

TalkTalk Group plc (“TalkTalk”)

Dispute relating to BT’s MPF Rental Charge
 (“Dispute”)

2 September 2011

NON-CONFIDENTIAL VERSION

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A. PRELIMINARY INFORMATION

1. Summary of the dispute

This Dispute is submitted by TalkTalk Group plc pursuant to sections 185ff of the Communications Act 2003 (“the Act”). It constitutes a formal request to Ofcom to exercise its powers under section 190 of the Act to resolve the dispute.

The Dispute concerns BT’s MPF rental charge for the period commencing 1 April 2011. The subject matter of the dispute is straightforward:

- For the period up to 1 April 2011 BT was subject to a charge control which (inter alia) governed the price of MPF rental (the “old control”). For the period after 1 April 2011 a charge control obligation also applied. However, Ofcom is currently working on specifying a new charge control which is expected to come into force some time later this year (“the new control”) and so no specific charge control is in force.
- The Dispute relates to the price for MPF rental in the period between the old control and the new control (“the interim period”).
- BT has set the MPF rental price for the interim period at £91.50 per annum (“extant price”).
- Ofcom has indicated that the appropriate MPF rental price (based on the best / most up-to-date information) for the interim period is £90.00 (“correct price”). In this dispute we are simply asking Ofcom to oblige BT to charge the correct price going forward (until the new control enters into force) and to repay prior overcharging above the extant price. We consider that it is incumbent on Ofcom to use the best, most up-to-date information in deciding this dispute.
- BT has SMP in the relevant market (wholesale local access) and is subject to various applicable *ex ante* regulatory obligations.
- TalkTalk has asked BT in writing to revise its price. BT has refused, despite repeated requests.
- BT’s apparent justification for its refusal to revise its price is that it had previously made a voluntary commitment to keep its prices at a particular level and that Ofcom had endorsed that commitment (in December 2010). However, Ofcom’s

comment on BT's commitment does not amount to any form of regulatory approval or acceptance of the price.

- Therefore, it is not possible for BT simply to declare itself compliant with its regulatory obligations by making voluntary commitments to price at a particular level.
- The overcharge by BT has a significant and negative financial impact on TalkTalk. It is estimated that the overcharge (with regard to TalkTalk) amounts to approximately [REDACTED] for every month as from 1 April 2011.
- Ultimately the excessively high charges for MPF rental will be to the detriment of consumers' interests. Ofcom's principal duty is to further the interests of consumers in relevant markets, where appropriate by encouraging competition.
- In the current case, both the primary duty (furthering consumers' interests) and the preferred means of achieving it (the promotion of competition) are clearly best served by requiring BT to reduce its MPF rental charge to the correct price.

Accordingly TalkTalk asks that Ofcom make a determination requiring that BT:

- (i) Reduce the price for MPF rental to a level no higher than £90 with immediate effect;
- (ii) AND, repay TalkTalk for amounts paid in excess of the correct price since:
 - a. 1 April 2011; or (in the alternative)
 - b. 3 June 2011 (being the date at which TalkTalk first asked BT to reduce its price to the correct level);Plus interest
- (iii) OR, in the alternative to (ii), repay TalkTalk for amounts overpaid representing the difference between:
 - a. The extant price and £90.70 from 1 April 2011 to 18 May 2011 and;
 - b. The extant price and £90.00 from 18 May 2011;Plus interest

For the avoidance of doubt, this is a dispute falling within section 185(1A) and (2) of the Act. For this reason Ofcom is under a duty to handle the dispute unless it falls within the "alternative means" exception in section 186(3). We do not consider that the alternative means exception can apply in this case.

2. The submitting party – basic information:

Business name	TalkTalk Group plc
Address	11 Evesham Street, London, W11 4AR
Telephone	[REDACTED]
Email	[REDACTED]
Contact handling dispute	[REDACTED]

3. About the parties and their relationship

TalkTalk is a leading provider of telephony and broadband services in the UK. Originally part of the Carphone Warehouse group, it demerged in March 2010 and is now listed separately on the London Stock Exchange.

