



# Draft Determination to resolve Disputes between BT and each of Opal and Sky about Local Loop Unbundling Charges

This version is non-confidential.

Confidential redactions are indicated by [✂]

Draft Determination

Publication date:

14 June 2011



# Contents

Section		Page
1	Introduction	2
2	Opal's and Sky's requests for resolution of the disputes	5
3	Analysis of the Disputes	9
<b>Annex</b>		<b>Page</b>
1	The Draft Determination	19
2	Responding to this consultation	22
3	Ofcom's consultation principles	24
4	Consultation response cover sheet	25

# Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

## **Glossary of terms**

**Act:** the Communications Act 2003.

**CC:** Competition Commission

**CP:** Communications provider

**LLU:** Local Loop Unbundling

**MPF:** Metallic Path Facility

**SMPF:** Shared Metallic Path Facility

## Section 1

# Introduction

## Summary

- 1.1 This draft determination (the “Draft Determination”) sets out our proposed resolution to the disputes brought by Opal Telecom Limited (“Opal”) and British Sky Broadcasting Limited (“Sky”) against BT plc (“BT”). We refer to these disputes as the “Disputes” and we refer to Opal, Sky and BT as the “Parties”.
- 1.2 The Disputes relate to the Local Loop Unbundling (“LLU”) charges levied by Openreach<sup>1</sup> (a BT Group business) (“Openreach”) between 20 June 2009 and 14 October 2010 (the “relevant period”).

## Background facts

### Local Loop Unbundling

- 1.3 LLU enables CPs to connect directly to the consumer via BT’s copper local loops and then add their own equipment (located in BT’s local exchange buildings) to offer broadband, voice and other services. This copper-based access service is provided by BT through Openreach.
- 1.4 LLU is provided by means of both fully unbundled lines (known as Metallic Path Facility or “MPF”) and shared unbundled lines (known as Shared Metallic Path Facility or “SMPF”). There are three LLU services provided by Openreach which are relevant to these Disputes: MPF rental, SMPF rental and ancillary services (which include MPF new provide).

### Regulatory LLU Decisions

- 1.5 Ofcom has determined that BT has significant market power (“SMP”) in the wholesale local access market since publication of the “*Review of the wholesale local access market: Identification and analysis of markets, determination of market power and setting of SMP conditions*” in December 2004 (the “December 2004 Statement”) and has set LLU price controls since 2005<sup>2</sup>.
- 1.6 On 22 May 2009 Ofcom set a new price control in relation to LLU services (the “2009 LLU decision”) <sup>3</sup>. The price controls set in the 2009 LLU decision came into force on 19 June 2009 and were set to cover the period from that date until 31 March 2011 (the “2009 price control”). The 2009 price control was in operation during the period of these Disputes.

---

<sup>1</sup> References to Openreach throughout this document are references to the division of BT responsible for provision of LLU services to communications providers such as Opal.

<sup>2</sup> See statement: “*Local loop unbundling: setting the fully unbundled rental charge ceiling and minor amendment to SMP conditions FA6 and FB6*”, 30 November 2005.

<sup>3</sup> <http://stakeholders.ofcom.org.uk/binaries/consultations/openreachframework/statement/statement.pdf>

### ***The 2009 price control in the 2009 LLU decision***

- 1.7 The 2009 price control consisted of two principal elements: price ceilings for 2009/10 and indexation of the ceiling for the services in 2010/11. These are set out in Table 1.

**Table 1: 2009 LLU decision controls on MPF and SMPF rental**

	Price prior to 2009 price control	Price in 2009/10	Indexation in 2010/11
MPF rental	£81.69	£86.40	RPI + 5.5%
SMPF rental	£15.60	£15.60	RPI + 1.0%

- 1.8 The 2009 LLU decision also set out cost forecasts for MPF and SMPF until 31 March 2013 and a glide path intended to lead to prices equalling costs in 2012/13.

### ***The appeal against the 2009 LLU decision***

- 1.9 On 22 July 2009, the Carphone Warehouse Group plc (“CPW”), Opal’s then parent company, appealed the 2009 LLU decision to the Competition Appeal Tribunal (the “Tribunal”), alleging that Ofcom had made a number of errors in setting the price controls for MPF and SMPF services. The price control matters were referred to the Competition Commission (“CC”).
- 1.10 Sky was granted permission to intervene in support of CPW in the proceedings on 18 August 2009.
- 1.11 On 31 August 2010, the CC published its final determination in relation to the price control matters raised in the appeal (the “CC’s Determination”). It rejected the majority of the questions referred by the Tribunal, but found that:
- 1.11.1 Ofcom had materially erred by underestimating the rate of efficiency savings which Openreach could reasonably be expected to achieve over the period of the price controls;
  - 1.11.2 Ofcom’s assessment of inflation of wage and energy costs was incorrect; and
  - 1.11.3 Ofcom made certain errors in relation to specifying the price caps for baskets of ancillary services.
- 1.12 On 11 October 2010, the Tribunal determined that no aspects of the CC’s Determination fell to be set aside on the application of judicial review principles, and therefore remitted the 2009 LLU decision to Ofcom with directions to adopt a revised price control taking account of the CC’s findings, on a prospective basis.

