



## MPF Rental at Service Maintenance Level 1

Proposed direction specifying the fair and reasonable  
charge that BT may apply for MPF Rental provided at  
SML1

Consultation

Publication date: 31 March 2017

Closing Date for Responses: 5 May 2017

## About this document

This document contains a notification of our proposal to use our direction making powers to specify the fair and reasonable charge that BT may apply for an important local loop unbundling service which is used by telecoms providers to supply broadband to retail customers. The proposed direction will apply in the period prior to the introduction of new regulation on which we are consulting in our review of the Wholesale Local Access market.

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## Section 1

# Proposed direction for MPF SML1 Rental

## Background

- 1.1 In our 2014 statement on the Fixed Access Market Reviews<sup>1</sup> (2014 FAMR) we found that BT held significant market power (SMP) in the market for the provision of copper loop-based, cable-based, and fibre-based wholesale local access at a fixed location in the United Kingdom excluding the Hull Area (the WLA market). By way of remedies, we imposed SMP conditions requiring BT to supply telecoms providers with network access to, among other services, Local Loop Unbundling in the form of Metallic Path Facilities (MPF).
- 1.2 In February 2016, we published the Initial Conclusions of our Strategic Review of Digital Communications (Strategic Review).<sup>2</sup> Our overall aim is to make sure digital communications markets continue to work for consumers and businesses, looking particularly at issues relating to infrastructure and competition. In the Strategic Review, we set out a number of key features of our strategy relevant to the WLA market, including proposals for a strategic shift to encourage the large-scale deployment of new ultrafast broadband networks, including fibre direct to homes and businesses, and actions designed to deliver a step change in quality of service, including in relation to Openreach, BT's access division.
- 1.3 A key tool for delivering that strategy is our review of the WLA market, on which we have published a consultation document today (the 2017 WLA Consultation).<sup>3</sup> The need to take account of our Strategic Review in developing proposals for the WLA market has led to a delay in our timetable for the introduction of regulation to replace that imposed in the 2014 FAMR. In the 2017 WLA Consultation, we propose to apply new regulation to BT in the WLA market commencing on 1 April 2018.
- 1.4 Pending the introduction of new regulation, in most instances the SMP conditions imposed on BT in the 2014 FAMR will continue to apply. For example, BT will remain subject to obligations to provide network access on fair and reasonable terms, conditions and charges to services within the WLA market to telecoms providers on reasonable request and will remain subject to existing non-discrimination, Equivalence of Inputs and transparency obligations (such as the requirement to publish reference offers for key wholesale services and contract on those terms).
- 1.5 Certain other SMP conditions will cease to apply from 31 March 2017 and it is necessary for us to consider what, if any, steps it is appropriate for us to take in the period prior to the imposition of any new regulation from 1 April 2018.<sup>4</sup> We imposed a

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<sup>1</sup> Ofcom, 2014, *Fixed Access Market Review*, <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/narrowband-broadband-fixed/fixed-access-market-reviews-2014>.

<sup>2</sup> Ofcom, 2016, *Initial Conclusions of our Strategic Review of Digital Communications*, (2016 Strategic Review) [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0016/50416/dcr-statement.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0016/50416/dcr-statement.pdf).

<sup>3</sup> <https://www.ofcom.org.uk/consultations-and-statements/category-1/wholesale-local-access-market-review>.

<sup>4</sup> In October 2016, for example, we made directions under the 2014 FAMR legal conditions to ensure that appropriate quality of service obligations continue to apply to MPF in the period to 1 April 2018. Ofcom, 2016, *Quality of Service for WLR and MPF*, [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0032/92678/20161017-QoS-Statement\\_Non-confidential.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0032/92678/20161017-QoS-Statement_Non-confidential.pdf).

charge control condition on BT, setting the maximum average charge for the yearly rental price of MPF in each of the financial years 2014/15, 2015/16 and 2016/17. The current charge controls for MPF expire today, on 31 March 2017.

- 1.6 We set out below for consultation our proposal to exercise our powers to make a direction under the 2014 FAMR SMP conditions specifying the fair and reasonable charge for MPF.

