needed. In particular, this document sets out the Parties' arguments and the reasoning that underpins our provisional assessment, including why we consider that action is needed in this case. The Parties will have an opportunity to comment on this in advance of our determination of the Dispute.

Annex 1

Responding to the Provisional Conclusions

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 10 October 2016**.

We would be grateful if you could assist us by completing a response cover sheet (see Annex 2), to indicate whether or not there are confidentiality issues.

For larger responses - particularly those with supporting charts, tables or other data - please email tor.ahjem@ofcom.org.uk attaching your response in Microsoft Word format, together with a Provisional Conclusions response coversheet.

Responses may alternatively be posted to the address below, marked with the title of these Provisional Conclusions.

Tor Ahjem
Competition Group
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Note that we do not need a hard copy in addition to an electronic version. It would be helpful if you could explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

If you want to discuss the issues and questions raised in this document, or need advice on the appropriate form of response, please contact Tor Ahjem on 020 7783 4158.

Confidentiality

In line with our Dispute Resolution Guidelines, as a part of publishing a final determination, Ofcom may publish non-confidential versions of responses. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

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

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/website/terms-of-use/>

Next steps

Ofcom intends to publish a determination by 17 November 2016.

Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details, please see:

http://www.ofcom.org.uk/static/subscribe/select_list.htm

Annex 2

Consultation response cover sheet

We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality where appropriate.

Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

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

Nothing

Name/contact details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

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

DECLARATION

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

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

Name

Signed (if hard copy)

Annex 3

[Provisional] Determination to resolve a dispute between BT and Sky

[Provisional] Determination under sections 188 and 190 of the Communications Act 2003 ("2003 Act") for resolving a dispute between Sky UK Limited ("Sky") and British Telecommunications Plc ("BT") concerning BT's charges for special fault investigation services and time related charges.

WHEREAS—

(A) Section 188(2) of the 2003 Act provides that, where Ofcom has decided pursuant to section 186(2) of the 2003 Act that it is appropriate for it to handle a 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 2003 Act, together with a full statement of the reasons on which the determination is based. Ofcom must publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) it considers appropriate to publish for bringing it to the attention of the members of the public, including to the extent that Ofcom considers pursuant to section 393(2)(a) of the 2003 Act that any such disclosure is made for the purpose of facilitating the carrying out by Ofcom of any of its functions;

(B) Section 190 of the 2003 Act sets out the scope of Ofcom's powers on resolving a dispute which may include, in accordance with section 190(2) of the 2003 Act:

- a) making a declaration setting out the rights and obligations of the parties to the dispute;
- b) giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
- c) 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
- d) 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 28 November 2003, Oftel published a statement called "Review of the fixed narrowband wholesale exchange line, call origination, conveyance and transit markets" (the "2003 Oftel Statement") which found that BT held significant market power ("SMP") in the market for wholesale fixed analogue exchange line services within the United Kingdom but not including the Hull Area ("WFAEL market");¹⁹⁶

¹⁹⁶ <http://stakeholders.ofcom.org.uk/binaries/consultations/750148/fixednarrowbandstatement.pdf>.

(D) In the 2003 Ofcom Statement, Ofcom imposed a series of SMP conditions on BT in the WFAEL market under section 45 of the 2003 Act, including a basis of charges obligation which required:

“AA3.1 Unless the Director directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of the Director, that each and every charge offered, payable or proposed for Network Access covered by Condition AA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed”;

(E) On 16 December 2004, Ofcom published a statement called “Review of the wholesale local access market” (the “2004 WLA Statement”) which found that BT held SMP in the market for wholesale local access services within the United Kingdom but not including the Hull Area (“WLA market”);¹⁹⁷

(F) In the 2004 WLA Statement, Ofcom imposed a series of SMP conditions on BT in the WLA market under section 45 of the 2003 Act, including a basis of charges obligation which required:

“FA3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition FA1 and/or Condition FA9 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed”;

(G) On 15 September 2009, Ofcom published a statement called “Review of the fixed narrowband services wholesale markets” (the “2009 Narrowband Statement”) which found that BT continued to hold SMP in the WFAEL market;¹⁹⁸

(H) In the 2009 Narrowband Statement, Ofcom imposed a series of SMP conditions on BT in the WFAEL market under section 45 of the 2003 Act, including a basis of charges obligation which required:

“AAA3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed”;

(I) On 7 October 2010, Ofcom published its second review of the wholesale local access market¹⁹⁹ (the “2010 WLA Statement”) which found that BT continued to hold SMP in the WLA market;

¹⁹⁷ <http://stakeholders.ofcom.org.uk/binaries/consultations/rwlam/statement/rwlam161204.pdf>.