### ***The 2010 statement***

- 1.13 Ofcom gave effect to the Tribunal’s directions on 14 October 2010 by publishing the Statement “*Openreach Financial Framework Local Loop Unbundling Charge Control: Adoption of Revised SMP Services Conditions following the Competition Appeal*”

Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

*Tribunal's Directions*<sup>4</sup>, which revised the LLU price control with effect from 15 October 2010.

1.14 The revised LLU price control is as set out in Table 2 below:

**Table 2: Revised LLU price controls on MPF and SMPF rental following the Tribunal's Directions of 11 October 2010**

	Indexation in 2010/11	2009 price control price in 2010/11 following indexation	Price from 15/10/2010 until end of charge control period
MPF rental	RPI + 5.5%	£90.46	£89.10
SMPF rental	RPI + 1.0%	£15.63	£15.04

---

4

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

## Section 2

# Opal's and Sky's requests for resolution of the disputes

- 2.1 On 7 February 2011, Opal submitted a dispute to Ofcom, requesting that Ofcom exercise its discretion under section 190(2)(d) of the Communications Act 2003 (the "Act") to order Openreach to repay an amount to Opal for charges for LLU services between 20 June 2009 and 14 October 2010, to reflect the suggested adjustments to Ofcom's LLU price control set out by the CC in its 31 August 2010 determination<sup>5</sup>.
- 2.2 In its submission, Opal described the history of negotiations between Opal and Openreach in relation to Openreach's LLU charges. Despite these negotiations, Opal and Openreach were unable to reach an agreement.
- 2.3 On 15 February 2011, Openreach wrote to Ofcom, asserting that Ofcom's dispute jurisdiction is not engaged on the basis that "*Opal has raised a compliance complaint, not a commercial dispute in relation to which negotiations have broken down*".
- 2.4 We address below Ofcom's jurisdiction to consider the dispute.
- 2.5 Section 186 of the Act provides that, where a dispute is referred to Ofcom in accordance with section 185, Ofcom must decide whether or not it is appropriate to handle it. Section 186(3) further provides that Ofcom must decide that it is appropriate for it to handle a dispute unless there are alternative means available for resolving the dispute, a resolution of the dispute by those means would be consistent with the Community requirements set out in section 4 of the Act, and those alternative means would be likely to result in a prompt and satisfactory resolution of the dispute.
- 2.6 In accordance with section 186(4) of the Act, on 21 March 2011 we decided in light of the evidence submitted by Opal that Opal and Openreach were in dispute. We considered whether there were any appropriate alternative means for resolving the dispute and decided that there were none in this case which could provide a prompt and satisfactory resolution. As a result we decided that it was appropriate for us to handle the dispute brought to us by Opal. We informed Opal and Openreach of our decision and published details of the dispute brought to us by Opal, including the following scope, on the Competition and Consumer Enforcement Bulletin part of our website (the "CCEB"):
- "The scope of the dispute is: should Ofcom exercise its discretion under s 190(2)(d) to direct Openreach to repay an amount to Opal for charges for Local Loop Unbundling services to reflect the suggested adjustments to Ofcom's LLU price control set out in the Competition Commission 31 August 2010 Determination for the period 20 June 2009 to 14 October 2010."*
- 2.7 On 8 April 2011, we received a dispute submission from Sky, which also disputed Openreach's LLU charges between 20 June 2009 and 14 October 2010.

---

<sup>5</sup> Carphone Warehouse Group PLC v Office of Communications Case 1111/3/3/09 [2010] CAT 26



## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

- 2.8 As part of its dispute submission, Sky set out a history of its negotiations with Openreach in relation to the charges. Despite these negotiations, Sky and Openreach were unable to reach an agreement.
- 2.9 We considered whether there were any appropriate alternative means for resolving the dispute and decided that there were none in this case. As a result we decided that it was appropriate for us to handle the dispute brought by Sky and that it was appropriate to join Sky to the existing dispute between Opal and Openreach.
- 2.10 On 18 April 2011, we informed Sky, Openreach and Opal of our decision to join Sky to the dispute and published an update to the CCEB on 19 April 2011.
- 2.11 Cable & Wireless Worldwide have written to us to state that they are interested in this dispute<sup>6</sup>.