TalkTalk serves around 4.2 million broadband customers, around [REDACTED] of which are served “on-net” (i.e. using local loop unbundling (“LLU”)) as opposed to off-net (i.e. relying on BT Wholesale’s wholesale broadband products). TalkTalk has the largest LLU-based network of any communications provider; it has enabled more BT exchanges for LLU than any other provider and therefore covers more of the country than any other provider with LLU-based services.

TalkTalk was a pioneer in the use of MPF (as opposed to SMPF) which it uses to provide both voice and broadband services. Approximately [REDACTED] of TalkTalk’s customers overall (including telephony and broadband customers) are provisioned on MPF.

At all material times the parties were signatories to BT’s LLU contract. However this dispute is not about contractual matters.

B. THE ISSUES IN DISPUTE

1. *Full statement of the scope of the dispute*

This Dispute concerns the MPF rental price. That price is the only matter in dispute. The Dispute is ultimately straightforward. BT provides MPF services under a regulatory regime specifically designed to prevent pricing which is too high. For example, this is what Ofcom said in its WLA market review statement:¹

“The ultimate goal of this review is to protect consumers’ interests by using regulation to promote competition and choice in the delivery of fixed line telecommunications services. This will help to ensure that consumers do not have to pay excessive prices for those services, and that they benefit from innovation and investment.”

And again:

“Other important remedies that support the obligation on dominant providers to provide network access to third parties are those that relate to pricing.... they can facilitate effective competition in downstream markets by limiting BT’s ability to set charges at an excessive level.”

This is the context for the Dispute. The meaning of the regulatory obligations actually imposed is dealt with below.²

On 1 December 2010 Ofcom published an update on its website about the prices in this local access market.³ The update said that BT had offered voluntary commitments about price ‘ceilings’ which it would apply during the interim period between the expiry of the old charge control and the commencement of the new control (or, if earlier, 1 April 2012). On the basis of that commitment Ofcom said this:

*“Ofcom currently does not intend to impose a charge control [in the interim period].” [emphasis added]*⁴

¹ 7 October 2010, in which BT was found to have SMP in the relevant market.

² Note that it is no part of our submission that BT’s prices constitute an excessive pricing abuse under competition law. We are not alleging that, and we are not asking Ofcom to investigate or comment on it.

³ The update can be found here:
<http://stakeholders.ofcom.org.uk/binaries/consultations/openreachframework/statement/charges>.

⁴ It is on this exchange that BT relies in defending its current position and we deal with this further below.

“We have indicated to Openreach that we consider that setting the charges on the basis indicated is a reasonable approach,”⁵

These prices were based on what was, at that time, the best current view of costs and of the appropriate price in 2011/12. Ofcom said:

“These charge ceilings were calculated using the financial modelling set out in our statement A new pricing framework for Openreach of 22 May 2009 (which forecasts costs to 2013/14) with the outputs of the model adjusted to reflect the conclusions of the Competition Commission in their Determinations on the appeals of the current controls.”

Following Ofcom’s statement, BT quickly announced the new prices to apply from 1 April 2011⁶, which included the extant price for MPF rental.

On 31 March 2011 Ofcom published a consultation (“March Consultation”) about charge controls for charges including MPF rental for the period 2011/12 to 2013/14. At that time Ofcom’s ‘base case’ view was that the appropriate level for MPF rental price in 2011/12 should be £90.70 (for instance, see Figure 1.1 on page 2 of the consultation document). This was 80p less than the ceiling which BT had previously offered.

Ofcom later changed its base case view: on 18 May 2011 (“May Update”) Ofcom concluded (following the correction of an error) that the appropriate price was in fact £90.00. It issued a revised version of the March Consultation and an update note. In effect, had Ofcom imposed a charge control for the interim period, it would have set the charge at £90.00.

We would make the following points in this sequence of events:

- BT volunteered a price ceiling rather than a fixed price.
- Ofcom commented on a price ceiling in December 2010. At that time the ceiling (£91.50) was at a level that seemed appropriate since it was based on the then best available evidence. However the March Consultation and the May update make it clear that the figure of £91.50 is considerably in excess of an appropriate figure since better information is available.
- There is nothing in the voluntary commitments offered by BT that bind anyone. They do not bind BT; they do not get BT out of its other obligations; and they most certainly do not bind Ofcom. Further, Ofcom cannot fetter its discretion

⁵ Charge control review for LLU and WLR services (31 March 2011) para 1.16.

