



Dispute between TalkTalk Group and Openreach relating to the MPF rental charge

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Determination

Issue date: 23 January 2012

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Section 1

Executive Summary

- 1.1 This statement and determination (the “Determination”) sets out our resolution to the dispute brought by TTG against Openreach (collectively the “Parties”), relating to the price set by Openreach for its wholesale MPF rental from 1 April 2011 (the “Dispute”). Please refer to the Glossary in Annex 2 for defined terms.
- 1.2 MPFs (metallic path facilities) are BT’s copper lines between the local telephone exchanges and the customer premises. These can be rented by other communications providers to connect to their own networks and provide broadband and voice services to end users.
- 1.3 In 2010, Ofcom reviewed the market for wholesale local access (“WLA”) and concluded that BT has SMP in the WLA market in the UK excluding the Hull Area (the “2010 WLA statement”). In the 2010 WLA statement Ofcom imposed a number of SMP Conditions on BT, including a requirement to provide network access on fair and reasonable terms (SMP Condition FAA1)¹ and a cost orientation obligation (SMP Condition FAA4)².³ At the same time, Ofcom also concluded that a charge control should be imposed and explained that it would consult further on the terms of that charge control.
- 1.4 The most recent charge control, set in May 2009, ceased to have effect from 1 April 2011. In December 2010 Openreach made a voluntary commitment that from 1 April 2011 until 31 March 2012 (or until the next Ofcom charge control starts, whichever is sooner) it would charge no more than £91.50 for MPF rental (the “Openreach MPF rental price”).⁴ The £91.50 Openreach MPF rental price is at a midpoint between the MPF rental price for 2010/11 and the forecasted 2012/13 costs for MPF determined in the previous charge control.⁵ Ofcom’s stated view at the time was that Openreach’s approach to setting the Openreach MPF rental price was “*a reasonable approach to take*”.⁶

¹ SMP Condition FAA1.2 (Requirement to provide Network Access on reasonable request) requires that network access “*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*” (2010 WLA statement).

² SMP Condition FAA4 (Basis of charges) requires that BT “*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 [...] 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*” (2010 WLA statement).

³ Ofcom had previously reviewed the WLA market in 2004 and concluded that BT has SMP in the WLA market in the UK excluding the Hull Area. Ofcom imposed a number of SMP Conditions on BT, including a requirement to provide network access on fair and reasonable terms and a cost orientation obligation. The 2004 WLA statement also concluded that a charge control should be imposed. Following various related consultations and regulatory statements in May 2009, Ofcom imposed a charge control SMP Condition on BT which set a price ceiling for MPF rental on a forward look basis. The price set for the period from 15 October 2010 to 31 March 2011 was £89.10.

⁴ Letter from M Shurmer (Openreach) to S McIntosh (Ofcom) dated 24 Nov 2010.

⁵ See the 2009 statement, adjusted to reflect the conclusions of the CC in their determinations on the appeals of that statement.

⁶ See update on Ofcom’s website of 1 December 2010:

<http://stakeholders.ofcom.org.uk/binaries/consultations/openreachframework/statement/charges>.

- 1.5 Ofcom has consulted on proposals for a next charge control. The March 2011 Consultation included proposals on the range for the MPF rental charge to run until 31 March 2014. The proposals set out a range for MPF rental of £89.40 to £92.00, with a base case of £90.70. On 18 May 2011, we published a revised version of the March 2011 Consultation and the underlying models to correct for a number of errors in the original consultation. The corrected proposals set out a range for MPF rental of £88.70 to £91.30, with a base case corrected downwards from £90.70 to £90.00.
- 1.6 We reconsulted on the proposals for the MPF rental charge in the November 2011 Consultation, which revised the consultation proposal to reflect our understanding of RPI and a restatement of the costs stacks in light of the previously incorrect attribution of £100 million of Information Systems projected expenditure. We expect to publish our conclusions on the LLU and WLR charge controls in the first quarter of 2012 and intend to impose an SMP Condition setting a charge control on a forward look basis from 1 April 2012.
- 1.7 While a charge control is not currently in place, Openreach's charge for MPF rental is still subject to SMP Conditions FAA1 and FAA4.
- 1.8 In TTG's Submission, TTG argued that Openreach's MPF rental price should be no more than £90.00, based on the "base case" figure in the March 2011 Consultation. In its response to our Provisional Determination, TTG revised this figure to "*about £88.70*"⁷ based on its assessment of the information published in the November 2011 Consultation. TTG also suggested that Ofcom could require the Openreach MPF rental price to be set at £88.70 going forward.
- 1.9 In effect, TTG is asking us retrospectively to set the Openreach MPF rental price for the period between 1 April 2011 and 31 March 2012 on the basis of our forward looking assessment relating to the charge control which is to apply from 1 April 2012. TTG argues that we should do this on the basis that the Openreach MPF rental price is not compliant with SMP Condition FAA1 (fair and reasonable) or SMP Condition FAA4 (cost orientation). TTG also requests that we exercise our discretion to require repayments for overpayments made.

Conclusions

- 1.10 Having carefully considered the responses to the Provisional Determination and based on the assessment set out in this Determination, we have concluded that the Openreach MPF rental price is compliant with Openreach's relevant regulatory obligations, namely SMP Condition FAA1 and SMP Condition FAA4.
- 1.11 On this basis, we do not consider that TTG has made any overpayments for the MPF rental service in the relevant period. Accordingly, we have decided not to exercise our discretion under section 190(2)(d) of the 2003 Act to require payments to be made by way of an adjustment in order to give effect to our Determination. As a result, we are not requiring Openreach to make any payments to TTG.
- 1.12 In reaching our conclusions we were guided by our duties and Community obligations under sections 3 and 4 of the 2003 Act. We consider that our Determination is consistent with those duties.
- 1.13 Our Determination for resolving this Dispute is at **Annex 1**.

⁷ Footnote 3 to Page 2 of TTG's response.

Section 2

The Dispute

Dispute resolution

- 2.1 On 5 September 2011 TTG referred a dispute to us, asking us to determine that BT is required to:
 - 2.1.1 Reduce its charge for MPF rental to no higher than £90.00 with immediate effect; and
 - 2.1.2 Make repayments to TTG for amounts paid in excess of the reduced charge, plus interest.

Reference of disputes to Ofcom

- 2.2 Section 185(1A) of the 2003 Act provides that any party to a dispute may refer it to Ofcom where:
 - 2.2.1 It is a dispute relating to the provision of network access between a CP and a person who is identified or is a member of a class identified, in a condition imposed on the CP under section 45 of the 2003 Act; and
 - 2.2.2 The dispute relates to entitlements to network access that the CP is required to provide to that person by or under that condition.

Action by Ofcom on a dispute reference

- 2.3 Section 186 of the 2003 Act provides that where a dispute is referred to Ofcom in accordance with section 185 of the 2003 Act, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) of the 2003 Act further provides that, in relation to a dispute falling within section 185(1A) of the 2003 Act, Ofcom must decide that it is appropriate for it to handle a dispute unless:
 - 2.3.1 There are alternative means available for resolving the dispute;
 - 2.3.2 A resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the 2003 Act; and
 - 2.3.3 A prompt and satisfactory resolution of the dispute is likely if those alternative means are used for resolving it.

Ofcom's powers when determining a dispute

- 2.4 Ofcom's powers in relation to making a dispute determination are limited to those set out in section 190 of the 2003 Act. Ofcom's main power is to do one or more of the following:⁸
 - 2.4.1 Make a declaration setting out the rights and obligations of the parties to the dispute;

⁸ Except in relation to a dispute relating to the management of the radio spectrum.