### Ofcom's jurisdiction

- 2.12 At the date that Opal made its dispute submission, Ofcom had jurisdiction in relation to disputes which fell within section 185(1) and/or 185(2) of the Act. In its submission, Opal did not distinguish between these subsections, referring instead more broadly only to section 185. Sky similarly refers only to section 185 of the Act.
- 2.13 Section 185(1) of the Act applies to disputes relating to the provision of network access. Section 185(2) of the Act relates (amongst other things) to disputes relating to rights or obligations conferred or imposed under Part 2 of the Act.
- 2.14 In its dispute submission, Opal makes a number of different arguments (considered further below), which all go to its main contention that Openreach should be required to repay to Opal the difference between the 2009 price control set by Ofcom and the revised price control as determined by the CC, for the relevant period in dispute. In support of that contention, Opal argues as follows:
- 2.14.1 whilst Openreach's prices for the relevant period in dispute were compliant with the 2009 price control, they were not compliant with other SMP conditions which Ofcom had imposed on Openreach in respect of the relevant LLU services, namely:
- a) Condition FA3<sup>7</sup>: a requirement that charges for LLU services (*inter alia*) be 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 condition"); and
  - b) Condition FA1.2<sup>8</sup>: a requirement to provide Network Access upon reasonable request, as soon as reasonably practicable, on fair and reasonable terms and conditions and subject to such conditions and

---

<sup>6</sup> Letter from Andrea Sheridan (C&W) to Phil Jones (Ofcom) dated 6 May 2011.

<sup>7</sup> Set in the December 2004 Statement, and retained as a result of the 2009 LLU decision; following the 2010 Statement, this condition became Condition FAA4.

<sup>8</sup> Set in the December 2004 Statement, and retained as a result of the 2009 LLU decision; following the 2010 Statement, this condition became Condition FAA1.2.

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

charges as Ofcom may direct from time to time (the “fair and reasonable condition”)<sup>9</sup>;

- 2.14.2 the cost orientation condition and the fair and reasonable condition apply irrespective of the 2009 price control and BT is not excused from the requirement to comply with them if Ofcom has erred in setting the maximum price caps in the price control;
- 2.14.3 Openreach’s charges were not compliant with the cost orientation condition and it therefore follows that they cannot be regarded as being compliant with the fair and reasonable condition;
- 2.14.4 it is a minimum requirement of both the cost orientation condition and the fair and reasonable condition that both (i) the charges in question are set in compliance with the price control applying at the time (the 2009 price control in this case) and (ii) that that price control was set correctly. In this case the CC found that the 2009 price control was not set correctly and so notwithstanding that Openreach’s charges were set in line with the 2009 price control, they must still have been in breach of the cost orientation and fair and reasonable conditions;
- 2.14.5 similarly, Openreach is under a separate regulatory and contractual obligation to justify to Opal that its price increases are fair and reasonable, which Opal contends Openreach has failed to do in this case, despite the fact that the Tribunal held in the *TRD* case<sup>10</sup> that the onus lies on the party proposing a price variation to justify that price variation to the other party and to Ofcom.
- 2.15 Opal’s complaint in essence appears to be that Openreach was (a) in breach of the separate cost orientation condition and the fair and reasonable condition, and (as we understand it) (b) that Openreach has a separate regulatory obligation to justify to Opal why its prices are fair and reasonable, and that because Openreach has not done so to Opal’s satisfaction, its prices are not fair and reasonable.
- 2.16 In its dispute submission, Sky simply argues that it would be unfair and unreasonable if Openreach was permitted to keep the difference between the amount it actually charged, and the maximum amount it would have been permitted to charge had the price control levels as determined by the CC been applied during the period in dispute.
- 2.17 It appears to be common ground that Openreach is not in breach of the 2009 price control condition set by Ofcom, as Openreach’s charges were clearly at all times in the period in dispute set in accordance with that condition.
- 2.18 Pursuant to section 185(1) of the Act, Ofcom has jurisdiction in relation to disputes concerning the provision of network access (as defined in section 151(3) of the Act). Consistent with section 185(8)(a) of the Act and the Tribunal’s judgment in the PPCs preliminary issues judgment<sup>11</sup>, disputes relating to the provision of network access

---

<sup>9</sup> In addition, condition FA9 contains a requirement to provide LLU services upon reasonable request, as soon as reasonably practicable, on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may direct from time to time.

<sup>10</sup> See *T-Mobile v Office of Communications* [2008] CAT 12, para 177

<sup>11</sup> See [2010] CAT 15 paragraphs 81-84

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

under section 185(1) of the Act include disputes as to the terms and conditions on which that access may be provided in a particular case. The Disputes in this case relate to the terms on which Openreach provided certain services to Opal and Sky. We therefore consider that they relate to the provision of network access by Openreach, and that Ofcom's jurisdiction in this case therefore falls within section 185(1) of the Act.