¹⁹⁸

http://stakeholders.ofcom.org.uk/binaries/consultations/wnmr_statement_consultation/summary/main.pdf.

¹⁹⁹ http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf.

(J) In the 2010 WLA Statement, Ofcom imposed a series of SMP conditions on BT in the WLA market under section 45 of the 2003 Act, including a basis of charges obligation which required:

“FAA4.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition FAA1 and/or Conditions FAA9, FAA10 and FAA12 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed. FAA1 requires BT to provide network access on reasonable request from a third party, and also to provide such network access as Ofcom may from time to time direct”;

(K) On 20 December 2010, Ofcom published a statement called “Review of the wholesale fixed analogue exchange lines markets” (the “2010 WFAEL Statement”) which found that BT continued to hold SMP in the WFAEL market;²⁰⁰

(L) In the 2010 WFAEL Statement, Ofcom imposed a series of SMP conditions on BT in the WFAEL market under section 45 of the 2003 Act, including a basis of charges obligation which required:

“AAAA3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed”;

(M) On 22 June 2016, Sky referred a dispute with BT to Ofcom for dispute resolution requesting a determination that BT has overcharged them for certain services, known as special fault investigation services (“SFIs”) and time related charges (“TRCs”), provided to them between 1 January 2009 and 30 June 2014 (which depends on whether or not BT’s charges for those services were cost oriented during that time) and, if so, by how much they have been overcharged and should therefore be reimbursed;

(N) Having considered the submissions from Sky and BT, Ofcom set the scope of the issues in dispute to be resolved as follows-

“1) Whether the amount that BT charged Sky for TRCs and SFIs in the relevant period was compliant with Conditions AA3, FA3, AAA3, FAA4.1 and AAAA3, as applicable; and

2) If not, in order to resolve the dispute between the parties, what amount BT should have charged Sky for TRCs and SFIs in the relevant period and whether any repayments should be made.”;

The relevant period was defined as being between 1 January 2009 and 30 June 2014.

(O) In order to resolve this dispute, Ofcom has considered (among other things) the information provided by the Parties and Ofcom has further acted in accordance with its

²⁰⁰ <http://stakeholders.ofcom.org.uk/binaries/consultations/review-wholesale-fixed-exchange/statement/statement.pdf>.

general duties set out in section 3 and the Community requirements set out in sections 4 and 4A of the 2003 Act;

(P) A fuller explanation of the background to the dispute and Ofcom's reasons for making this [Provisional] Determination is set out in the explanatory statement accompanying this [Provisional] Determination; and

NOW, THEREFORE, OFCOM MAKES, FOR THE REASONS SET OUT IN THE ACCOMPANYING EXPLANATORY STATEMENT, THE FOLLOWING [PROVISIONAL] DETERMINATION FOR RESOLVING THE DISPUTE:

I Declaration of rights and obligations, etc.

1. BT has overcharged Sky for the following services (which shall each be construed as having the same meaning as provided by BT on its website for definitions and explanations of its products):

- (a) Standard Chargeable Visit
- (b) Additional Hours (or Part thereof)
- (c) Supplementary charges (Per Visit or call out per engineer)
- (d) Supplementary charges (Per Hour or Part thereof)
- (e) MPF Special Fault Investigation (SFI) (product withdrawn in March 2011)
- (f) SMPF Special Fault Investigation (SFI) (product withdrawn in March 2011)
- (g) MPF Special Fault Investigation 2 (SFI2) - Network module
- (h) MPF Special Fault Investigation 2 (SFI2) - Frame module
- (i) MPF Special Fault Investigation 2 (SFI2) - Internal Wiring module
- (j) MPF Special Fault Investigation 2 (SFI2) - Coop module
- (k) MPF Special Fault Investigation 2 (SFI2) - Frame direct module
- (l) SMPF Special Fault Investigation 2 (SFI2) - Network module
- (m) SMPF Special Fault Investigation 2 (SFI2) - Frame module
- (n) SMPF Special Fault Investigation 2 (SFI2) - Internal Wiring module
- (o) SMPF Special Fault Investigation 2 (SFI2) - Coop module
- (p) SMPF Special Fault Investigation 2 (SFI2) - Frame direct module