⁶ ACCN OR 217, 9 December 2010: <http://bit.ly/riPrdG>.

about what a fair and reasonable price might be and so BT should not have placed any definitive reliance on Ofcom's comments at the time. Ofcom recognised that situation by referring in December 2010 only to its then current intention not to impose a charge control in the interim period. Any other approach would be an illegal fettering of discretion.

- There is ample room for manoeuvre in the voluntary arrangements for the price to be reset at the correct level since BT's voluntary commitment was a ceiling and also because BT's voluntary commitment had no binding effect. It is deeply regrettable that BT has chosen (for reasons, presumably, of self-interest) not to do so.
- In its March Consultation Ofcom did not seek to address the disparity between the extant price and its view (then) of the correct price.
- The only outcome of the current position is excessive returns for BT. Consumers' interests will suffer.

It is part of our case that Ofcom should also order BT to repay amounts overpaid since the extant charge came into effect. We consider this entirely justified in the circumstances and supported by the various precedents. There are five salient features in the current case which justify this approach:

- BT themselves (not Ofcom) decided the price which BT intended to charge;
- BT must have been aware of the possibility of change and even BT apparently described it as a "ceiling" – i.e. a maximum which they intended to charge;
- The March Consultation made it very clear that the extant charge was set at the wrong level;
- Ofcom's comments in December 2010 on the extant charge gave no guarantees to BT but merely indicated that (at that time) they were not minded to impose a charge control;
- The voluntary commitments offered by BT were not binding on Ofcom (or any other party) in any event.

Accordingly a determination requiring repayment is entirely justified in the current case.

2. *The action / conduct leading to the dispute*

This is as set out above. The relevant documents are as set out in section C.3 below.

C. HISTORY OF COMMERCIAL NEGOTIATIONS

1. *History of Negotiations*

The history of this matter is brief and clear – it is as set out in section B above.

Evidence of negotiations between TalkTalk and BT is set out in paragraph 3 below. We would be happy to provide any further information required by Ofcom.

2. *Explanation of why a commercial agreement could not be reached*

The Parties' views appeared to be diametrically opposed. It appears that BT are unwilling to compromise since, we presume, they consider it not in their interests to do so. However, despite our long experience of this kind of discussion, we have been surprised by their intransigence in this case.

3. *Documentary evidence of commercial negotiations*

The relevant documents are:

[REDACTED]

These letters speak for themselves but there can be no doubt that BT will not soften its position. In document (iv) above, **[REDACTED]** made this quite clear when he said the following:

"Just to confirm that we will not be reducing the interim prices for MPF."

Accordingly there can be no doubt that the parties are genuinely in dispute and there is no prospect of agreement.

D. RELEVANT LEGAL AND REGULATORY FRAMEWORK

1. Statutory Duties

The relevant statutory duties are as set out in the Act. In this case Ofcom's principal duty is clearly engaged. That duty is as follows (from section 3 of the Act):

"(1) It shall be the principal duty of OFCOM, in carrying out their functions—
(a) to further the interests of citizens in relation to communications matters; and
(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition."

The duty contained in section 3(1)(b) is directly relevant.

Consumers' interests are best met through prices that are cost-reflective (as is the case when charges are capped through a charge control). If prices are set above the appropriate level then consumers' interests suffer through one of two effects:

- CPs pass the high charges through to consumers in the form of increased retail prices; and/or,
- CPs absorb the additional costs thereby weakening efficient competition.⁷

Either way, prices which are too high will act against consumers' interests.

This being the case, Ofcom's other duties are perhaps of comparatively lesser importance but it is worth considering the following:

- As Ofcom is exercising a community function, the duties in section 4 are engaged. The decision we seek would meet the community requirement for the promotion of competition by protecting competitors from overcharging by BT and allowing them to compete more vigorously in downstream markets.
- Ofcom should also have regard to the matters in section 3(4) and in this case the "the desirability of promoting competition in relevant markets" is particularly relevant.