- 2.19 Finally, we note that we do not agree with Openreach's suggestion that Ofcom does not have jurisdiction to consider these Disputes because they raise compliance issues, and not matters falling within Ofcom's dispute jurisdiction. First, as set out above, we do not consider that the Disputes raise compliance issues. Second, the issue of whether the possibility of a compliance investigation excludes Ofcom's dispute jurisdiction has already been clearly resolved by the Tribunal in BT's appeal of Ofcom's partial private circuits dispute determination<sup>12</sup>. The Tribunal confirmed that there is substantial potential parallel jurisdiction between compliance investigation and disputes and the fact that the issues raised in a dispute could also be dealt with as a compliance complaint does not prevent them being considered as a dispute.

---

<sup>12</sup> Preliminary judgment of 11 June 2010 in Case 1146/3/3/09 BT v Ofcom (Partial Private Circuits) [2010] CAT 15 (the "PPC case"), for example at para. 169.

## Section 3

# Analysis of the Disputes

## Introduction

- 3.1 This section sets out our analysis of the Disputes and our proposed determination of them.
- 3.2 Our analysis is intended to address the scope of the Disputes, which is:
- “should Ofcom exercise its discretion under s 190(2)(d) to direct Openreach to repay an amount to Opal for charges for Local Loop Unbundling services to reflect the suggested adjustments to Ofcom’s LLU price control set out in the Competition Commission 31 August 2010 Determination for the period 20 June 2009 to 14 October 2010”.*
- 3.3 In light of the scope as set out above, we consider that these Disputes pose the following question: should we exercise our discretion under section 190(2)(d) of the Act to require Openreach to repay to Opal and Sky an amount equal to the difference between what they paid to Openreach for the relevant LLU services, and the amount they would have paid to Openreach had the prices specified by the CC in its determination been in effect from 20 June 2009, plus interest?
- 3.4 Opal and Sky purchase the services in dispute from Openreach. For the period between 20 June 2009 and 14 October 2010, they paid the prices that Openreach had set in compliance with Ofcom’s 2009 price control. Opal and Sky both argue that they should now be reimbursed the difference between the amounts they actually paid in that period and the amounts they would have paid had the prices specified by the CC in its determination been in effect from 20 June 2009. They are claiming for amounts that they consider they have overpaid, amounting to approximately £[redacted] plus interest in the case of Opal, and £[redacted] plus interest in the case of Sky.

## The nature of Ofcom’s discretion under s.190(2)(d) of the Act

- 3.5 Both Opal and Sky argue that Ofcom should exercise its discretion under section 190(2)(d) of the Act to direct Openreach to make a payment to them by way of an adjustment of an overpayment.
- 3.6 Section 190 of the Act sets out Ofcom’s powers when making a determination to resolve a dispute referred under section 185.
- 3.7 Section 190(2) is expressed as a power not a duty. As a result, Ofcom has discretion as to whether, and if so how, it chooses to exercise that power, including as regards requiring any payments to be made by one party to another. The Act does not provide specific guidance as to how Ofcom should exercise its discretion.
- 3.8 When Ofcom resolves disputes, it does so as the regulator<sup>13</sup>. As such, it is required to act in accordance with its statutory duties under the Act as set out primarily in sections 3 and 4 of the Act. Ofcom’s principal duty in carrying out its functions is to

---

<sup>13</sup> See for example *Hutchison 3G (UK) Limited v Ofcom* [2005] CAT 39

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

further the interests of citizens, and to further the interests of consumers, where appropriate by promoting competition<sup>14</sup>. Ofcom is also required to have regard to the principles under which regulatory activities should be transparent, accountable, proportionate, consistent, targeted only at cases in which action is needed, and any other principles appearing to Ofcom to represent the best regulatory practice. Ofcom must in any event also act in accordance with general administrative law principles. In this context, we consider that the principles of regulatory certainty, as well as legal certainty, are of relevance and we consider them further below.

### Analytical framework

- 3.9 We go on to consider below whether we should exercise our discretion in this case to require Openreach to make repayments to Opal and Sky.
- 3.10 We consider that this case requires us to make an assessment of what is fair as between the parties on the facts of this case, in light of our statutory duties.
- 3.11 In doing so we consider that, in light of our statutory duties, we must also consider the potential effect of our proposed determination of the Disputes on:
- 3.11.1 consumers; and
  - 3.11.2 competition.
- 3.12 We also consider the potential effect of our determination of the Disputes on the incentives of the Parties.