### **Obligation to supply network access on fair and reasonable terms, conditions and charges**

- 1.7 In the 2014 FAMR we imposed a package of SMP conditions on BT in the WLA market to address the competition concerns we had identified in our analysis of the market arising from BT's SMP. In particular, SMP Condition 1 requires BT to provide network access to services within the WLA market on reasonable request. That SMP condition, which remains in force, requires BT to provide network access on fair and reasonable terms and conditions, including charges (except where a specific charge control or basis of charges obligation applies).<sup>5</sup> We explained that we considered a fair and reasonable charges obligation to be necessary for the WLA market to address the risk we had identified of adverse effects arising from a price distortion if BT were to fix and maintain its prices at an excessively high level for such services.<sup>6</sup>
- 1.8 In relation to MPF specifically, we imposed a charge control on the main rental service and key ancillary services (SMP Condition 7A). We explained that in the case of MPF a well designed charge control, which constrained charges to a reasonable level of costs would achieve our aim to prevent excessive pricing. We also noted our view that a charge control would continue to provide certainty and transparency regarding charges over the charge control period, which would allow charges to be set in advance.<sup>7</sup>
- 1.9 Where such specific charge controls applied, we explained that they would be sufficient to address our competition concerns and that a fair and reasonable charges obligation would not, additionally, be required. Where a specific charge control does not apply because, for example, it has expired or because the service in question was introduced after the imposition of regulation in the 2014 FAMR, the fair and reasonable charges obligation applies.<sup>8</sup> To support this obligation, we required BT to comply with directions set by Ofcom concerning the terms, conditions and charges as Ofcom may direct from time to time.
- 1.10 In the 2017 WLA Consultation, published today, we are proposing to continue to find that BT holds SMP in the WLA market. In our market analysis for the period 2018/19-2020/21, we provisionally identify a risk that BT would have the ability and incentive to engage in excessive pricing by virtue of its SMP. We propose a charge control on the annual rental price of MPF and certain ancillary services to address this risk.<sup>9</sup> As with the 2014 FAMR, where we do not propose a charge control we propose a

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<sup>5</sup> SMP Condition 1 2014 FAMR, see paragraphs 10.32-10.37 2014 FAMR.

<sup>6</sup> See paragraph 10.37 2014 FAMR.

<sup>7</sup> See paragraphs 13.39-13.41 2014 FAMR.

<sup>8</sup> See paragraph 10.37 2014 FAMR.

<sup>9</sup> Section 9, 2017 WLA Consultation (Volume 1).

condition requiring BT to provide network access on fair and reasonable terms, conditions and charges.<sup>10</sup>

## Assessment and proposal

- 1.11 Anticipating a delay in the introduction of new charge controls, by letter of 2 August 2016 Openreach made a voluntary commitment to cap charges in the WLA market at the level of the existing charge controls until 31 December 2017. Ofcom responded to that letter on 4 August 2016.<sup>11</sup>
- 1.12 Under Openreach's voluntary commitment, the rental charge for MPF will continue to be no more than £87.65 from 1 April 2017 to 31 December 2017. This figure corresponds to BT's current charge for MPF provided with Service Maintenance Level 2, which includes a 'one day' repair obligation (MPF SML2).<sup>12</sup> MPF (across all Service Maintenance Levels) is the largest service in terms of revenues that will no longer be subject to a charge control and is therefore a particularly significant service for competition.
- 1.13 Following correspondence with TalkTalk regarding BT's letter of 2 August 2016 and Ofcom's response, on 1 November 2016 we published an update on our website clarifying that:
- at that time we had taken no decisions in relation to BT's pricing of relevant services in the period following the expiry of the existing charge controls;
  - we would consider the appropriateness of exercising our regulatory powers to set charges during the lacuna period at the same time as consulting on proposals for the forward look period; and
  - we would consult with stakeholders on our proposed approach and consider any representations received before taking any decision on the exercise or otherwise of such powers.<sup>13</sup>
- 1.14 The MPF charge control set in the 2014 FAMR (which expires on 31 March 2017) and the price that BT has voluntarily committed to in its letter of 2 August 2016 both apply to MPF SML2. The majority of MPF lines are now in fact provided to telecoms providers with Service Maintenance Level 1, which includes a 'two-day' repair obligation (MPF SML1). This followed the introduction by Openreach of a new MPF SML1 service in 2015 (at the request of telecoms providers) priced at a discount to MPF SML2 and, subsequently, a large scale switch between those Service Maintenance Levels by telecoms providers using MPF.<sup>14</sup> The current charge for MPF