in the Relevant Period for the periods specified in the explanatory statement, where those services were reasonably necessary for the use of BT's network access services in the WLA and/or WFAEL markets, including its local-loop unbundling services, sub-loop unbundling services and/or wholesale line rental services.

2. Ofcom gives a direction to BT to pay to Sky, by way of adjustment of an overpayment for those services, a sum to be calculated by BT and Sky in accordance with the methodology set out in the explanatory statement. Unless otherwise already paid by BT to Sky, this sum shall be payable within five working days after the Court of Appeal hands down its judgment in the Ethernet Determination provided that judgment does not find that Ofcom has no jurisdiction under section 190(2) of the 2003 Act to make a direction as set out above.

3. Finally, interest at a rate of the Bank of England base rate plus 1% compounded annually shall be payable by BT to Sky on the amount to be calculated by the Parties in paragraph 2 above. Unless otherwise already paid by BT to Sky, this sum shall be payable within five working days after the Court of Appeal hands down its judgment in the Ethernet Determination provided that judgment does not find that Ofcom has no jurisdiction under section 190(2) of the 2003 Act to direct BT to pay interest as set out above.

II Binding nature and effective date

4. This Determination is binding on BT and Sky in accordance with section 190(8) of the 2003 Act.

5. This Determination shall take effect on the day it is published.

III Interpretation

6. For the purpose of interpreting this Determination—

a) except as otherwise defined in this Determination, words or expressions used in this Determination (and in the recitals hereto) shall have the same meaning as they have been ascribed in the 2003 Act;

b) headings and titles shall be disregarded; and

c) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.

7. In this Determination—

a) “2003 Act” means the Communications Act 2003 (c.21);

b) “BT” means British Telecommunications plc, whose registered company number is 01800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, as defined by section 1159 of the Companies Act 2006;

c) “Ethernet Determination” means British Telecommunications PLC v Office of Communications & Ors (Case No 1205-7/3/3/13);

d) “Ofcom” means the Office of Communications;

e) “SFIs” means special fault investigation services;

f) “Sky” means Sky UK Limited whose registered company number is 02906991, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006; and

g) “TRCs” means time related charges.

[x]

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

[Date]

Annex 4

SMP Conditions

Introduction

This annex sets out, for ease of reference, the SMP Conditions that are most relevant to this Dispute. The SMP Conditions, along with the relevant accompanying explanatory statements, were published in the following Of tel and Of com documents:

- The 2003 Of tel Statement.
- The 2004 WLA Statement.
- The 2009 Narrowband Statement.
- The 2010 WLA Statement.
- The 2010 WFAEL Statement.²⁰¹

SMP conditions – 2003 Of tel Statement

Condition AA1(a) - Requirement to provide Network Access on reasonable request

AA1(a).1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as the Director may from time to time direct.

AA1(a).2 The provision of Network Access in accordance with paragraph AA1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the Director may from time to time direct.

AA1(a).3 The Dominant Provider shall comply with any direction the Director may make from time to time under this Condition AA1(a).

Condition AA3 - Basis of charges

AA3.1 Unless the Director directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of the Director, that each and every charge offered, payable or proposed for Network Access covered by Condition AA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

AA3.2 For the avoidance of any doubt, where the charge offered, payable or proposed for Network Access covered by Condition AA1(a) is for a service which is subject to a charge control under Condition AA4, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of the Director, that such a charge satisfies the requirements of paragraph AA3.1 above.

²⁰¹ As set out in section 2 Condition AAAA10, imposed under the 2010 WFAEL Statement, was subsequently amended in the 2012 LLU/WLR Statement. This Annex therefore sets out the wording of Condition AAAA10 both before and after the amendment.