### Should Ofcom exercise its discretion in this case to require repayment by Openreach?

#### *Fairness as between the parties*

##### Arguments of the parties

##### Fairness to Opal and Sky

- 3.13 Sky maintains in its dispute submission that it would be “*manifestly unfair and unreasonable*” if Openreach were not required to repay monies to Sky in this case, because Openreach would otherwise simply keep money that it would not have been permitted to charge, had Ofcom set the correct price control at the outset. Sky sets out that to require a repayment would simply put Sky in the position it would have been in had the correct charge control been set. In support of this position, Sky relies on the Tribunal’s findings in the *PPC* case, in which it stated that Ofcom’s discretion under s.190(2) of the Act is a “*hard discretion confined to requiring Ofcom to follow through on the conclusions it has drawn pursuant to the dispute resolution process*”<sup>15</sup>.
- 3.14 Opal argues to similar effect (albeit on a slightly different basis), namely that “*a party in its position that has had to pay for services on the basis of erroneously set price controls must be entitled to a full and effective remedy*” and that this “*inevitably means some form of remedy that compensates or otherwise adjusts for past over-*

---

<sup>14</sup> See s.3(1) of the Act

<sup>15</sup> See *BT v Ofcom* [2011] CAT 5, paras 182 and 338(1)

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

*payments*". Opal relies on the Tribunal's TRD judgment, in which it stated that "s.192(2)(d) of the 2003 Act is a straightforward provision designed to ensure that Ofcom's determination of what is a reasonable rate is backdated to the time at which that rate would have come into effect had the OCCN been accepted. It should ordinarily follow on from a determination that this kind of readjustment takes place. Otherwise the party which has wrongly resisted the proposed OCCN is in a better position than they would have been in had they accepted it without challenge"<sup>16</sup>.

- 3.15 Opal also makes reference to the *Retrospection* case<sup>17</sup>, in which the Court of Appeal considered whether a price control could be altered with retrospective effect under the SMP regime.
- 3.16 Openreach argues that "no material financial and/or competitive harm was suffered by Opal throughout the lapsed period. TalkTalk Group (Opal's parent company) raised its own end-user prices three times during the lapsed period of the charge control [...] to an extent unrelated to their input prices".

### Fairness to Openreach

- 3.17 Opal has also made various suggestions that, regardless of the price control set by Ofcom, Openreach was under a separate obligation to charge fair, reasonable and cost oriented prices, and it should therefore separately have assessed whether the price control ceiling set by Ofcom constituted a fair, reasonable and cost oriented price. Opal goes on to argue that Openreach should itself have determined at the outset that Ofcom's price control did not constitute a fair, reasonable and cost oriented price, and so should have charged lower prices for the relevant LLU services in any event.
- 3.18 Openreach contends that it "complied with all relevant charge controls and regulatory obligations relating to the LLU services "importantly by offering cost orientated prices which were fair and reasonable throughout the lapsed period"". In addition, it asserts that "Openreach was itself not recovering its efficiently incurred costs, including a fair return on its capital employed, on its MPF service throughout the lapsed period – nor, indeed for some significant time before the charge control took effect. [...] and cost recovery was not intended until the end of the glide path in 2012/13."

### Ofcom's preliminary view

#### Fairness to Opal and Sky

- 3.19 The primary source of potential unfairness (if any) to Opal and Sky is that they paid more for the LLU services during the relevant period than they would have paid had either (a) Ofcom set the price control at a lower level from the outset, following the approach subsequently adopted by the CC or (b) the CC's Determination been capable of applying retrospectively, given that Openreach charged the amounts set in the 2009 LLU price control.
- 3.20 We consider that any costs for Opal and Sky during the relevant period, that are higher than those which would have applied had Ofcom set prices at a lower level from the start of the charge control, are in fact likely to have been ultimately borne by Sky and Opal's customers, rather than having been absorbed by Sky and Opal

<sup>16</sup> See *T-Mobile v Ofcom* [2008] CAT 12 (the "TRD case"), para 169

<sup>17</sup> *Vodafone, O2, T-Mobile, Orange v Ofcom and BT* [2010] EWCA Civ 391

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

themselves. With regard to Opal, we note in this regard CPW's June 2009 presentation to investors, in which Charles Dunstone, CEO of CPW, said that the MPF prices were in line with expectations and had no impact on the company's financial guidance, noting that CPW had increased its prices on 1 May 2009, which more than covered the increase in the MPF charges<sup>18</sup>. On that basis, repayments from Openreach to Opal would not necessarily put Opal in the position in which it would otherwise have been if it had already recovered Openreach charges from its own consumers.