⁷ This would be the case where CPs (collectively) that use the relevant wholesale product are price-takers as against price-setters. This would, for instance, occur in the case where only a small proportion of retail providers depend on the wholesale product. This is the case here since only about 25% of the total retail voice and broadband markets rely on MPF and therefore increases in MPF prices cannot and will not be fully passed through to customers. Notably extant WLR prices (£103.68) are not above the appropriate price (£103.70)

In each case related to competition and its promotion, it is relevant that TalkTalk is one of BT's major competitors in relevant downstream markets.

2. SMP Rules

BT is subject to SMP in the relevant market (which is the wholesale local access market) by virtue of Ofcom's statement of 7 October 2010. This statement includes a notification setting SMP Conditions.

It has been Ofcom's practice to apply a charge control to products in this market for some time. In the most recent WLA Market Review (2010) a charge control remedy was maintained on products in this market (para 5.96).

During the interim period though, there is no specific charge control in force. This is not due to Ofcom considering that a charge control is inappropriate but rather that due to administrative and timing difficulties Ofcom has not been able to complete a new charge control before the expiry of the old one. In such a lacuna the best approach is clearly to apply the price which would apply if the correct charge control were in place. Indeed, this approach was arguably implicit in BT's calculation of the price and Ofcom's 'acceptance' of BT's voluntary commitment in the first place.

Some of the other relevant obligations (provision of network access and general basis of charge obligation) are set out here for ease of reference:

***“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.*

***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.”

TalkTalk’s view is that the fair and reasonable charges obligation in Condition FAA1.2 provides ample support for a finding in its favour in this case. Ofcom’s announcement that £90.00 is at the appropriate MPF price ceiling for 2011/12 is determinative for the outcome of this dispute. In the absence of a charge control, this price must be the sole guide as to what a fair and reasonable price would be in these circumstances.⁸ There is no reason to deviate from this conclusion.⁹

We do not consider it necessary to analyse the detailed reasoning behind the £90.00 figure. It suffices to say that the figure of £90.00 is Ofcom’s best current view of the appropriate price and there is no realistic reason why it should not apply now. It is worth considering one aspect of the current consultation – cost of capital. It is relevant for two reasons: (i) the cost item forms a distinct part of the BT cost stack and any changes to the size of the cost item will directly impact the price; and (ii) Ofcom reduced the cost of capital figure leading to a reduction in the estimated MPF price.

BT is quite rightly entitled to a reasonable return on capital. The previous charge control model set in May 2009 (which was used to derive the price of £91.50) assumed a cost of capital of 10.1%. Ofcom’s updated models (published March/May 2011) assumed that the (mid-case) cost of capital is 8.6%. This change in assumption alone would result in a reduction of about £4.50 in the MPF rental cost.¹⁰ Ofcom have recently reiterated their view that the cost of capital should be much lower in the WBA

⁸ For the avoidance of doubt, TalkTalk considers there are good arguments for an even lower price but is not advancing them for the purposes of this dispute.

⁹ The relevant direct obligation (FAA4) is difficult to apply for technical accounting reasons. However the principle that this price ought to be cost-reflective is not seriously questioned by anyone. In this case, since it is difficult to apply a LRIC-based standard, the correct standard (indeed the only reasonably practicable standard) is RAV-adjusted FAC. Further (and alternatively), Ofcom should require BT to prove that its prices are cost-based as mandated by Article 13 of the Access Directive.

¹⁰ The ROCE (using a 10.1% cost of capital) is about £30.

charge control where it set a cost of capital of 8.8% for Openreach and Ofcom has said that it expects (under certain conditions) to use this same figure in the LLU/WLR charge control.

It would be, in our submission, unreasonable to allow BT to set an MPF price that is based on an outdated estimate of the appropriate cost of capital (from May 2009) especially since a clearly preferable estimate is now available. This approach of updating to reflect latest / best available evidence is consistent with the approach taken in setting the voluntary commitment in December 2010 whereby it was considered 'reasonable' to update the May 2009 model to reflect decisions made by the Competition Commission in the LLU Appeal.

Given that BT remains subject to a fair and reasonableness SMP obligation, TalkTalk believes that the assessment of whether BT's charges are indeed fair and reasonable must necessarily be based on a cost-reflective approach.¹¹ The best available evidence and only plausible estimate of what such a cost-reflective approach can reasonably be found in Ofcom's statements and models of the appropriate charge control for MPF rental.