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<sup>10</sup> Paragraph 5.8-5.25 2017 WLA Consultation (Volume 1).

<sup>11</sup> Copies of the relevant letters have been published on our website:

<https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/narrowband-broadband-fixed>.

<sup>12</sup> Openreach price list, <https://www.openreach.co.uk/org/home/products/pricing/loadPricing.do> [accessed 29 March 2017].

<sup>13</sup> <https://www.ofcom.org.uk/phones-telecoms-and-internet/information-for-industry/telecoms-competition-regulation/narrowband-broadband-fixed>.

<sup>14</sup> Further background in relation to this switch between service maintenance levels is set out in our document *Quality of Service for WLR and MPF: Directions and Consents relating to the minimum standards and KPIs imposed in the 2014 Fixed Access Market Reviews* <https://www.ofcom.org.uk/consultations-and-statements/category-3/wlr-mpf-quality>.

SML1 is £85.29. As explained above, our proposal in the 2017 WLA Consultation is to set the charge control for MPF on the annual rental for MPF SML1.

- 1.15 Openreach's voluntary pricing commitment is silent on MPF SML1. Given, however, that the MPF SML1 price is derived by discounting the MPF SML2 price, we anticipate that this means that BT effectively committed to charge £85.29 for MPF SML1 over the period 1 April 2017 to 31 December 2017. When BT made this commitment, this was based on the best information available to it.
- 1.16 We have considered whether, in the light of all the circumstances, relying on the fair and reasonable charges obligation alone provides a sufficient measure of protection to downstream competition, having regard to the risk of excessive pricing that we identified in the 2014 FAMR.
- 1.17 Relying on the fair and reasonable charges obligation – in relation to a service as significant as MPF for downstream competition – may be appropriate in circumstances where BT has engaged with industry to negotiate an appropriate price for this service in the absence of charge controls. In the absence of intervention by Ofcom, BT would need to consider whether this commitment remains consistent with the fair and reasonable charges obligation that will continue to apply. We would expect BT to have particular regard, in this respect, to the proposals set out in the 2017 WLA Consultation.
- 1.18 However, given the timing of the expiry of the present charge controls and the significance of this service to telecoms providers, and the importance of these services to downstream competition, we are concerned that if we do not take steps now using our regulatory powers, there will be an extended period of delay and uncertainty for industry as to the level of the fair and reasonable charge for MPF. This uncertainty may involve regulatory disputes to resolve.
- 1.19 Given these factors, we consider that it is important for there to be greater legal certainty and transparency for telecoms providers as to the level of the charges that will apply in the period prior to the introduction of new charge controls, as proposed in the 2017 WLA Consultation. We do not consider the fair and reasonable charges condition imposed in the 2014 FAMR to be sufficient protection on its own for such an important service, given BT's significant market power, and we do not consider that an extended period of uncertainty for BT and telecoms providers would be in the interests of citizens and consumers who ultimately purchase broadband services from telecoms providers that rely on MPF.
- 1.20 Consequently, we propose that it is appropriate in this instance to issue a direction to BT to specify the fair and reasonable charge for the provision of network access to MPF at SML1. That direction would apply from the date on which it is put in place, until it is revoked by Ofcom.
- 1.21 Selecting a fair and reasonable charge involves a degree of judgement. Unlike a formal charge control, which may set a specific charge following detailed modelling, identifying a fair and reasonable charge requires us to identify the best proxy from within a range of charges that may be fair and reasonable. Whilst there may be a range of potential approaches, the best information we have available at this time is the model we have prepared for the purpose of setting a charge control for the period to end March 2021 in the 2017 WLA Consultation. For the reasons set out in Volume 2, Section 3 of the 2017 WLA Consultation we are proposing, for the forward-looking period of the review, to impose a three-year charge control on MPF SML1 that will glide to our forecast of BT's costs in 2019/20 and 2020/21. Our base case forecast of

Openreach's costs of providing MPF SML1 in the final year of the proposed control is £81.98,<sup>15</sup> which is somewhat lower than the prevailing charge.