- 3.21 We do not consider that the Tribunal's findings in either the *PPC* or the *TRD* case necessarily determine how Ofcom should act in this case. Each case must properly be considered in the context of its own specific circumstances:
- 3.21.1 The *TRD* case concerned a contractual proposal by certain counterparties to BT to change their contractual terms in a context where no regulatory obligations otherwise applied to those terms.
- 3.21.2 The *PPC* case concerned BT's compliance with a regulatory obligation to charge cost-oriented charges, but where Ofcom had not set a price control in relation to those charges.
- 3.22 In our view, this case is quite different to either the *TRD* case or the *PPC* case:
- 3.22.1 In the *TRD* case, BT had a choice whether or not to accept a price variation. It decided not to, and hence took a risk as to whether its position would be vindicated by Ofcom or not.
- 3.22.2 In the *PPC* case, BT failed to comply with an SMP obligation to charge a cost-oriented price.
- 3.22.3 In contrast, in this case Ofcom had by regulation set a price control, and Openreach set charges in accordance with it.
- 3.23 This distinction between these Disputes and the *TRD* and *PPC* cases does not however necessarily mean that Ofcom should not exercise its discretion to order repayments and we consider below further factors in the *PPC* case in particular which we consider to be relevant to the position in this case.
- 3.24 As regards the *Retrospection* case, the Court of Appeal did not consider it necessary to decide whether a price control could be altered with retrospective effect in the context of a dispute<sup>19</sup>.

### Fairness to Openreach

- 3.25 The purpose of the detailed and complex regulatory process for setting price controls, as set out in the European and domestic legislation, is to provide certainty to both regulated and non-regulated providers. We consider that Openreach was entitled to set its own charges in accordance with the price controls that Ofcom set, as it in fact

---

<sup>18</sup> Sources: 5 June 2009 presentation, 'Preliminary Results for the year to March 2009': <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9Nzg0MnxDaGlsZEIEPS0xfFR5cGU9Mw==&t=1>; and contemporaneous internal Ofcom note of 5 June 2009 audio presentation by Charles Dunstone.

<sup>19</sup> See para 43 of the Court of Appeal judgment.

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

did. To conclude that Openreach was not entitled to do so would in our view be contrary to and would frustrate the purpose and scheme of the regulatory framework for electronic communications.

- 3.26 In relation to Openreach's costs, we considered the issue of cost recovery when setting the 2009 price control. We set prices so that the price delivered would equal our assessment of the projected efficient fully allocated cost of each service in the final year of the price control.

### ***Effect of repayments on consumers***

#### Arguments of the parties

- 3.27 Sky argues that *“One of the purposes of the price control is to prevent consumer harm that would result from excessive charges/monopoly rents. Therefore, if it transpires that Ofcom erred by setting prices too high, then it is clear that there is a consumer welfare loss.”* It argues that, if Openreach is allowed to keep any past overcharge, *“it will be consumers who will have lost out, since either the higher charges will have been passed on to them by LLU operators or LLU operators will not have invested in new and more innovative products and services, which would have been to the benefit of consumers.”*
- 3.28 Opal has not argued that requiring repayments would be of benefit to consumers.
- 3.29 Openreach argues that requiring it to repay any amounts for the lapsed period of the charge control would provide Opal with a financial “windfall”. It further comments that there is no assurance from Opal that it would pass on the benefits of any repayment to its customers<sup>20</sup>.

#### Ofcom's preliminary view

- 3.30 Our principal duty is to further the interests of consumers and a solution that resulted in direct recompense to consumers who had overpaid would weigh strongly in our analysis. However, we do not have the power under our dispute resolution powers to require parties to a dispute to make onward payments to their own customers of any monies that we require to be repaid to them. We have therefore considered whether the repayments sought by Opal and Sky would otherwise lead to a more positive consumer outcome.
- 3.31 Opal and Sky have not shown that repayments to them would lead them to make repayments to their customers to whom higher LLU prices may have been passed on. Sky's argument is that consumers will have been harmed as a result of Ofcom setting the 2009 LLU price control too high. However, whether or not there are repayments, any such harm has already occurred in the past, and Sky does not identify a benefit that would accrue to consumers following a repayment. We consider Sky's argument further below, in relation to effects on competition.
- 3.32 We do not consider that a requirement for Openreach to repay a lump sum to Opal or Sky in respect of past conduct would tend to provide incentives to the recipient to benefit consumers, whether by reducing consumer prices or providing a rebate to

---

<sup>20</sup> Openreach's argument was made in response to Opal's submission. Following our decision to join Sky as a party to the Dispute, Openreach stated that the arguments it had made in respect of Opal's submission applied also to the substance of the issues raised by Sky.



## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

consumers to whom higher costs may have been passed on. Repayments for the retrospective period in dispute would not affect the forward-looking costs of services offered by Opal and Sky and no economic incentive has been identified by the parties that would lead them to reduce their prices to consumers either retrospectively or prospectively as a consequence of the repayments.

- 3.33 We consider below the potential for indirect (i.e. longer-term or wider) effects on consumers through effects on competition or incentives.