AA3.3 The Dominant Provider shall comply with any direction the Director may from time to time direct under this Condition AA3.

AA3.4 This Condition AA3 shall not apply to the markets set out in paragraphs 1(a)(ii) and 1(a)(v) of this Notification.

Condition AA10 - Requirement to provide Wholesale Line Rental etc.

AA10.1 The Dominant Provider shall provide Wholesale Analogue Line Rental as soon as it is reasonably practicable on reasonable terms to every Third Party who reasonably requests such Wholesale Analogue Line Rental. The Dominant Provider shall also provide such Wholesale Analogue Line Rental as the Director may from time to time direct.

AA10.2 Except in so far as the Director may otherwise consent in writing, the Dominant Provider shall provide:

- (a) Wholesale Business ISDN2 Line Rental; and
- (b) Wholesale ISDN30 Line Rental,

in accordance with the Wholesale ISDN Line Rental Functional Specification as soon as it is reasonably practicable on reasonable terms to every Third Party who reasonably requests Wholesale Business ISDN2 Line Rental and/or Wholesale ISDN30 Line Rental. The Dominant Provider shall also provide such Wholesale Business ISDN2 Line Rental and/or Wholesale ISDN30 Line Rental as the Director may from time to time direct.

AA10.3 The Dominant Provider shall ensure that charges for the provision of the respective services mentioned below shall be made by the Dominant Provider as follows:

- (a) subject always to the requirement of reasonableness, charges shall be based on the forward looking long-run incremental costs of providing Wholesale Analogue Line Rental and Wholesale Business ISDN2 Line Rental unless:
 - (i) the Dominant Provider and the Third Party have agreed another basis for the charges; or
 - (ii) any other basis for such charges be used as directed by the Director from time to time;
- (b) the Dominant Provider shall categorise its costs as falling within one of the following categories:
 - (i) Wholesale Line Rental Per Provider Set-up Costs;
 - (ii) Wholesale Line Rental Per Provider On-going Costs;
 - (iii) Wholesale Line Rental Per Customer Line Set-up Costs; or
 - (iv) Wholesale Line Rental System Set-up Costs,

and, where the Dominant Provider either fails to categorise its costs in such a manner or the Director considers that any individual item of cost cannot reasonably be categorised in the manner in which the Dominant Provider has made the categorisation, the cost in question shall fall within

- one of the categories in sub-paragraphs (i) to (iv) above or, as the case may be, in any new category of cost, as the Director may direct;
- (c) the Dominant Provider shall recover the costs for any new category of cost that the Director has directed under sub-paragraph (b) above in the manner in which the Director may direct;
 - (d) the Dominant Provider shall recover Wholesale Line Rental Per Provider Set-up Costs, and Wholesale Line Rental Per Provider On-going Costs and Wholesale Line Rental Per Customer Line Set-up Costs by means of direct charges to the Third Party, or as the Director may otherwise direct;
 - (e) the Dominant Provider shall recover Wholesale Line Rental System Set-up Costs by means of a separate surcharge on all Exchange Lines provided by the Dominant Provider, or as the Director may otherwise direct; and
 - (f) the Dominant Provider shall modify any of its charges for the provision of Wholesale Line Rental in the manner in which the Director may direct.

AA10.4 The Dominant Provider shall comply with any direction that the Director may make from time to time under this Condition AA10.

AA10.5 This Condition AA10 is without prejudice to the generality of the provisions in Conditions AA1(a) to AA7 above.

SMP Conditions – 2004 WLA Statement

Condition FA1 - Requirement to provide Network Access on reasonable request

FA1.1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

FA1.2 The provision of Network Access in accordance with paragraph FA1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

FA1.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

Condition FA3 - Basis of charges

FA3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition FA1 and/or Condition FA9 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

FA3.2 The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition.

Condition FA9 - Requirement to provide Local Loop Unbundling Services

FA9.1 Where a Third Party reasonably requests in writing Local Loop Unbundling Services, the Dominant Provider shall provide those Local Loop Unbundling Services.

FA9.2 The provision of Local Loop Unbundling Services in accordance with paragraph FA9.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may direct from time to time.