It would be wrong directly to equate the concept of prices being "cost-reflective" with the concept of prices being "cost-oriented". Although neither is necessarily a defined term of art, the latter would normally refer to a specific SMP obligation which specifies that prices should be reasonably derived from the costs of provision based on a forward looking long run incremental cost approach etc. Even when a cost-orientation obligation does not apply, the CAT concluded in the Blended Rates case that whether prices were cost-reflective (i.e. whether the prices can be related to the underlying cost of provisioning or whether price increase can be justified with reference to an increase in the underlying cost of provisioning) is an important factor in determining whether the prices are fair and reasonable. In this dispute, TalkTalk believes that the question whether BT's MPF price is cost-reflective is highly relevant and must in fact be determined with reference to Ofcom's pronouncements around what the price would have been if Openreach had been subject to a specific charge controls.

¹¹ The comments of the Tribunal (See section 3. Below) in Blended Rates make it clear that a consideration of cost should be a starting point. In a case such as this, though, where the dispute relates to a lacuna between price controls, it should also be the end point.

For the avoidance of doubt, TalkTalk does not believe there are any other interests that Ofcom would need to take into account in resolving this dispute. As noted above, BT has given a voluntary commitment to charge a certain price but it cannot argue that this price in any way has been endorsed or ratified by Ofcom for the simple reason that it was not and is not within Ofcom's powers to do so (that is Ofcom cannot fetter its discretion in such a way).

3. *Precedents etc*

In this section we look at cases which have dealt with similar questions to those in dispute here. As far as we are aware there is no exact analogy to this dispute (i.e. the appropriate price where a charge control remedy applies but in a lacuna between specified charge controls and where Ofcom has clearly provided its view on the appropriate charge). However, there are other disputes and appeals that do provide some relevant precedents in relation to key parts of this case. In particular:

- Ofcom clearly have the power to resolve this dispute;
- Ofcom must **at least** have regard to costs in resolving the dispute;
- Ofcom should rely on the best and most recent available information to resolve the dispute; and
- Ofcom have the power to, and should, award repayment of a prior overcharge.

The scope of Ofcom's powers in the dispute process

Ofcom clearly has the power to set a wide range of charges through the dispute process. It has recently applied this power in the SLU dispute¹² where (paras 4.57ff) it declined to follow BT's narrow view of its powers. Similarly it effectively set charges in the PPC Trunk dispute decision (where its use of those powers was supported on appeal to the Competition Appeal Tribunal).

¹² Determination to resolve a dispute between DRL/Thales and BT relating to Sub Loop Unbundling charges (15 July 2011).

Ofcom should use the best available information

It is clearly incumbent on Ofcom to decide this dispute on the basis of the best information currently available, rather than just applying the approach set out by BT and noted by Ofcom in December 2010. Such an approach is mandated by the Competition Appeal Tribunal which, in the Blended Rates ruling,¹³ said this:

“Section 393(2)(a) of the 2003 Act permits OFCOM to use material gathered for one regulatory purpose to facilitate its carrying out of any of its other functions. In carrying out its dispute resolution task OFCOM is entitled to and should make use of information in its possession which appears relevant, including information gathered in the course of its other regulatory activities. This is subject to allowing the parties to comment on the accuracy and relevance of that information. The Tribunal has already found that OFCOM erred in ruling out reliance on costs information gathered in the course of the SMP market review. ” [emphases added]

The situation in Blended Rates was effectively analogous with the situation in this Dispute: Ofcom should use the best, most recent information, including that on cost of capital, in deciding this dispute. In practice this means it must use the information in the March Consultation as well as the WBA charge control statement in July 2011.

In Blended Rates, the Tribunal said that Ofcom should always look at costs in deciding pricing disputes:

“Even if the submissions made by the parties do not focus on costs issues, the Tribunal would expect OFCOM at least to consider whether an analysis, however broad brush, of the relationship of prices to costs is necessary.”

Of course, in this case our submission is focussed on cost issues. *A fortiori*, therefore, Ofcom should consider the question. The approach was noted and approved by the Tribunal in its recent judgment on the 080 case¹⁴ in which it was also noted that:

“OFCOM should also have regard to the consistency of price and cost trends in all cases.”