- 2.4.2 Give a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - 2.4.3 Give a direction imposing an obligation to enter into a transaction between the parties to the dispute on the terms and conditions fixed by Ofcom; and
 - 2.4.4 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.
- 2.5 Ofcom may also exercise certain other powers in consequence of its consideration of a dispute, including its powers under Chapter 1 of the 2003 Act to, *inter alia*, set, modify or revoke general conditions or SMP Conditions.
- 2.6 A determination made by Ofcom to resolve a dispute binds all the parties to that dispute.

Ofcom's duties when determining a dispute

- 2.7 The dispute resolution provisions set out in sections 185-191 of the 2003 Act are functions of Ofcom. 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, *inter alia*, to the requirements of Article 8 of the Framework Directive.⁹

Ofcom's process for determining disputes

- 2.8 In light of the four-month time period within which Ofcom must determine how to resolve disputes (except where there are exceptional circumstances),¹⁰ the Dispute Resolution Guidelines set out the evidence that we require before we will accept a dispute. In particular, these guidelines set out the information that a complainant is required to provide when submitting a dispute, including details of any relevant *ex ante* SMP Conditions, a clear statement of the scope of the matters in dispute, details of the preferred remedy (with reasons), evidence of commercial negotiations and a statement of an officer of the company that best endeavours have been used to resolve that dispute through commercial negotiation, before bringing it to Ofcom. The purpose of the Dispute Resolution Guidelines is to aid both Ofcom and the parties to a dispute to manage the dispute resolution process effectively.
- 2.9 We determine disputes on the evidence available to us.

TTG's Submission

- 2.10 As set out above in section 1, TTG argued in its Submission that Openreach's MPF rental price should be no more than £90.00, based on the "base case" figure in the March 2011 Consultation. In its response to our Provisional Determination, TTG revised this figure to "*about £88.70*"¹¹ based on its assessment of the information published in the November 2011 Consultation. TTG also suggested that Ofcom could require the Openreach MPF rental price to be set at £88.70 going forward. TTG also

⁹Directive 2002/21/EC of 7 March 2002.

¹⁰ Section 188 of the 2003 Act.

¹¹ Footnote 3 to Page 2 of TTG's response.

requests that we exercise our discretion to require repayments for overpayments made.

- 2.11 In TTG's dispute Submission, TTG argued that as Openreach's voluntary commitment is not binding, Ofcom's view of it in December 2010 does not amount to regulatory approval, and that in an interim period between an old and new charge controls "*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*".¹² TTG suggested 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*".¹³
- 2.12 TTG considered that the fair and reasonable charges obligation in SMP Condition FAA1 "*provides ample support for a finding in [TTG's] favour*".¹⁴ TTG suggests that in the absence of a charge control, the £90.00 level in the March 2011 Consultation "*must be the sole guide as to what a fair and reasonable price would be*".¹⁵
- 2.13 Whilst TTG also notes that SMP Condition FAA4 is relevant, it adds that a LRIC-based standard "*is difficult to apply*" and suggests that the correct standard to apply should be RAV-adjusted FAC.¹⁶

Comments from Openreach's on TTG's submission

- 2.14 We provided a copy of TTG's Submission to Openreach on 6 September 2011. In response, Openreach's comments included the following observations:
- 2.14.1 In Openreach's view, it is not necessary or appropriate for Ofcom to accept the dispute for resolution, as Openreach provided advance notice of its proposals on 9 December 2010 and TTG did not challenge these during the notification period that ran to 31 March 2011;¹⁷
- 2.14.2 Ofcom's view on Openreach's approach to setting its MPF rental price was that it was "*a reasonable approach to take*";¹⁸
- 2.14.3 The MPF rental price of £91.50 is below the DSAC ceiling published in BT's RFS, and therefore Openreach believes the £91.50 level to be consistent with regulatory obligations;¹⁹
- 2.14.4 Openreach does not consider Ofcom's proposal in the March 2011 Consultation to be binding on it or Ofcom, with the future charge control level for MPF rental being dependent on Ofcom reaching its conclusion following consultation;
- 2.14.5 Negotiations between TTG and Openreach can only be considered to have broken down from 28 June 2011. As Openreach is required to provide 90

¹² Page 11 of TTG's Submission.

¹³ Page 12 of TTG's Submission.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ FAC refers to Fully Allocated Costs. The 'RAV-adjustment' refers to an adjustment to the regulatory asset valuation of pre-1997 assets to historic cost accounting.

¹⁷ Page 2, Openreach's comments.

¹⁸ *Ibid.*

¹⁹ Page 3, Openreach's comments.

days' notice of changes to charges, Openreach could not, in any event, have implemented a revised charge before 28 September 2011.²⁰

- 2.14.6 Openreach also requested that should Ofcom accept the dispute for resolution, Ofcom should consider the counter-factual situation where the relevant price was below the level set out in the March 2011 Consultation and the implications of this if there was another dispute about price-capped services (e.g. MPF New Provides), where the outcome of which was to require purchasers to make retrospective repayments to Openreach.²¹

Accepting the Dispute for resolution

- 2.15 Having considered TTG's Submission and subsequent comments made by both Parties, we were satisfied that the Dispute is a dispute between CPs within the meaning of s185(1A) of the 2003 Act. This is because the Dispute concerns the terms on which Openreach is prepared to provide network access to other CPs, where the network access is required to be provided by or under a condition imposed under section 45 of the 2003 Act.
- 2.16 On 23 September 2011 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 of the Dispute

- 2.17 On 27 September 2011 we published details of the Dispute, including the scope, on the Competition and Consumer Enforcement Bulletin part of our website:

"The scope of the dispute is to determine:

(i) whether BTs charge of £91.50 for MPF rental is compliant with the regulatory obligations to which BT is subject, including:

- *Condition FAA1 (Requirement to provide Network Access on reasonable request); and*
- *Condition FAA4 (Basis of charges)*

and (ii) whether a payment of sums by way of adjustment of an underpayment or overpayment should be required".²²

- 2.18 Openreach's charge for MPF rental is also subject to the requirements of SMP Condition FAA9 (Requirement to provide LLU services), however SMP Condition FAA1 and FAA9 place the same requirements on the Openreach MPF rental price. Accordingly, we have not considered FAA9 further.
- 2.19 Ofcom received no comments, objections or challenges from the Parties nor any third party on the scope as published on 27 September 2011.

²⁰ Page 4, Openreach's comments.

²¹ Page 4, Openreach's comments.

²² CCEB entry at: http://stakeholders.ofcom.org.uk/enforcement/competition-bulletins/open-cases/all-open-cases/cw_01075/.

Interested parties

- 2.20 Three stakeholders, Sky, O2 and EE expressed an interest in the outcome of this Dispute. EE provided a written submission arguing that Ofcom should determine that the Openreach MPF rental price is compliant with BT's relevant regulatory obligations.²³

Ofcom's provisional assessment of the matters in dispute

- 2.21 In line with Ofcom's Dispute Resolution Guidelines, on 18 November 2011 Ofcom published its Provisional Determination, which set out our provisional assessment that the Openreach MPF rental price is compliant with the relevant regulatory obligations, namely:
- 2.21.1 SMP Condition FAA1, requiring that MPF rental is provided by Openreach on "*fair and reasonable terms, conditions and charges*"; and
 - 2.21.2 SMP Condition FAA4, requiring that Openreach "*shall secure, and shall be able to demonstrate to the satisfaction of Ofcom, that 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*".
- 2.22 On this basis, we did not consider that TTG has made any overpayments for the MPF rental service in the relevant period. Accordingly, we did not need to consider whether it would be appropriate for us to exercise our discretion under section 190(2)(d) of the 2003 Act to require payments to be made by way of an adjustment.
- 2.23 We invited the Parties and other interested parties to comment on the Provisional Determination by 5pm on 28 November 2011. Ofcom received five responses, from CWW, EE, Openreach, O2 and TTG.