FA9.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

SMP Conditions – 2009 Narrowband Statement

Condition AAA1(a) - Requirement to provide Network Access on reasonable request

AAA1(a).1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

AAA1(a).2 The provision of Network Access in accordance with paragraph AAA1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

AAA1(a).3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA1(a).

AAA1(a).4 The Direction made in the document 'BT's use of Cancel Other' published on 28 July 2005, shall continue to have force for the purposes of this Condition from the date that this Condition AAA1(a) enters force.

Condition AAA3 - Basis of charges

AAA3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

AAA3.2 For the avoidance of any doubt, where the charge offered, payable or proposed for Network Access covered by Condition AAA1(a) is for a service which is subject to a charge control under Condition AAA4, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that such a charge satisfies the requirements of paragraph AAA3.1 above.

AAA3.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAA3.

Condition AAA10 - Requirement to provide Wholesale Line Rental etc.

AAA10.1 The Dominant Provider shall provide Wholesale Line Rental as soon as is reasonably practicable, or as directed by Ofcom, on reasonable terms to every Third Party who makes a reasonable request in relation to:

- (a) wholesale analogue exchange line services; and
- (b) wholesale ISDN2 exchange line services.

AAA10.2 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges of providing WLR services in paragraph AAA10.1 are based on the forward looking long-run incremental cost, except where the Dominant Provider and Third Party have agreed another basis for the charges.

AAA10.3 The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAA10.

AAA10.4 This Condition AAA10 is without prejudice to the generality of the provisions in Conditions AAA1(a) to AAA7 above.

SMP Conditions – 2010 WLA Statement

Condition FAA1 - Requirement to provide Network Access on reasonable request

FAA1.1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

FAA1.2 The provision of Network Access in accordance with paragraph FAA1.1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

FAA1.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

FAA1.4 The Direction dated 20 March 2008 concerning service level agreements, as published on the same day at Annex 2 of the statement entitled '*Service level guarantees: incentivising performance*', given by Ofcom under Condition FA1.2 shall continue to have force, until such time it is modified or withdrawn, as if it has been given under Condition FAA1.2 from the date that this Condition enters into force and that Direction shall be read accordingly.

Condition FAA4 - Basis of charges

FAA4.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition FAA1 and/or Conditions FAA9, FAA10 and FAA12 is reasonably derived from the costs of provision based on a forward looking long run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

FAA4.2 For the avoidance of any doubt:

(a) this Condition FAA4 shall not apply to the requirement on the Dominant Provider to provide Virtual Unbundled Local Access under Condition FAA11; and

(b) except for the charge for MPF Rental, where the charge offered, payable or proposed for Network Access covered by Condition FAA1 and/or Condition FAA9 is for a service which is subject to a charge control under Condition FA3(A), the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that such a charge satisfies the requirements of paragraph FAA4.1 above.

Condition FAA9 - Requirement to provide Local Loop Unbundling Services (LLU)

FAA9.1 Where a Third Party reasonably requests in writing Local Loop Unbundling Services, the Dominant Provider shall provide those Services, which shall include, where also so requested by the Third Party, such Ancillary Services as may be reasonably necessary for the use of those Services. The Dominant Provider shall also provide such Ancillary Services or other Network Access as Ofcom may from time to time direct to ensure the provision of Local Loop Unbundling Services.

FAA9.2 The provision of Local Loop Unbundling Services, together with any Ancillary Services, in accordance with paragraph FAA9.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may direct from time to time.

FAA9.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

FAA9.4 In this Condition:

(a) “**Ancillary Services**” mean an Associated Facility or services associated with an Electronic Communications Network and/or an Electronic Communications Service which enable and/or support the provision of services via that Network and/or Service or have the potential to do so, which include at a minimum (but without limitation) the following:

(i) power;

(ii) Co-Location;

(iii) Co-Mingling;

(iv) Site Access;

(v) Internal Tie Circuits;

(vi) External Tie Circuits.