### ***Effect of repayments on competition***

#### Arguments of the parties

- 3.34 Opal argues that requiring Openreach to repay monies would reduce or remove any competitive distortion and economic inefficiency caused by its past “excessive” charges. Opal does not elaborate on what competitive distortion or economic inefficiency may in fact have occurred in this case.
- 3.35 Sky submits that as a result of Openreach’s charges, LLU operators may not have invested in new and more innovative products and services which would have been to the benefit of consumers.
- 3.36 Openreach argues that *“the sums claimed by Opal (circa £[X]) are insufficient to have had any meaningful effect on consumers or competition in the market. Indeed, Opal puts forward no evidence to suggest that it has suffered any competitive harm as a result of the price changes, or that the prices have resulted in any material distortion of competition. All of Openreach’s customers were subject to the same price increases and the size of those Openreach price increase when considered on an individual line basis was in fact extremely small [...] As a result, the impact on suppliers, end-users, and competition in the market generally, would therefore most likely have been immaterial.”*

#### Ofcom’s preliminary view

- 3.37 We consider that a distinction should be drawn between the implications for innovation and investment of the higher charges at the time of the 2009 LLU Decision and the effect on competition of retrospective repayments at the present time. We note that Sky’s argument relates only to the former, i.e. the effect of higher charges at the time. Opal’s argument appears to relate the latter, i.e. the effect of retrospective repayments now.
- 3.38 In relation to the effect of the charges on innovation and investment during the relevant period, we note that the amounts which are being claimed by Opal and Sky are relatively small in the context of the overall value of the services provided. In our view, this means that the scale of any harm that arose during the relevant period as a result of the disparity between the rates set by Ofcom and rates set on the basis of the CC’s Determination is similarly limited. We also note that the prices charged by Openreach applied to all LLU customers, further limiting the potential for competitive distortion.
- 3.39 In relation to the effect of repayments on competition, we do not consider that any repayment would have an impact on any alleged competitive distortion or economic inefficiency. Whilst we would expect the change in the price cap in the 2010 Statement to remove any competitive distortion or economic inefficiency

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

prospectively, it is not clear that retrospective repayments would do so (or could in some way correct any past distortions). More specifically, although changes in prices that apply prospectively alter the marginal costs to LLU operators, it is not clear how retrospective repayments (especially on the scale relevant to the Disputes) would affect the current or future pricing or investment decisions of LLU operators and we do not consider that the parties have explained how this would occur.

### ***Effect of repayment on incentives***

#### Arguments of the parties

- 3.40 Opal argues that from July 2009 (when CPW appealed Ofcom's price control decision and Opal raised concerns with Openreach as to its pricing) Openreach has been fully aware that Opal considered its prices were too high, and that it could and should have made provision in its accounts for a possible requirement to repay monies to Opal as a result.
- 3.41 Sky also considers that Openreach would have been aware of a risk that it might have to repay, following both CPW's appeal and Sky's application in August 2009 to intervene in that appeal.
- 3.42 In addition, Opal argues that if Openreach is not required to make any repayments, it will have an incentive to seek to prolong appeals for as long as possible, so as to be able to charge higher prices for as long as possible.

#### Ofcom's preliminary view

#### *Effect on incentives of a requirement to set aside amounts in anticipation of an appeal*

- 3.43 We consider that the application of this argument to the facts of these Disputes reveals a number of difficulties. CPW's appeal alleged a large number of errors in Ofcom's analysis which, had they been upheld, would taken together have implied a considerably larger repayment than is now being claimed by Opal in its Dispute. In the event, CPW was successful in only three of its claims.
- 3.44 In its appeal, CPW argued that the total impact of Ofcom's alleged errors was £[redacted] in total for 2009/10 and 2010/11<sup>21</sup>. We consider it reasonable to assume that the financial impact on CPW in respect of the relevant period can be derived on a pro rata basis for these two years, which results in an estimate of £[redacted], based on approximately 16 of 24 months (or 2/3) of £[redacted]. The amount that Openreach would have needed to set aside at the outset of Opal's appeal, in respect of the relevant period, would therefore have been approximately £[redacted] or [redacted] times the amount claimed in Opal's Dispute.
- 3.45 We do not consider that it is always reasonable to expect a regulated entity, on receipt of notice that a counterparty intends to appeal a regulatory decision relating to a price control to which it is subject, to put aside in escrow or otherwise make provision for an amount equal to the whole sum claimed. Depending on the amounts claimed by the counterparty (which, as here, could be considerably more than the difference between the rates set by Ofcom and the rates that the CC indicated should

---

<sup>21</sup> The figure of £[redacted] is taken from a witness statement made by Andrew Heaney (*Witness Statement of Andrew John Heaney, dated 21 July 2009, para 55*), which is relied on by CPW's WLR Notice of Appeal for the estimate of the impact (para 9 of WLR notice of appeal).

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

have been set), we consider there is a risk that such an outcome could have a negative effect on investment incentives and ultimately on consumers. This is because it could involve potentially large sums of money being tied up for uncertain periods of time. We consider this reasoning applies to these Disputes, and it would not have been reasonable to expect Openreach to put aside the amounts initially claimed in respect of the relevant period.