Information relied upon in resolving the dispute

- 2.24 In making our Determination, we have considered and taken account of the following information provided by the Parties:
- 2.24.1 TTG's Submission, dated 5 September 2011;
 - 2.24.2 Openreach's comments on TTG's Submission, dated 12 September 2011;
 - 2.24.3 TTG's response to Ofcom's pre-EPM questionnaire, dated 21 September 2011;²⁴ and
 - 2.24.4 Openreach's response to Ofcom's pre-EPM questionnaire, dated 21 September 2011.

²³ Letter from R Durie (EE) to L Knight (Ofcom), dated 11 October 2011.

²⁴ We held an Enquiry Phase Meeting ("EPM") with both parties on 22 September 2011 and sent both parties questions in advance in line with our published guidelines.

- 2.25 We also refer to the March 2011 Consultation and November 2011 Consultation, as well as the following Ofcom statements:
- 2.25.1 the 2004 WLA statement;
 - 2.25.2 the 2009 statement; and
 - 2.25.3 the 2010 WLA statement.
- 2.26 In addition to the information relied on in the Provisional Determination of 14 November 2011, this Determination takes account of the responses to the Provisional Determination.

Section 3

Regulatory framework for resolving the Dispute

Issues in dispute

- 3.1 The scope of the dispute is to determine: (i) whether BT's charge of £91.50 for MPF rental is compliant with the regulatory obligations to which BT is subject, namely:
- 3.1.1 SMP Condition FAA1 (Requirement to provide Network Access on reasonable request) which requires that network access "*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*"; and
 - 3.1.2 SMP Condition FAA4 (Basis of charges) which requires that BT "*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 [...] 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*" (the cost orientation SMP Condition).
- and (ii) whether a payment of sums by way of adjustment of an underpayment or overpayment should be required.

Summary of the prevailing regulatory framework

- 3.2 Under EU law, the regulation of electronic communications networks and services is governed by a common regulatory framework comprising the Framework Directive and the Specific Directives. The Specific Directives include Directive 2002/19/EC on access to, and interconnection of, electronic communication networks and associated facilities. The Directives are transposed into UK law through the 2003 Act. Under this legislation, Ofcom is required to keep certain markets under review by periodically conducting market reviews of them to determine whether they are effectively competitive and, where appropriate, to impose appropriate remedies (i.e. SMP Conditions).
- 3.3 Ofcom reviewed the WLA market in 2004 and set SMP Conditions (2004 WLA statement). Ofcom subsequently reviewed the WLA market again in 2010 and set SMP Conditions (2010 WLA statement).
- 3.4 In the 2004 WLA statement we concluded that BT has SMP in the WLA market in the UK excluding the Hull Area, and imposed a number of SMP Conditions on BT, including, a requirement to provide network access on fair and reasonable terms and a cost orientation obligation. The 2004 WLA statement also concluded that a charge control for MPF rental should be imposed but deferred the specifics of the charge control, including the relevant costs, to a separate consultation.
- 3.5 Accordingly, having considered LLU charges as part of the Openreach Financial Framework Review, on 22 May 2009, following consultation, Ofcom published the 2009 statement, which specified the charge control SMP Condition imposed on BT.

The 2009 statement, *inter alia*, set a price ceiling for MPF rental on a forward look basis. The price set for the period from 15 October 2010 to 31 March 2011 was £89.10.

- 3.6 In the 2010 WLA statement we concluded that BT has SMP in the WLA market in the UK excluding the Hull Area, and imposed a number of SMP Conditions on BT, including a requirement to provide network access on fair and reasonable terms and a cost orientation obligation. In imposing these SMP Conditions on BT, we considered our duties under section 3 and all the Community requirements set out in section 4 of the 2003 Act. In particular, we considered that *“any pricing to be charged on a fair and reasonable basis under the network access obligations [i.e. SMP Condition FAA1] would be appropriate in order to promote efficiency and sustainable competition and provide the greatest possible benefits to end users by enabling competing providers to buy network access at levels that might be expected in a competitive market”*. The cost orientation SMP Condition was set with the intention of *“promoting competition and securing efficient and sustainable competition and the maximum benefit for customers of communications providers by ensuring that charges for wholesale services are set at a level that enable operators to compete downstream”*.²⁵
- 3.7 The 2010 WLA statement also concluded that a charge control should be imposed and explained that Ofcom would consult further on the terms of that charge control. In particular, while we considered that the cost orientation SMP Condition would act to constrain BT’s LLU pricing, we also considered that due to BT having SMP in the relevant market BT would be *“unlikely to be incentivised to reduce its costs and set prices at the competitive level”* and, on the basis of our market analysis, we considered that there was *“a risk that BT might set its prices for LLU at an excessively high level or operate a margin squeeze”*.²⁶
- 3.8 Accordingly, we considered that it was also necessary to impose a charge control to address the concern that BT’s pricing would not be constrained at a competitive level. Further, we considered that the charge control would also provide certainty over the life of the control period about the maximum level of LLU charges, which would promote sustainable competition from LLU operators.²⁷
- 3.9 On 31 March 2011 we published our consultation setting out proposals for the charge controls to take effect on a forward look basis (the “March 2011 Consultation”). The March 2011 Consultation included proposals on the range for the MPF rental charge to run until 31 March 2014. The proposals set out a range for MPF rental of £89.40 to £92.00, with a base case of £90.70. On 18 May 2011, we published a revised version of the March 2011 Consultation and the underlying models to correct for a number of errors in the original consultation. The corrected proposals set out a range for MPF rental of £88.70 to £91.30, with a base case corrected downwards from £90.70 to £90.00. We reconsulted on the proposals for the MPF rental charge in the November 2011 Consultation, which revised the consultation proposal to reflect our understanding of RPI and a restatement of the costs stacks in light of the previously incorrect attribution of £100 million of Information Systems projected expenditure.
- 3.10 Ofcom intends to issue its statement on the charge control in early 2012 and impose the SMP Condition with effect from 1 April 2012.

²⁵ See paragraph 5.81 of the 2010 WLA statement.

²⁶ See paragraph 5.86 of the 2010 WLA statement.

²⁷ See paragraph 5.87 of the 2010 WLA statement.

Regulatory requirements concerning BT's provision of LLU

- 3.11 The scope of this Dispute is to determine whether the Openreach MPF rental price was in breach of BT's regulatory obligations, namely the SMP Conditions FAA1 and FAA4 imposed on BT in the 2010 WLA statement.
- 3.12 As is clear from the 2010 WLA statement these SMP Conditions were set in light of Ofcom's general duties under section 3²⁸ and 4²⁹ of the 2003 Act and the specific requirements of section 47,³⁰ 87³¹ and 88³² of the 2003 Act. We do not understand TTG to be suggesting in its dispute submission that these SMP Conditions were not properly imposed. Rather, TTG is arguing that BT has not acted in compliance with those SMP Conditions, and is effectively seeking the retrospective application of the SMP Condition imposing the charge control which is to be set on a forward looking basis with effect from 1 April 2012.