- 1.22 In the 2017 WLA Consultation we are consulting on a range for the proposed MPF SML1 charge control. For present purposes we need to identify a fair and reasonable charge for the period to 1 April 2018. We propose that the most straightforward approach is to adopt the base case figures for MPF SML1 on which we are consulting in the 2017 WLA Consultation. We recognise that this model is subject to consultation and that our proposals at this stage involve a range of potential outcomes. However, given the information available, we consider that it represents an appropriate basis upon which to ensure that BT applies a fair and reasonable charge for MPF SML1 at this time.
- 1.23 We propose to apply the principles of our glidepath to work back to derive a fair and reasonable charge. Applying that approach leads to a figure of £84.38, which is our estimate of the nominal price in the first year of a two-year glidepath from BT's current price for MPF SML1 (£85.29) to our proposed charge control nominal estimate for MPF SML1 in 2019/20 (£82.28). The effect is to create a smooth three-year path from the level of current prices to our forecast of BT's costs in 2019/20. This is illustrated in the table below.

**Table 1.1: Estimates of proposed prices (£ nominal)**

	Actual Charges at 31 March 2017	Proposed fair and reasonable charge 2017/18	Proposed Charge control for 2018/2019 (Base Case)	Proposed Charge control for 2019/20 (Base Case)	Proposed Charge control for 2020/21 (Base Case)
<b>MPF SML1 Rental (annual)</b>	£85.29	£84.38	£83.50	£82.28	£81.98

## Legal tests

- 1.24 In the 2014 FAMR we found that, as a result of BT's SMP, there was a relevant risk of adverse effects arising from a price distortion; namely, that BT would have the ability and incentive to set the price of services within the WLA market, including MPF, at an excessively high level. As explained above and in Volume 1, Section 9 of the 2017 WLA Consultation, we propose to identify the same relevant risk.
- 1.25 SMP Condition 1.2(b) set in the 2014 FAMR requires BT, where a charge control condition does not apply, to provide network access on (i) fair and reasonable terms, conditions and charges; and, (ii) such terms, conditions and charges as Ofcom may direct from time to time. Pursuant to SMP Condition 1.5 set in the 2014 FAMR, BT is required to comply with directions set by Ofcom.

<sup>15</sup> Price estimate in nominal terms.

1.26 That SMP Condition was set pursuant to:

- section 87(3) of the Communications Act 2003 (the Act), which authorises Ofcom to set SMP services conditions requiring the dominant provider (here BT) to provide network access as Ofcom may from time to time direct;
- section 87(5) of the Act, which authorises Ofcom to include provision for securing the fairness and reasonableness in the way in which requests for network access are made and responded to;
- section 87(9) of the Act, which authorises the imposition of SMP services conditions imposing on the dominant provider such rules in relation to the recovery of costs and cost orientation, subject to the conditions of section 88 of the Act being met.<sup>16</sup>

1.27 In relation to the conditions in section 88 of the Act, we explained that the fair and reasonable charges obligation would:

- support the aim of improved efficiency in that it would prevent BT from charging excessively high prices;
- promote sustainable competition by ensuring that other telecoms providers can effectively compete at the retail level; and
- confer the greatest benefits to end-users of these services.<sup>17</sup>

1.28 We also took account of BT's investment in the relevant services and concluded that a fair and reasonable charges obligation would be appropriate as it takes into account BT's costs and its ability to recover common costs.<sup>18</sup>

1.29 Moreover, section 87(9)(d) authorises Ofcom to impose obligations by way of SMP services condition, to adjust prices in accordance with such directions given by Ofcom as they may consider appropriate. We propose to apply the direction making power in SMP Condition 1.2(b)(ii) to specify a fair and reasonable charge for MPF SML1 within the meaning of Condition 1.2(b)(i).