(b) “**Co-Location**” means the provision of space permitting a Third Party to occupy part of an MDF Site reasonably sufficient to permit the use of Local Loop Unbundling Services, and in particular to permit the connection of the Dominant Provider's Electronic Communications Network with the Electronic Communications Network of a Third Party at that location;

(c) "Co-Mingling" means the provision of Co-Location having the following characteristics:

(i) the Third Party's Electronic Communications Network is situated in an area of the MDF Site which:

(A) is a single undivided space;

(B) after proper performance by the Dominant Provider of its obligation to provide Local Loop Unbundling Services pursuant to Condition FAA10.1, would permit the normal operation of the Third Party's Electronic Communications Network (or would permit if the Dominant Provider removed any object or substance whether toxic or not, which might reasonably prevent or hinder the occupation of the MDF Site for such use); and

(C) if so requested by the Third Party, is not unreasonably distant from the Dominant Provider's Electronic Communications Network within the MDF site;

(ii) no permanent physical partition is erected in the space between the Third Party's Electronic Communications Network and the Dominant Provider's Electronic Communications Network; and

(iii) the Third Party's Electronic Communications Network is neither owned nor run by the Dominant Provider or by any person acting on the Dominant Provider's behalf;

(d) "External Tie Circuit" means a link that connects Local Loop Unbundling Services to the Electronic Communications Network of a Third Party at a location outside the MDF Site;

(e) "Internal Tie Circuit" means a link, the whole of which is contained within an MDF Site, that connects Local Loop Unbundling Services to the Electronic Communications Network of a Third Party;

(f) "Local Loop Unbundling Services" mean Network Access to Metallic Path Facilities or Shared Access;

(g) "MDF Site" means the site of an operational building of the Dominant Provider that houses a main distribution frame;

(h) "Metallic Path Facilities" means a circuit comprising a pair of twisted metal wires employing electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy to convey Signals when connected to an Electronic Communications Network;

(i) "Shared Access" means the non-voice band frequency of Metallic Path Facilities;

(j) "Site Access" means access (including the right of entry) to the Dominant Provider's MDF Sites in order to install and operate an Electronic Communications Network to provide Electronic Communications Services over Local Loop Unbundling Services; and

(k) references to the expression Electronic Communications Network for the purposes of the expressions Co-Location, Co-Mingling and Site Access in this Condition shall be limited to those matters set out at section 32(1)(b)(i)-(iii) of the Act.

Condition FAA10 - Requirement to provide Sub-Loop Unbundling Services (SLU)

FAA10.1 Where a Third Party reasonably requests in writing Sub-Loop Unbundling Services, the Dominant Provider shall provide those Services, which shall include, where also so requested by the Third Party, such Ancillary Services as may be reasonably necessary for the use of those Services. The Dominant Provider shall also provide such Ancillary Services or other Network Access as Ofcom may from time to time direct to ensure the provision of Sub-Loop Unbundling Services.

FAA10.2 The provision of Sub-Loop Unbundling Services, together with any Ancillary Services, in accordance with paragraph FAA10.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may direct from time to time.

FAA10.3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition.

FAA10.4 In this Condition:

(a) “**Ancillary Services**” mean an Associated Facility or services associated with an Electronic Communications Network and/or an Electronic Communications Service which enable and/or support the provision of services via that Network and/or Service or have the potential to do so, which include at a minimum (but without limitation) Tie Circuit.

(b) “**Shared Access**” has the meaning given to it in Condition FAA9;

(c) “**Sub-Loop Unbundling Services**” means access to Metallic Path Facilities or Shared Access at an intermediate point prior to the main distribution frame;

(d) “**Tie Circuit**” means a link that connects Sub-Loop Unbundling Services to the Electronic Communications Network of a Third Party; and

(e) references to the expression Electronic Communications Network for the purposes of the expression Ancillary Services in this Condition shall be limited to those matters set out at section 32(1)(b)(i)-(iii) of the Act.

SMP conditions – 2010 WFAEL Statement

Condition AAAA1(a) - Requirement to provide Network Access on reasonable request

AAAA1(a).1 Where a Third Party reasonably requests in writing Network Access, the Dominant Provider shall provide that Network Access. The Dominant Provider shall also provide such Network Access as Ofcom may from time to time direct.

AAAA1(a).2 The provision of Network Access in accordance with paragraph AAAA1(a).1 above shall occur as soon as it is reasonably practicable and shall be provided on fair and

reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

AAAA1(a).3 The Dominant Provider shall comply with any direction Ofcom may make from time to time under this Condition AAAA1(a).