²⁸ Section 3(1) of the 2003 Act states that Ofcom's principal duty is to further the interests of citizens in relation to communications matters and consumers in relevant markets, where appropriate, by promoting competition.

²⁹ In carrying out our functions, we also have to comply with the six European Community requirements set out in section 4 of the 2003 Act. In summary, these six requirements are, to promote competition; to contribute to the development of the internal market; to promote the interests of all EU citizens; not to favour one type of network, service or associated facility over another; to encourage network access and service interoperability in order to promote efficiency and competition; and to encourage compliance with relevant international standards.

³⁰ The tests set out in section 47(2) of the 2003 Act are that each SMP Condition must be objectively justifiable in relation to the networks, services or facilities to which it relates; not such as to discriminate unduly against particular persons or a particular description of person; proportionate to what the condition is intended to achieve; and in relation to what is intended to achieve, transparent.

³¹ Section 87(1) of the 2003 Act provides that, where Ofcom has made a determination that a person is dominant in a particular market, it must set such SMP conditions as it considers appropriate and as are authorised under the 2003 Act. One of the SMP conditions which Ofcom is authorised to impose on a dominant provider is a price control (section 87(9) of the 2003 Act). Further, section 87(9)(b) of the 2003 Act also authorises Ofcom to put in place rules in relation to the recovery of costs.

³² Section 88 of the 2003 Act states that Ofcom may not set a price control as an SMP condition, except where it appears to Ofcom (from the market analysis carried out for the purpose of setting that condition) that there is a relevant risk of adverse effects arising from price distortions and that the setting of the condition is appropriate for the purposes of promoting efficiency; promoting sustainable competition; and conferring the greatest possible benefits on the end-users of public electronic communications services. In addition, in setting the price control, Ofcom must take account of the extent of the investment in the matters to which the condition relates of the person to whom it is to apply (section 88(2) of the 2003 Act).

Section 4

Analysis and conclusions

Responses to the Provisional Determination

- 4.1 We issued our Provisional Determination on 14 November 2011 in which we provisionally found that the Openreach MPF rental price was compliant with BT's regulatory obligations. Ofcom received five non-confidential responses to the Provisional Determination from CWW, EE, Openreach, O2 and TTG. Ofcom received no confidential responses.
- 4.2 Openreach and EE provided responses that in general supported Ofcom's findings in its Provisional Determination. TTG submitted a response disagreeing with Ofcom's provisional reasoning and assessment in the Provisional Determination. CWW responded with concerns with Ofcom's approach to resolving the Dispute. O2's response provided a view on the potential implications of Ofcom's proposals for providers of services that utilise SMPF.
- 4.3 In this section, we summarise the key issues raised in the responses to the Provisional Determination and having carefully considered those responses we now set out our analysis and final conclusions. Our Determination to resolve the Dispute is at Annex 1 to this Statement.
- 4.4 In line with the scope of this Dispute, we have grouped the responses into the following themes:
- 4.4.1 Assessing Openreach's compliance with SMP Condition FAA4; and
 - 4.4.2 Assessing Openreach's compliance with SMP Condition FAA1.
- 4.5 We then address any other issues raised in the responses to the Provisional Determination and whether we should exercise our discretion to require payments to be made by way of an adjustment of an overpayment.

Assessing compliance with SMP Condition FAA4

- 4.6 SMP Condition FAA4 (Basis of charges) requires that BT *"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"*.³³

Summary of our position in the Provisional Determination

- 4.7 In the Provisional Determination, our provisional view was that the Openreach MPF rental price is compliant with SMP Condition FAA4.1. SMP Condition FAA4 requires that charges are derived from the forward looking long run incremental costs allowing an appropriate mark up for the recovery of common costs. The 2010 WLA statement sets out our view that if the Openreach MPF rental price, as a first-order test, is

³³ See Condition FAA4.1 – Basis of charges, 2010 WLA statement.

between DLRIC³⁴ and DSAC,³⁵ it will be compliant with the cost orientation SMP Condition. This would provide BT with pricing flexibility between DLRIC and DSAC, but ensuring its charges remain within an appropriate upper and lower bound, constraining BT from setting excessive charges (the DSAC test).³⁶

- 4.8 SMP Condition FAA4 puts the onus on BT to demonstrate its compliance with the SMP Condition to Ofcom's satisfaction. We do not consider that there is any single appropriate methodology which BT must adopt in order to assess compliance with SMP Condition FAA4. Rather, it is for BT to decide how to allocate common costs and, provided that it is capable of demonstrating to our satisfaction that it has done so appropriately, it is not open to us to impose on BT an alternative method of allocating common costs (even if that were also an appropriate method of so doing).
- 4.9 In the context of this Dispute, we have asked BT to comment on its compliance with FAA4 and have provided Openreach with TTG's submissions on this point. Openreach has submitted in response that the Openreach MPF rental price of £91.50 is compliant with SMP Condition FAA4.1, on the basis that *"the MPF Rental price is considerably below the Distributed Stand Alone Cost ("DSAC") ceiling published in the Regulatory Financial Statements ("RFS"), and thus must be considered to pass the first order test for cost orientation"*.³⁷
- 4.10 As explained above, we agree that the DSAC test is an appropriate test for BT to demonstrate its compliance with the cost orientation SMP Condition.
- 4.11 Openreach referred to RFS data for 2010/11 to support its view that the £91.50 level it has set for the Openreach MPF price falls between the unaudited DLRIC value of £60.40 and the unaudited DSAC value of £162.01.³⁸ We note that the RFS data for 2011/12 is not yet available.
- 4.12 We are required to determine this dispute within four months of accepting the dispute for resolution. In light of this, we have to determine the dispute on the evidence available to us now. In the absence of RFS data for the 2011/12 financial year, we have therefore taken into account historical DSAC levels as providing relevant information in this regard.
- 4.13 We note that the reported DSACs in the previous five years was between £127.14 and £270.67. We also note that the reported DSAC of £162.01 in 2010/11 is higher than it has been in previous years. We understand that this is largely to do with a large holding loss in the relevant year which has increased reported costs. However,

³⁴ Distributed Long Run Incremental Cost. LRIC is a forward-looking approach to costing that values assets on the basis of the cost of replacing them today. DLRIC is estimated by defining a broader increment of a product group, and then adding to the incremental cost of an individual product within that product group a share of the intra-group common costs.

³⁵ Distributed Stand Alone Costs. The stand alone cost ("SAC") of a service is the cost of providing that particular service on its own, including common costs. A similar approach to calculating DLRIC from LRIC is adopted with the SAC to generate the DSAC. However, rather than only including a proportion of the intra-group common costs (as is the case with the DLRIC), the DSAC for any individual service also includes a proportion of costs that are common across all groups of services.

³⁶ Further details of DSACs and DLRICs, and how BT calculates them, can be found in BT's *Primary Accounting Documents* which are available on its website at:

<http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements>.

³⁷ Page 3 of Openreach's comments.

³⁸ We have verified that the data referred to in Openreach's Comments matches data in BT's RFS, published on 15 September 2011. See

<http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/2011/index.htm>.

we also note that the reported DSAC in 2009/10, which would have been reduced by a large holding gain in the relevant year, was £107.14³⁹ and was therefore also above the Openreach MPF rental price.