1.30 Section 49 and 49A-C of the Act, set out the procedural requirements where a condition set under section 45 has effect by reference to directions, approvals or consents (as is the case here) and Ofcom is proposing to make such a direction. We consider that making the proposed direction under SMP Condition 1.2(b)(ii) imposed in the 2014 FAMR would meet the tests set out in section 49(2) of the Act in that it is:

- objectively justifiable because we consider it is necessary to provide BT and telecoms providers with sufficient certainty as to the fair and reasonable charges that BT may apply when providing network access to MPF SML1. In the absence of the proposed direction, BT will only be subject to an obligation to provide fair and reasonable charges, which we do not consider to offers a sufficient level of certainty for such an important service;

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<sup>16</sup> See paragraph 10.76-10.78 2014 FAMR.

<sup>17</sup> See paragraph 10.82 2014 FAMR.

<sup>18</sup> See paragraph 10.83 2014 FAMR.

- not unduly discriminatory, in that the proposed direction only imposes obligations on BT, which is the party identified by Ofcom in the 2014 FAMR as having SMP in the WLA market excluding the Hull Area;
- proportionate, because the direction does no more than is required having regard to our objective of ensuring that there is legal certainty as to the fair and reasonable price that will apply for MPF SML1 rental. The proposed direction addresses only MPF SML1, which is a service used by the majority of telecoms providers that compete with BT in the provision of voice and broadband services to retail customers. We are not proposing to make a direction in relation to any other charges, including those subject to BT's voluntary pricing commitment of 2 August 2016; and
- transparent, because we have explained in this document what we are intending to achieve by proposing a direction and our reasons for doing so. Moreover, the obligation on BT is clearly set out on the face of the proposed direction.

1.31 We have also considered whether our proposal is consistent with our duties under sections 3 and 4 of the Act. We consider that our proposal to impose a direction to specify the fair and reasonable charge in relation to MPF SML1 will, in particular, further the interests of citizens and consumers in the relevant market by the promotion of competition in line with section 3 of the Act. Further, we consider that, in line with section 4 of the Act, our proposal will, in particular, promote competition in relation to the provision of electronic communications networks, further the development of superfast broadband services and encourage the provision of network access for the purpose of securing efficiency and sustainable competition in the downstream market for electronic communications networks and services.

## Representations and next steps

1.32 We invite representations on this proposal by **5 May 2017**.

1.33 Given the limited period of time before the proposed introduction of new regulation, as proposed, from 1 April 2018, and in the interests of providing legal certainty, subject to consultation responses we aim to reach a decision expeditiously.

*Consultation question: Do you agree with our proposal to impose a direction specifying the fair and reasonable charge that BT may apply for MPF SML1 rental? Please provide your reasons and any evidence in support of your views.*

## Annex 1

# Responding to this consultation

## How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 5 May 2017**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form. Please respond at <https://www.ofcom.org.uk/consultations-and-statements/category-3/mpf-rental-at-service-maintenance-level-1>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [WLA2017@ofcom.org.uk](mailto:WLA2017@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted to the address below, marked with the title of the consultation.
- WLA team  
Floor 4  
Ofcom, Competition Group  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the question asked in this document. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response please contact:
- Heli Frosterus (Market Review team) at [heli.frosterus@ofcom.org.uk](mailto:heli.frosterus@ofcom.org.uk) or on 020 7981 3404; or
  - Melanie Everitt (Charge Control team) at [melanie.everitt@ofcom.org.uk](mailto:melanie.everitt@ofcom.org.uk) or 020 7834 4340.

## Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.
- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/terms-of-use/>

## Next steps

- A1.11 Following the end of the consultation period, Ofcom will aim to reach a decision shortly thereafter.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: <http://www.ofcom.org.uk/email-updates/>

## Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Steve Gettings, Secretary to the Corporation, who is Ofcom's consultation champion:
- A1.16 Steve Gettings  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 9HA
- Tel: 020 7783 4652
- Email [Steve.Gettings@ofcom.org.uk](mailto:Steve.Gettings@ofcom.org.uk)

## Annex 2

# Ofcom's consultation principles

## Ofcom has seven principles that it follows for every public written consultation:

### Before the consultation

- A2.1 Wherever possible, we will hold informal talks with people and organisations before announcing a big consultation, to find out whether we are thinking along the right lines. If we do not have enough time to do this, we will hold an open meeting to explain our proposals, shortly after announcing the consultation.

### During the consultation

- A2.2 We will be clear about whom we are consulting, why, on what questions and for how long.
- A2.3 We will make the consultation document as short and simple as possible, with a summary of no more than two pages. We will try to make it as easy as possible for people to give us a written response. If the consultation is complicated, we may provide a short Plain English / Cymraeg Clir guide, to help smaller organisations or individuals who would not otherwise be able to spare the time to share their views.
- A2.4 We will consult for up to ten weeks, depending on the potential impact of our proposals.
- A2.5 A person within Ofcom will be in charge of making sure we follow our own guidelines and aim to reach the largest possible number of people and organisations who may be interested in the outcome of our decisions. Ofcom's Consultation Champion is the main person to contact if you have views on the way we run our consultations.
- A2.6 If we are not able to follow any of these seven principles, we will explain why.

### After the consultation

- A2.7 We think it is important that everyone who is interested in an issue can see other people's views, so we usually publish all the responses on our website as soon as we receive them. After the consultation we will make our decisions and publish a statement explaining what we are going to do, and why, showing how respondents' views helped to shape these decisions.

## Annex 3

# Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email or post you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at <http://stakeholders.ofcom.org.uk/consultations/consultation-response-coversheet/>.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

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

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

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

### DECLARATION

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

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

Name

Signed (if hard copy)

## Annex 4

# Consultation question

*Do you agree with our proposal to impose a direction specifying the fair and reasonable charge that BT may apply for MPF SML1 rental? Please provide your reasons and any evidence in support of your views.*

# Legal instrument

## Notification of a proposed direction under sections 49 and 49A of the Communications Act 2003 and SMP Services Condition 1.2(b)(ii) specifying the fair and reasonable charge for MPF at Service Maintenance Level 1

### Background

1. On 26 June 2014, OFCOM published a statement entitled “*Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30 Volume 1: Statement on the markets, market power determinations and remedies and Fixed access market reviews: wholesale local access, wholesale fixed analogue exchange lines, ISDN2 and ISDN30: Volume 2: LLU and WLR Charge Controls*” (together the “**2014 FAMR Statement**”).<sup>19</sup> Among other fixed access markets identified, the 2014 FAMR Statement identified the market for:
  - the supply of copper loop-based, cable-based and fibre-based wholesale local access at a fixed location in the United Kingdom excluding the Hull Area and determined that BT has significant market power in relation to such market.
2. As a result of that significant market power determination, in the 2014 FAMR Statement OFCOM imposed certain SMP services conditions which, together with provisions modifying and revoking certain SMP services conditions previously imposed, are contained in a notification dated 26 June 2014 (the “**2014 FAMR Notification**”) at Part I of Annex 29 to the 2014 FAMR Statement.
3. Conditions 1 and 2.1A(a) of the 2014 FAMR Notification imposed an obligation on BT to supply network access in the specific form of Metallic Path Facilities.
4. In order to address the risk of adverse effects arising from price distortion through BT fixing or maintaining its prices for Metallic Path Facilities at an excessively high level, OFCOM also imposed an SMP services condition requiring BT to comply with certain charge controls, including a control on the charge for MPF Rental in each of the financial years 2014/15, 2015/16, and 2016/17 (Condition 7A). Those charge controls cease to apply on 31 March 2017.