Furthermore, in Blended Rates – unlike in the current case – 3G termination was not subject to ex ante rules at all.¹⁵ The fact that MPF pricing is subject to stronger ex ante

¹³ British Telecommunications plc v Office of Communications (Termination Rate Disputes), [2008] CAT 12.

¹⁴ BT and others v Ofcom, [2011] CAT 24.

rules than the 3G element in the Blended Rates suggests that a cost-reflective outcome to this dispute is even more appropriate.

The overall effect of this is:

- Ofcom must consider costs in all cases.¹⁶
- In this case – in which there is no dispute that a cost-reflective approach is appropriate – the precedents suggest that that Ofcom is effectively under a duty to apply cost-reflective pricing.

Repayment of amounts overcharged

In relation to overcharging: the overcharging in the current case has close similarities with the PPC Trunk ruling.¹⁷ The Tribunal said in the appeal on that case:

“It is plain that the Altnets have overpaid in respect of [the services concerned], and that BT has had the benefit of such overpayments. Repayment is simply putting the parties in the position they would have been in had [the relevant rules] been complied with. Failure to do so would undoubtedly signal that compliance with SMP conditions is not rigorously policed and that – we consider – is an inappropriate signal to send.”¹⁸

This clearly applies, *mutatis mutandis*, to the current case.

As with the PPC Trunk case, it is clear that in the current case that there is no need for Ofcom to show “economic harm” or other economic effects for it to order repayment of amounts overpaid¹⁹. In practice, though, prices which are too high will almost inevitably lead to consumer detriment as discussed in section D.1 above. In particular, the CAT found as follows in the PPC Trunk ruling:

“Plainly, if, according to Condition H3.1 properly applied, there has been overcharging, then the Altnets will have suffered economic harm (and BT will have had a corresponding economic benefit). The likelihood is that the increased costs

¹⁵ In its Statement of 1 June 2004, Wholesale Mobile Voice Termination, Ofcom concluded that there should be no ex-ante regulation of 3G voice call termination services.

¹⁶ Which of course is not the same thing as saying that Ofcom must always adopt a cost-reflective approach.

¹⁷ British Telecommunications Plc v Office of Communications (Partial Private Circuits), [2011] CAT 5.

¹⁸ As above, at para 338.

¹⁹ As above, at para 338(4).

borne by the Altnets (in the form of unduly high charges for 2 Mbit/s trunk segments) will (in some way) be passed on to the Altnets' retail customers.”²⁰

This paragraph applies directly (*mutatis mutandis*) for the present case:

“Plainly, if, according to [the relevant SMP conditions and Ofcom’s view of the correct price] properly applied, there has been overcharging, then [TalkTalk] will have suffered economic harm (and BT will have had a corresponding economic benefit). The likelihood is that the increased costs borne by [TalkTalk]... will (in some way) be passed on to the [its] retail customers.”

In relation to repayment, it is worth noting that this current case is very clearly distinguished from the recent dispute regarding repayment of LLU charges where charges were historically set above the appropriate level determined in following a Competition Commission ruling²¹. In that case, BT had complied with a charge control that was set by Ofcom (by means of a detailed *ex ante* ruling) and the charge control was legally binding. In that dispute determination, Ofcom decided not to award repayment to TTG (even though TTG absorbed the excessively high charge) since Ofcom felt the need for regulatory certainty was more important (see para 3.57).

However, in contrast in this case BT are merely complying with a price which BT themselves decided to charge, and is not legally binding. Further, Ofcom cannot fetter its discretion about what a fair and reasonable price might be and so BT should not have placed any definitive reliance on Ofcom’s comments at the time.

For these reasons Ofcom cannot legitimately rely on the need for regulatory certainty as a reason not to award repayment. If regulatory certainty was relied upon then it would be tantamount to claiming that where a charge control did not apply, BT could set any price it wished and Ofcom could never award repayment since to do so would result in uncertainty for BT. Clearly such a construct would render sterile non-charge control regulatory obligations that pertain to the level of price.

In any event the principle of regulatory certainty cannot possibly stand in successful opposition to Ofcom’s primary duties. In fact, there is a good argument in the current case that the principle of regulatory certainty supports TalkTalk’s case because companies buying from BT are entitled to certainty that the rules will be properly enforced.