- 4.14 Although this does not demonstrate that the Openreach MPF rental price in 2011/12 was below the DSAC in that year, it does suggest that we would need to see compelling evidence to have reason to believe that the DSAC in 2011/12 will be sufficiently less than previously reported levels to be at a level that was below the Openreach MPF rental price in 2011/12. While not prejudging the outcome of the March / November 2011 Consultation we would also note that our review of BT FAC data in connection with the March / November 2011 Consultation has indicated to us that this is not likely.

TTG's argument

- 4.15 TTG has instead argued that FAC, rather than DSAC, is the appropriate measure against which to assess compliance with FAA4.⁴⁰ In particular, while TTG accepts that assessing whether the MPF rental charge is below DSAC is a “first order” test for assessing compliance with cost-orientation obligations,⁴¹ TTG argues that Ofcom has failed to consider other tests of whether the charge is cost-oriented and suggests that Ofcom should assess whether the charge is based on FAC.⁴²
- 4.16 As we have set out above, we consider that the DSAC test, which BT has applied, is an appropriate test for BT to demonstrate its compliance with the cost orientation SMP Condition. Accordingly, do not consider it is necessary to assess whether BT is compliant with SMP Condition FAA4 on the basis of FAC. Nonetheless, for completeness, we have gone on to consider TTG's arguments in this regard.
- 4.17 TTG argues that the correct FAC data against which to assess the Openreach MPF rental price is found in the March / November 2011 Consultation. Specifically, TTG refers to the figure of £90.00.⁴³
- 4.18 We do not consider that the MPF rental charge figure of £90.00 published in the March 2011 Consultation is the “correct” estimate of FAC. In fact, it is not a FAC estimate at all. Instead, it is simply a point on the glide path which was proposed in the March 2011 Consultation and the appropriate profile of which has not been determined and was in fact challenged by TTG in its response to the consultation. Further, the purpose of that glidepath was to allow the price to move between two points, neither of which represented FAC. Specifically, the proposed glidepath started from a regulated price in 2009/10 (that was not equal to FAC) towards an estimated unit cost in 2013/14 (that was also not equal to FAC). While the 2013/14 estimate of unit cost is based on an estimate of FAC (as set out in the March 2011 Consultation) this estimate was adjusted downwards for pricing purposes (i.e. for the purpose of setting the end point of the glidepath).

³⁹ Originally reported as £104.28 and restated in BT's 2010/11 RFS due to a change in the methodology used by BT to calculate (amongst other things) DSACs.

⁴⁰ CWW also considered that “DSAC test is an inappropriate test”, but CWW does not explain why use of the DSACs is “an inappropriate test” in resolving this Dispute, and does not offer an alternative approach for assessing whether or not Openreach's charge for MPF rental is compliant with relevant regulatory obligations (page 2 of CWW's response).

⁴¹ Page 1 of TTG's response.

⁴² Page 2 of TTG's response.

⁴³ Alternatively, TTG suggests the charge of £88.70 based on its assessment of the information published in the November 2011 Consultation.

- 4.19 Therefore, neither the starting point nor the end point of the proposed glidepath could be considered to represent an estimate of FAC and the profile of the glidepath was proposed without reference to FAC in the intervening years. It is therefore incorrect to suggest that the £90.00 figure represents an estimate of FAC.
- 4.20 Accordingly, if (contrary to our view) FAC were relevant for the purposes of assessing compliance with FAA4, we would need to consider other available evidence to provide an estimate of FAC in 2011/12.
- 4.21 In this regard, we note that the RFS for 2010/11 includes an estimate of FAC for MPF rental of £128.75 in 2010/11. While the Openreach MPF rental price is significantly below this figure, we recognise that the reported 2010/11 FAC is inflated by holding losses in the relevant year.
- 4.22 We also note that the March 2011 Consultation includes an estimate of FAC in 2011/12 of £91.99. As explained elsewhere, we recognise that the numbers in the March 2011 Consultation are an estimate and are subject to change in light of responses ahead of our final decision. However, to date this figure remains the only published estimate of FAC for MPF rental for the 2011/12 financial year.
- 4.23 Therefore, if FAC was the relevant benchmark for assessing the 2011/12 price and the March 2011 Consultation was considered to provide the relevant source of FAC data (as it appears TTG is suggesting), then we consider that this FAC estimate is the best available benchmark for the 2011/12 price.
- 4.24 As the price (£91.50) is below this benchmark (£91.99), we do not consider the Openreach MPF rental price is in breach of its cost orientation obligation on this basis.

Compliance with SMP Condition FAA1

- 4.25 TTG in its Submission states that the £90.00 figure in the March 2011 Consultation is “*determinative*”, since “*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*”. TTG would appear to be suggesting that only a single price (which is derived from the March / November 2011 Consultation) would be a fair and reasonable price.

SMP Condition relating to Network Access

- 4.26 SMP Condition FAA1 (Requirement to provide Network Access on reasonable request) states that network access “*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*”.⁴⁴
- 4.27 The purpose of the SMP Condition relating to Network Access in the WLA market is, *inter alia*, to enable “*competing providers to buy network access at levels that might be expected in a competitive market*”. Nevertheless, we went on to note that, notwithstanding the existence of a cost orientation SMP Condition in addition to the Network Access SMP Condition, as BT had SMP in the WLA market, it was “*unlikely to be incentivised to reduce its costs and set prices at the competitive level*” and there was “*a risk that BT might set its prices for LLU at an excessively high level or*

⁴⁴ See Condition FAA1 - Requirement to provide Network Access on reasonable request, as set out in the 2010 WLA statement.

operate a margin squeeze".⁴⁵ As such, in order to address these concerns, we considered that it was necessary to impose a charge control (in addition to the Network Access SMP Condition and the cost orientation SMP Condition).

- 4.28 There is, therefore, a distinction between an SMP Condition imposing a charge control and an SMP Condition relating to Network Access.
- 4.29 An SMP Condition which imposes a charge control *may* specify a particular price⁴⁶ and while such a price would be compliant with the requirement for network access to be provided on "*fair and reasonable terms conditions and charges*", it may not be the only figure which would be compliant with the SMP Condition relating to Network Access (i.e. that would be a fair and reasonable charge).
- 4.30 TTG, in specifying a single price £90.00,⁴⁷ have therefore assumed that the price is the only charge that would be considered to be "fair and reasonable" in the context of the SMP Condition relating to Network Access.
- 4.31 We do not agree with TTG's view that only a charge of £90.00 (based on the information published in the March 2011 Consultation) would secure compliance with Condition FAA1. The charge control SMP obligation and the Network Access SMP obligation (and indeed also the cost orientation SMP obligation) are separate and designed to operate independently of each other. They are intended to provide *ex ante* regulation through different mechanisms. As explained above, we do not consider that the SMP Condition relating to Network Access, in the absence of a SMP Condition imposing a charge control, implies that there is only a single price which would satisfy the obligation.

The Openreach MPF rental price and the March / November 2011 Consultation

- 4.32 As explained above, Openreach made a voluntary commitment in December 2010 that from 1 April 2011 until 31 March 2012 (or until the next Ofcom charge control starts, whichever is sooner), it would charge no more than the Openreach MPF rental price (i.e. £91.50 for MPF rental).⁴⁸ The £91.50 Openreach MPF rental price is at a midpoint between the MPF rental price for 2010/11 and the forecasted 2012/13 costs for MPF determined in the previous charge control.⁴⁹ The Openreach MPF rental price was calculated on the basis of the best available information at the time. We note that this has not been disputed by TTG, who states "*these prices were based on what was, at that time, the best current view of costs and of the appropriate price in 2011/12*".⁵⁰ Ofcom's view was that this was "*a reasonable approach to take*".⁵¹

⁴⁵ Paragraph 5.86 of the 2010 WLA statement.