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<sup>19</sup> <http://stakeholders.ofcom.org.uk/telecoms/ga-scheme/specific-conditions-entitlement/market-power/fixed-access-market-reviews-2014/statement/>.

5. Condition 1.2(b) of the 2014 FAMR Notification requires BT, where a charge control condition does not apply, to provide network access on (i) fair and reasonable terms, conditions and charges; and, (ii) such terms, conditions and charges as OFCOM may direct from time to time. Pursuant to Condition 1.5 of the 2014 FAMR Notification, BT is required to comply with any direction OFCOM may make from time to time under Condition 1.
6. In the 2014 FAMR Statement, OFCOM concluded that it was necessary to set Condition 1.2(b) pursuant to sections 87(3), 87(5) and 87(9) of the Act. OFCOM explained, as required by section 88 of the Act, that the fair and reasonable charges obligation was appropriate for the purposes of promoting efficiency, sustainable competition and conferring the greatest possible benefits to end-users of public electronic communications services.
7. On today's date, OFCOM is publishing a document titled "*Wholesale Local Access Market Review Consultation*" (the "2017 WLA Consultation").<sup>20</sup> In that consultation, OFCOM sets out its provisional view that BT continues to have significant market power in the market for the supply of copper loop-based, cable-based and fibre-based wholesale local access at a fixed location in the United Kingdom (excluding the Hull Area).
8. In the 2017 WLA Consultation, OFCOM proposes a number of obligations on BT, including a requirement to provide network access in the form of Metallic Path Facilities. OFCOM also proposes a charge control on the charge for MPF Rental (provided at Service Maintenance Level 1) for the three year period starting on 1 April 2018 (covering financial years 2018/19, 2019/20, 2020/2021).

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<sup>20</sup> <https://www.OFCOM.org.uk/consultations-and-statements/category-1/wholesale-local-access-market-review/>.

### **Proposed Direction to specify a fair and reasonable charge**

9. OFCOM is proposing, in accordance with section 49 and 49A of the Act, to direct BT pursuant to Condition 1.2(b)(ii) of the 2014 FAMR Notification in the following terms:
- The fair and reasonable charge for the provision of network access to MPF SML1 is not more than the amount of £84.38.

### **OFCOM's duties and legal tests**

- 10 The effect of, and the reasons for giving, the proposed direction are set out in the consultation document accompanying this Notification.
- 11 For the reasons set out in the consultation document accompanying this Notification, OFCOM considers that the proposed direction set out in the Annex complies with the requirements of section 49(2) of the Act.
- 12 In making the proposals set out in this Notification, OFCOM has considered and acted in accordance with its general duties set out in section 3 of the Act and the duty to take account of European Commission recommendations for harmonisation in section 4A of the Act.

### **Making representations**

- 13 Representations may be made to Ofcom about any of the proposals set out in this Notification and the accompanying consultation document by no later than 5 May 2017.
- 14 Copies of this Notification and the accompanying consultation document will be sent to the Secretary of State in accordance with sections 49C(1) of the Act.

### **Interpretation**

- 15 For the purpose of interpreting this Notification (which for the avoidance of doubt includes the Annex):
- a. except in so far as the context otherwise requires, words or expressions have the meaning assigned to them in paragraph 17 below, and otherwise any word or expression has the same meaning as it has in the Act and/or the 2014 FAMR Notification (as applicable);
  - b. headings and titles shall be disregarded;
  - c. expressions cognate with those referred to in this Notification shall be construed accordingly; and

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

16 In this Notification:

- a. **“Act”** means the Communications Act 2003 (c. 21), as amended;
- b. **“BT”** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined in section 1159 of the Companies Act 2006;
- c. **“MPF SML1 Rental”** shall be construed as having the same meaning as “MPF Discounted Rental (SML1 in tariff)” as provided by the Dominant Provider on its website for definitions and explanations of its products;
- d. **“OFCOM”** means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002 (c. 11)

**Signed**

A handwritten signature in black ink, appearing to read 'Brian Potterill', enclosed in a thin black rectangular border.

**Brian Potterill**

Competition Policy Director, Ofcom

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

**31 March 2017**