AAAA1(a).4 The Direction made in the document 'BT's use of Cancel Other' published on 28 July 2005, shall continue to have force, until such time it is modified or withdrawn, for the purposes of this condition from the date that this Condition AAAA1(a) enters force.

Condition AAAA3 - Basis of charges

AAAA3.1 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that each and every charge offered, payable or proposed for Network Access covered by Condition AAAA1(a) is reasonably derived from the costs of provision based on a forward looking long-run incremental cost approach and allowing an appropriate mark up for the recovery of common costs including an appropriate return on capital employed.

AAAA3.2 For the avoidance of doubt, except for the charge for Analogue Core WLR Rental, where the charge offered, payable or proposed for Network Access covered by Condition AAAA1(a) is for a service which is subject to a charge control under Condition AAAA4(WLR) the Dominant Provider shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that such a charge satisfies the requirements of paragraph AAAA3.1 above.

AAAA3.3 The Dominant Provider shall comply with any direction Ofcom may from time to time direct under this Condition AAAA3.

AAAA3.4 The Direction regarding removal of cost orientation obligation for enhanced service level care made in the document 'Charge controls for Wholesale Line Rental – implementation and cost orientation' published on 23 February 2010, shall continue to have force, until such time it is modified or withdrawn, for the purposes of this condition from the date that this Condition AAAA3 enters force.

Condition AAAA10 - Requirement to provide Wholesale Line Rental etc. [prior to amendment under 2012 LLU/WLR Statement]

AAAA10.1 The Dominant Provider shall provide Wholesale Line Rental as soon as is reasonably practicable, or as directed by Ofcom, on reasonable terms to every Third Party who makes a reasonable request in relation to wholesale analogue exchange line services.

AAAA10.2 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges of providing WLR services in paragraph AAAA10.1 are based on the forward looking long-run incremental cost, except where the Dominant Provider and Third Party have agreed another basis for the charges.

AAAA10.3 The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAAA10.

AAAA10.4 This Condition AAAA10 is without prejudice to the generality of the provisions in Conditions AAAA1(a) to AAAA7 above.

AAAA10.5 The Direction regarding removal of cost orientation obligation for enhanced service level care made in the document 'Charge controls for Wholesale Line Rental – implementation and cost orientation' published on 23 February 2010, shall continue to have

force, until such time it is modified or withdrawn, for the purposes of this condition from the date that this Condition AAAA10 enters force.

Condition AAAA10 - Requirement to provide Wholesale Line Rental etc. [as amended amendment under 2012 LLU/WLR Statement]

AAAA10.1 The Dominant Provider shall provide Wholesale Line Rental, which shall include, where also requested by a Third Party, such Ancillary Services as may be reasonably necessary for the use of Wholesale Line Rental, as soon as is reasonably practicable, or as directed by Ofcom, on reasonable terms to every Third Party who makes a reasonable request in relation to wholesale analogue exchange line services.

AAAA10.2 Unless Ofcom directs otherwise from time to time, the Dominant Provider shall ensure that charges of providing WLR services in paragraph AAAA10.1, including for the avoidance of doubt such Ancillary Services as may be reasonably necessary for the use of Wholesale Line Rental, are based on the forward looking long-run incremental cost, except where the Dominant Provider and Third Party have agreed another basis for the charges.

AAAA10.3 The Dominant Provider shall comply with any direction that Ofcom may make from time to time under this Condition AAAA10.

AAAA10.4 This Condition AAAA10 is without prejudice to the generality of the provisions in Conditions AAAA1(a) to AAAA7 above.

AAAA10.5 The Direction regarding removal of cost orientation obligation for enhanced service level care made in the document 'Charge controls for Wholesale Line Rental – implementation and cost orientation' published on 23 February 2010, shall continue to have force, until such time it is modified or withdrawn, for the purposes of this condition from the date that this Condition AAAA10 enters force.

AAAA10.6 In this Condition: “**Ancillary Services**” mean an Associated Facility or services associated with an Electronic Communications Network and/or an Electronic Communications Service which enable and/or support the provision of services via that Network and/or Service or have the potential to do so.