⁴⁶ An SMP Condition imposing a charge control does not always refer to a single price or service. Instead it may refer to a basket of services and specify only how aggregate revenues from the services in that basket may change over time, depending on what was considered most appropriate in accordance with our duties under section 88 of the 2003 Act (i.e. appropriate for the purposes of promoting efficiency, promoting sustainable competition and conferring the greatest possible benefits on the end-users of public electronic communications services).

⁴⁷ Alternatively, TTG suggests the charge of £88.70 based on its assessment of the information published in the November 2011 Consultation.

⁴⁸ Letter from M Shurmer (Openreach) to S McIntosh (Ofcom) dated 24 Nov 2010.

⁴⁹ See the 2009 statement, adjusted to reflect the conclusions of the CAT in their determinations on the appeals of that statement.

⁵⁰ Page 7 of TTG's submission.

⁵¹ See update on Ofcom's website of 1 December 2010:

<http://stakeholders.ofcom.org.uk/binaries/consultations/openreachframework/statement/charges>.

Details of Openreach's voluntary commitment and Ofcom's view on it were published on Ofcom's website in December 2010.⁵²

- 4.33 In TTG's Submission, TTG contended that the £91.50 charge is too high and 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*".⁵³ TTG has submitted that we should use the best available information in determining the Dispute, and that in this case the best available information is the data set out in our March 2011 Consultation and/or the November 2011 Consultation.
- 4.34 Consultation is the process through which we take account of stakeholders' views on our proposals before reaching a final decision. Accordingly the March 2011 Consultation does not provide Ofcom's final view on charge ceilings for the MPF rental charge. This was made clear in the March 2011 Consultation.
- 4.35 For the purpose of the March 2011 Consultation we provided an estimate of the cost of the in scope services (i.e. including MPF rental). These cost estimates were then adjusted to inform the proposed glidepath, from which the base case price of £90.00 is derived. The basis of this estimate and the reason we provided it was made clear in the March 2011 Consultation "*For the purpose of illustrating our proposals, we consider that it is useful to present our proposals around a single base case that reflects a coherent set of parameters such as inflation and efficiency. The base case represents our position on each of the assumptions, where it is either a best estimate of where we think the assumption will be when we publish our Final Statement or it is the mid-point in our plausible range*".⁵⁴
- 4.36 As such it is clear that the base case estimates were provided for illustrative purposes only and furthermore, as discussed at paragraph 4.18 to 4.20 it is incorrect to suggest that the £90.00 figure represents an estimate of FAC for MPF rental.
- 4.37 Furthermore, as part of the March 2011 Consultation (and indeed November 2011 Consultation) Ofcom sought stakeholders' views on these assumptions.
- 4.38 Indeed, in its response to the March Consultation, TTG has argued both that the basis of calculation of the cost stacks in 2013/14 and the proposed profile of the glidepath to those cost stacks should be changed in our final decision on the charge control. Nevertheless, TTG would appear to be suggesting that Openreach was in some way obliged to rely on the March 2011 Consultation (and/or the November 2011 Consultation).
- 4.39 Accordingly, we do not agree that the data set out in the March 2011 Consultation (and/or the November 2011 Consultation) constitutes data on which we must rely in reaching any conclusions in this Dispute; that data is not settled. For the same reason, we do not agree with TTG's suggestion that Openreach should have revised its charges as soon as it had seen the March 2011 Consultation (and/or the November 2011 Consultation); again, the data set out in that document was for consultation, and is not a settled position.
- 4.40 We do not therefore agree with TTG that the data on which we consulted in the March and/or November 2011 Consultation suggests a single charge that would meet

⁵² *Ibid.*

⁵³ Page 12 of TTG's Submission.

⁵⁴ See paragraph A9.5 of the March 2011 Consultation. A similar point is also made in paragraph 7.6 of the March 2011 Consultation.

SMP Condition FAA1 (i.e. to provide network access on fair and reasonable terms, conditions and charges). We therefore also disagree that Openreach is obliged to amend its charges so as to ensure that its charges are aligned with those set out in the March / November 2011 Consultation.

TTG's case

- 4.41 In considering TTG's case, i.e. that the consultation base case constituted the best available information on which to assess the Openreach MPF rental price (which we do not consider to be the case), we do not consider that Openreach, in maintaining the Openreach MPF rental price following publication of the March 2011 Consultation or November 2011 Consultation is not in compliance with SMP Condition FAA1.
- 4.42 As outlined in paragraphs 4.26 to 4.31 above, we do not consider that compliance with SMP Condition FAA1 (in the absence of a SMP Condition imposing a charge control), implies that there is only a single price which would satisfy the obligation.
- 4.43 Furthermore, TTG's premise seems to be that we have to use the information and analysis from the charge control consultation because it is the "*best information currently available*" and apply it to the Openreach MPF rental price. However, this would, in effect, be imposing a revised charge control on a retrospective basis in relation to a period that has already elapsed and notwithstanding that the future revisions have not yet come into effect. We note that it is settled law that we cannot apply an *ex ante* charge control with retrospective effect.⁵⁵

Certainty

- 4.44 We also note that if we did agree with TTG's view that Openreach should have revised its charges by relying on data in the March 2011 Consultation, this would be a change from the position that we took when Openreach set the Openreach MPF rental price. At that time, we set out our position that Openreach's approach to setting the Openreach MPF rental price for the period from 1 April 2011 until 31 March 2012 (or until the next Ofcom charge control starts, whichever is sooner) was a "*reasonable approach to take*". It was in our view clear to all parties at the time that the Openreach MPF rental price would be in place until 31 March 2012 or, if sooner, until the next Ofcom charge control started, notwithstanding that Ofcom would clearly be consulting on the next charge control during that period, which would inevitably entail setting out for consultation a range within which that next charge control would fall.
- 4.45 Openreach, when it notified the voluntary Openreach MPF rental price in line with its regulatory obligations, received no comments or objections from industry. We consider that (as we set out at the time) Openreach's approach was reasonable and provided beneficial certainty for all stakeholders on a forward looking basis for the period between the previous and next charge controls.
- 4.46 TTG argues that the fact that Openreach received no comments or objections from industry is not a justification for not requiring changes to the Openreach MPF rental price. In particular, TTG notes that when Openreach provided notification of the Openreach MPF rental price in December 2010, TTG "*were not aware of the additional information that may subsequently come to light*", but once the information

⁵⁵ Vodafone Limited, Telefónica O2 (UK) Limited, T-Mobile (UK) Limited and Orange Personal Communications Services Limited v. BT plc and Ofcom [2010] EWCA Civ 391.