²⁰ As above, at para 332.

²¹ TalkTalk / BSKyB v Openreach: CW/01066/01/10.

In summary, the relevant law and precedents clearly support a decision in TalkTalk's favour in this dispute.

E. PROPOSED REMEDY

TalkTalk is asking that Ofcom exercise its power in section 190 of the Act to give a determination mandating the following:

That BT must:

- (i) Reduce its price for MPF rental to a level no higher than £90 with immediate effect; and
- (ii) Repay TalkTalk for amounts paid in excess of the correct price since:
 - a. 1 April 2011; or (in the alternative)
 - b. 3 June 2011 (being the date at which TalkTalk first asked BT to reduce its price to the correct level);Plus interest
- (iii) Or, in the alternative to (ii), repay TalkTalk for amounts overpaid representing the difference between:
 - a. The extant price and £90.70 from 1 April to 18 May and;
 - b. The extant price and £90 from 18 May,Plus interest

F. SUPPORTING EVIDENCE

The relevant documents are those referred to in section D.2 above.

Other relevant documents include Ofcom's own publications on this matter. We have not considered it necessary to provide a copy of these.

Many of the document types normally sought by Ofcom in disputes are not relevant to this case for reasons we explain here:

- *copies of the relevant contract*: this is not a contractual dispute.
- *business plans relating to the relevant product or service*: not relevant to this case.
- *all relevant documentary evidence of commercial negotiations*: see section C above. Relevant documents are provided along with this submission.
- *relevant details about the provision of the product or service in question*.
- *a full chronology of all the relevant facts*: this is as set out in B1 above.
- *detailed and specific cost/price information for the provision of the relevant product or service, as well as cost/price trends (where available). In all cases, costs/price information and data must, in view of the strict statutory timetable for resolving disputes, be presented in a usable format, including, where relevant, a fully executable model*: TalkTalk relies on Ofcom's own modelling.
- *full and complete benchmarking data. This could be on an international, industry or other basis. In the alternative, explain why no such data is available or relevant*: n/a.
- *all relevant previous decisions, determinations, rulings by courts/tribunals, guidance, opinions/recommendations and policy statements at the UK or EC level*: see above.

G. OTHER MATTERS

This section deals with issues not covered elsewhere in this submission.

1. Confidentiality and fairness

We have given careful thought to the issue of confidentiality in the submission. We are content for the dispute to be shared with BT. To be clear: it is our submission that for requirements of fairness and transparency to be met, we must enjoy full insight into any submissions made by BT and, if Ofcom is to rely on them, we must have had the chance to comment on them.

2. Timing

Although the issues raised in this dispute are important and potentially of wide application, the issues of principle are not in themselves particularly complex. Indeed, we have taken pains to keep the issues as simple as possible. Accordingly, we do not see any reason why the dispute could not be dealt with in the statutory four-month time period.

3. Privilege

We have taken pains to be full and frank in our approach to disclosure of facts and documents. It is just possible that, in taking that approach, we have inadvertently accompanied this dispute with a document which is subject to legal privilege. For the avoidance of doubt, if that is the case, it should not be taken as any wider waiver of privilege.

4. Copyright

The submission is a copyright work and the rights in it are owned by TalkTalk and/or our external legal counsel. We (and our external counsel) are, naturally, content for Ofcom to use the whole document for the purposes of deciding the dispute. That apart, all rights are reserved.

5. No waiver of rights

As we have said above, we have kept the arguments in this dispute as tightly defined as possible. However, we wish to make it clear that we are not giving up any other rights we may have. References to Ofcom decisions or publications should not be taken as indicating that TalkTalk accepts their conclusions or as an endorsement of them for any other purpose.

6. Interest

Interest should be applied to any repaid sums at the Oftel rate (LIBOR plus 3/8%) until the date of payment as required by the RANF (paragraph 11).

H. DECLARATION

Before making this submission to Ofcom, to the best of my knowledge and belief, TalkTalk has used its best endeavours to resolve this dispute through commercial negotiation.

Signed: _____

[REDACTED]

Position in the company: [REDACTED]

Date: 2 September 2011

ANNEX

[REDACTED]