(i.e. the March 2011 Consultation) came to light “*the certainty argument falls away*” and Openreach could have revised the Openreach MPF rental price.⁵⁶

- 4.47 However, EE noted that “*having previously determined that BT’s approach was reasonable and in the absence of any further evidence to suggest that the charge is not fair and reasonable, it would remove important industry certainty for Ofcom to now ‘unpick’ this*”.⁵⁷ We consider that to unpick the approach after the event, as TTG now proposes, would remove that certainty and it may also remove the incentive for Openreach to act reasonably in any future similar circumstances.
- 4.48 By reference to the November 2011 Consultation, CWW suggests that Ofcom’s proposals in the November 2011 Consultation do not “*correct the fact that the bridging arrangement in 2011/12 was wrong and that BT received a windfall benefit for the year 2011/12*”.⁵⁸
- 4.49 TTG also notes that “*the excessive level of [the Openreach MPF price] [...] will persist for an even longer period [...] this fact increases the onus on Ofcom to ensure that the MPF charge is based on a proper level*”.⁵⁹
- 4.50 We remain of the view set out in the Provisional Determination that we do not consider that Openreach was required to revise its charges as soon as it had seen the March 2011 Consultation. We do not agree with TTG’s view that once Openreach was aware of the March 2011 Consultation “*the certainty argument falls away*” because Openreach could have chosen to revise the Openreach MPF rental price. We also note that Openreach requested that Ofcom should consider the implications where the relevant price was below the level set out in the March 2011 Consultation. In this case, i.e. if the base case MPF rental (or any other charge) in the March 2011 Consultation had been above the Openreach MPF rental price, we would not have expected Openreach to increase its charges in that event, for the same reasons.
- 4.51 It was in our view clear to all parties at the time that Openreach put in place its voluntary pricing arrangement in April 2011, that the Openreach MPF rental price would be in place until 31 March 2012 or, if sooner, until the next Ofcom charge control started, notwithstanding that Ofcom would clearly be consulting on a the next charge control during that period, which would inevitably entail setting out a range for consultation within which that next charge control would fall.
- 4.52 Openreach’s MPF rental price therefore provided beneficial certainty for all affected stakeholders for the period between the previous and next charge controls (although we have not relied on this as the sole reason for determining this Dispute). We do not suggest that a lack of objections equates to industry’s conclusive agreement with the level of the Openreach MPF rental price (or that the conclusive agreement from industry would ensure that the Openreach MPF rental price was compliant with the relevant regulatory obligations).
- 4.53 For these reasons we also do not consider that it would be appropriate to require Openreach to amend the Openreach MPF rental price for the period going forward (i.e. from the date of this Determination until the charge control comes into effect).⁶⁰

⁵⁶ Page 5 of TTG’s response

⁵⁷ Page 1 of EE’s response.

⁵⁸ Page 3 of CWW’s response.

⁵⁹ *Ibid.*

Conclusion on Compliance with SMP Condition FAA1

- 4.54 Accordingly, for the reasons set out above, our view is that the Openreach MPF rental price of £91.50 is compliant with the requirements of SMP Condition FAA1.

Other issues raised

- 4.55 In response to the Provisional Determination, stakeholders raised two other issues; notification periods and impact on other charges.

Notification periods

- 4.56 TTG notes that in the Provisional Determination “Ofcom mentions the 90 day notification period but does not subsequently take a position”. TTG adds that “in the case where a notification period is appropriate [...] a 28 day notification period (or less) would be appropriate”.⁶¹
- 4.57 We would note that the question of whether Openreach’s MPF rental charge is compliant with FAA6 is not a matter disputed by the Parties and therefore a consideration of FAA6 is not within the published scope of this Dispute.

Impact on other charges

- 4.58 O2 advises that it would “be concerned at the distortionary competitive effect in favour of MPF based providers were Ofcom to reach a contrary assessment to that which it has set out in the Provisional Determination (i.e. that MPF rental prices should be reduced and that Openreach be required to make payments to TTG by way of an adjustment for overpayments made) without also making an assessment as to the appropriate charges and adjustment for any overpayments made in respect of SMPF charges”.⁶²
- 4.59 Whilst noting the concerns raised by O2 in respect of SMPF charges, we consider that this falls outside of the scope of this Dispute.

Repayments

- 4.60 In accordance with the published scope of the Dispute, we have considered whether a payment of sums by way of adjustment of an underpayment or overpayment should be required.
- 4.61 In light of our conclusion that Openreach’s charges are compliant with its regulatory obligations, we do not consider that TTG has made any overpayments for MPF rental by paying the Openreach MPF rental price.
- 4.62 Accordingly, we have decided not to exercise our discretion under section 190(2)(d) of the 2003 Act to require payments to be made by way of an adjustment in order to give effect to our determination of this dispute. We are not therefore requiring Openreach to make any payments to TTG.

⁶⁰ TTG had requested that “if Ofcom consider certainty so important it could require (as a resolution of this dispute) that MPF prices going forward (following a short notification period) are set at £88.70” (page 5 of TTG’s response).

⁶¹ Pages 5-6 of TTG’s response.

⁶² Page 1 of O2’s response.

Summary of Conclusions

- 4.63 The scope of this Dispute is to determine whether the Openreach MPF rental price complies with its applicable regulatory obligations, and whether any payments should be required by way of an adjustment of an underpayment or overpayment.
- 4.64 Based on the assessment set out in this Determination, and in accordance with our statutory duties and Community obligations, we have concluded that the Openreach MPF rental price is compliant with Openreach's relevant regulatory obligations, namely:
- 4.64.1 SMP Condition FAA1, which requires that network access should be provided on "*fair and reasonable terms, conditions and charges*"; and
- 4.64.2 SMP Condition FAA4, which requires that Openreach "*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 [...] 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*".
- 4.65 On this basis, we do not consider that TTG has made any overpayments for MPF rental. Accordingly, it has not been necessary for us to consider whether it would be appropriate for us to exercise our discretion under section 190(2)(d) of the 2003 Act to require payments to be made by way of an adjustment.
- 4.66 In reaching our conclusions we have taken account of 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. We are satisfied that our Determination of this Dispute is consistent with these duties.
- 4.67 We note that TTG has maintained that because in its view the Openreach MPF rental price is not compliant with BT's regulatory obligations, we should require Openreach to reduce the Openreach MPF rental price in order to further the interests of consumers, and to promote competition.
- 4.68 As set out above, we set BT's regulatory obligations in accordance with our statutory duties, including our duty to further the interests of consumers, where appropriate by promoting competition. We consider that charges which are compliant with such regulatory obligations are therefore themselves consistent with our duties. Given our conclusion that the Openreach MPF rental price is compliant with BT's regulatory obligations, we do not consider that it is necessary to require Openreach to reduce the Openreach MPF rental price for these reasons.
- 4.69 In setting out our assessment, we have kept in mind our duty under subsection 3(3)(a) of the 2003 Act to ensure that 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 reasoning that underpins our conclusions, and the Parties had an opportunity to comment on our provisional assessment in advance of our Determination of this Dispute.
- 4.70 Our formal determination is set out at Annex 1.

Annex 1

The Determination

Determination under sections 188 and 190 of the Communications Act 2003 (“2003 Act”) for resolving a dispute between TalkTalk Telecom Group plc (“TTG”) and Openreach about the Openreach MPF rental price

WHEREAS—

- (A) section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the 2003 Act that it is appropriate for it to handle the dispute (and pursuant to section 186(2A) of the 2003 Act, in relation to a dispute falling within section 185(1A), Ofcom must decide that it is appropriate for them to handle the dispute, unless the exceptions in 185(3)(a)-(c) apply), 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, and Ofcom must publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) Ofcom 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 in resolving a dispute which may, in accordance with section 190(2) of the 2003 Act, include—
- making a declaration setting out the rights and obligations of the parties to the dispute;
 - giving a direction fixing the terms or conditions of transactions between the parties to the dispute;
 - 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
 - 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 5 September 2011, TTG submitted a dispute with Openreach to Ofcom for resolution, claiming that the £91.50 charge for MPF rental set by Openreach (a BT Group business) should be reduced to £90.00. TTG considered that Openreach is thereby in breach of its regulatory obligations.
- (D) on 23 September 2011, Ofcom decided that it was appropriate for it to handle this dispute and set the scope of the issues to be resolved in the dispute as follows:

“(i) whether BTs charge of £91.50 for MPF rental is compliant with the regulatory obligations to which BT is subject, including:

- *Condition FAA1 (Requirement to provide Network Access on reasonable request); and*
- *Condition FAA4 (Basis of charges)*

and (ii) whether a payment of sums by way of adjustment of an underpayment or overpayment should be required.”

- (E) a non-confidential Provisional Determination was sent to the parties and published on Ofcom’s website on 14 November 2011;
- (F) 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 general duties set out in section 3 of, and the six Community requirements set out in section 4 of the 2003 Act; and
- (G) a fuller explanation of the background to the dispute and Ofcom’s reasons for making this Determination is set out in the explanatory statement accompanying this Determination.

NOW, therefore, Ofcom makes, for the reasons set out in the accompanying explanatory statement, this Determination for resolving this dispute—

I Declaration of rights and obligations, etc.

- 1 It is hereby declared that the Openreach MPF rental price of £91.50 is compliant with SMP Conditions FAA1 and FAA4.

II Binding nature and effective date

- 2 This Determination is binding on TTG and Openreach in accordance with section 190(8) of the 2003 Act.
- 3 This Determination shall take effect on the day it is published.

III Interpretation

- 4 For the purpose of interpreting this Determination—
- a) headings and titles shall be disregarded; and
 - b) the Interpretation Act 1978 shall apply as if this Determination were an Act of Parliament.
- 5 In this Determination—
- a) **“2003 Act”** means the Communications Act 2003 (c.21);
 - b) **“2010 WLA statement”** means the *Review of the wholesale local access market: Identification and analysis of markets, determination of market power and setting of SMP conditions* dated 7 October 2010

- c) **“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 by section 1159 of the Companies Act 2006;
- d) **“Condition FAA1”** means SMP Condition in the 2010 WLA statement; and
- e) **“Condition FAA4”** means the SMP Condition in the 2010 WLA statement
- f) **“Openreach”** means a BT group business offering CPs products and services that are linked to BT’s nationwide local access network;
- g) **“Openreach MPF rental price”** means Openreach’s voluntary commitment that from 1 April 2011 until 31 March 2012 (or until the next Ofcom charge control starts, whichever is sooner), it will charge no more than £91.50 for MPF rental.
- h) **“Ofcom”** means the Office of Communications;
- i) **“MPF rental”** shall be construed as the annual rental of access to Metallic Path Facilities; and
- j) **“TTG”** means TalkTalk Telecom Group plc whose registered company number is 06534112, 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.

Signed by:



Neil Buckley

Director of Investigations

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

23 January 2012

Annex 2

Glossary

Glossary of terms

2003 Act: The Communications Act 2003.

2004 WLA statement: *Review of the wholesale local access market: Identification and analysis of markets, determination of market power and setting of SMP conditions*, 16 December 2004
<http://stakeholders.ofcom.org.uk/binaries/consultations/rwlam/statement/rwlam161204.pdf>.

2009 statement: *A new pricing framework for Openreach*, Statement, 22 May 2009,
<http://stakeholders.ofcom.org.uk/consultations/openreachframework/statement/>.

2010 WLA statement: *Review of the wholesale local access market: Identification and analysis of markets, determination of market power and setting of SMP conditions*, 7 October 2010,
http://stakeholders.ofcom.org.uk/binaries/consultations/wla/statement/WLA_statement.pdf

BT: 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 by section 1159 of the Companies Act 2006.

CCA FAC: Fully Allocated Current Cost Accounting.

CP: Communications provider.

CWW: Cable and Wireless Worldwide.

CWW's response: Submission from A Sheridan (CWW) of 28 November 2011, in response to the Provisional Determination.

Dispute Resolution Guidelines: *Dispute Resolution Guidelines*, 7 June 2011. See:
<http://stakeholders.ofcom.org.uk/binaries/consultations/dispute-resolution-guidelines/statement/guidelines.pdf>.

EE: Everything Everywhere Limited.

EE's response: Submission from R Durie (EE) of 28 November 2011, in response to the Provisional Determination.

FAC: Fully Allocated Cost.

LLU: Local Loop Unbundling. A regulated wholesale service sold by Openreach. It allows CPs to physically take over or share the copper access network connection (from end-user to the BT exchange building) and to provide data services (e.g. broadband) and voice to retail customers.

March 2011 Consultation: *Charge Control Review for LLU and WLR services*, 31 March 2011, as updated by Ofcom on 18 May 2011,
<http://stakeholders.ofcom.org.uk/binaries/consultations/wlr-cc-2011/summary/wlr-cc-2011.pdf>.

Statement concerning a dispute between TalkTalk Group and Openreach relating to the Openreach MPF rental price

MPF: Metallic Path Facility. The copper access network connection from end-user to the BT exchange building. MPF allows a CP to provide the customer with data and voice services.

November 2011 Consultation: *LLU and WLR Charge Control - Further Consultation*, 23 November 2011,

<http://stakeholders.ofcom.org.uk/binaries/consultations/912888/summary/LLUWLRCC-consultation.pdf>.

O2: Telefónica O2 UK Limited.

O2's response: Submission from I Roy (O2) of 28 November 2011, in response to the Provisional Determination.

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

Openreach's comments: Letter from M Shurmer (Openreach) to L Knight (Ofcom) dated 12 September 2011.

Openreach MPF rental price: Openreach's voluntary commitment that from 1 April 2011 until 31 March 2012 (or until the next Ofcom charge control starts, whichever is sooner), it will charge no more than £91.50 for MPF rental.

Openreach's response: Submission from M Shurmer (Openreach) of 28 November 2011, in response to the Provisional Determination.

PPCs judgment: British Telecommunications Plc v Office of Communications (Partial Private Circuits) [2011] CAT 5.

Provisional Determination: *Dispute between TalkTalk Group and Openreach relating to the MPF rental charge*, 14 November 2011,

<http://stakeholders.ofcom.org.uk/binaries/consultations/talktalk-openreach-mpf/summary/condoc.pdf>.

RFS: BT's Regulatory Financial Statements. Ofcom requires that each year BT publishes its RFS, which contains certain accounting information on markets where BT has been found to have SMP. BT's RFS is available at:

<http://www.btplc.com/Thegroup/RegulatoryandPublicaffairs/Financialstatements/index.htm>.

Sky: British Sky Broadcasting Limited.

SMP: Significant Market Power, which is defined as a position of economic strength affording an undertaking the power to behave to an appreciable extent independently of competitors, customers and ultimately consumers.

SMPF: SMPF means shared MPF. SMPF only allows direct provision of data, with narrowband voice services being provided separately.

TTG: TalkTalk Telecom Group plc whose registered company number is 06534112, 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.

TTG's response: Submission from R Granberg (TTG) of 28 November 2011, in response to the Provisional Determination.

Statement concerning a dispute between TalkTalk Group and Openreach relating to the Openreach MPF rental price

TTG's Submission: TTG's submission *Dispute relating to BT's MPF Rental Charge*, provided to Ofcom 5 September 2011.