### Additional effects on the parties' incentives

3.46 We have also considered the wider implications of applying an automatic presumption that retrospective repayments should be made in situations where a price control is successfully appealed. In the present Disputes, the price control was found to be too high, but it is possible that a price control could be found to be too low. If we were to apply an automatic presumption in the former situation, we need to consider what our approach should be in the latter situation. We could adopt one of two approaches:

3.46.1 we could adopt a symmetric approach, i.e. assuming that purchasers of the price-capped services will be required to make retrospective repayments to the regulated entity whose regulated prices have been found to be too low. This runs the risk of reducing the incentives for purchasers to ensure that lower wholesale prices under a price cap flow through to lower end prices for consumers (see also paragraph 3.52 below); or

3.46.2 we could adopt an asymmetric approach, i.e. assuming that purchasers will not be required to make retrospective repayments to the regulated entity. This has the disadvantage that the regulated entity may expect not to recover its costs on average. For example, in a situation where a price cap is set by Ofcom at Ofcom's assessment of the regulated entity's costs (and in the absence of a glide path), but is later found to be too low, the regulated entity would not expect to receive a repayment from the purchasers of the price-capped services and so would fail to recover its costs. This could reduce the investment incentives for the regulated entity.

3.47 In addition, we do not consider that a requirement to make repayments would, in the context of these Disputes, increase Openreach's incentives to comply with its regulatory obligations, given that it had in our view at all times complied with the 2009 charge control. For completeness, we note that this should be distinguished from a situation in which a regulated party overcharges customers in breach of the applicable price control (or other SMP condition). In such a situation, the absence of a likely requirement to make repayments would give the regulated party an incentive not to comply with the charge control (or other regulation), but that does not apply in this case.

3.48 In relation to Opal's argument that BT will have an incentive to prolong appeals for as long as possible, we do not consider this is a particularly likely outcome, or one on which we should place significant weight. Both the Tribunal and the CC have sufficient powers to ensure that cases are heard as expeditiously as possible, as the Court of Appeal noted in the *Retrospection* judgment<sup>22</sup>.

---

<sup>22</sup> See paragraph 45 of that judgment.

### ***Legal and regulatory certainty in the context of the ex ante regulatory framework***

#### Ofcom's preliminary view

- 3.49 We consider that the principles of legal and regulatory certainty are relevant when deciding whether repayments should be required. Both principles support the position that stakeholders should know about, be able clearly to understand, and be able to rely on legal/regulatory decisions which may affect them.
- 3.50 Openreach has in our view at all times from 22 May 2009 complied with the regulatory obligations imposed on it in relation to its charges for the relevant LLU services. The Tribunal directed Ofcom to amend those regulatory obligations following the CC's determination, but those amendments applied only on a forward looking basis in line with the Court of Appeal's judgment in the *Retrospection* case that the Tribunal does not have the power to order Ofcom to amend such obligations on a retrospective basis. Openreach amended its charges accordingly following amendment by Ofcom of the 2009 price control (as set out at paragraph 1.14 above).
- 3.51 In our view, it is an important part of the regulatory regime that stakeholders should have certainty when the regulator makes a decision, subject to any appeal which may be brought in accordance with the provisions of the Act. That principle in our view weighs in favour of not requiring Openreach to make any repayments.
- 3.52 More generally, we are concerned that requiring Openreach to make repayments would lead to uncertainty across the industry. That uncertainty may be expected to increase companies' costs as a result of the need to provide for potential liabilities; it may also result in companies choosing not to pass on reductions in charges to customers for fear they will have to make repayments later (an example of this would be if CPs decided not to pass through the recent reductions in mobile termination rates to consumers, as a consequence of the recent appeals by mobile network operators against Ofcom's determination of those termination rates). While this does not mean that retrospective payments will never be appropriate in circumstances where a charge control is successfully appealed, we consider this is a factor that weighs against repayment on the facts of these Disputes.

#### **Provisional conclusions**

- 3.53 As set out above, there are a number of factors which are potentially relevant to the question of whether we should exercise our discretion to require Openreach to make repayments in this case. Some militate in favour of requiring such payments to be made, whilst others suggest that we should not require repayments by Openreach.
- 3.54 We have considered what is fair and reasonable between the parties. We note that Ofcom was found to have set the 2009 price control incorrectly and in that sense there was some overpayment by Opal and Sky to Openreach for the period before the revised price control came into effect. However we also note our view that Openreach complied with the regulatory obligations which Ofcom had set. We consider that legal and regulatory certainty in conditions set by Ofcom is important.
- 3.55 In considering fairness between the parties, we have considered materiality in this case. We acknowledge that the sums sought by Opal and Sky are not in themselves insignificant, but for the reasons set out above we also consider that in the context of the overall value of the services provided, any harm to competition that arose during

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

the relevant period was limited, and it is not clear that any retrospective repayment now would remove any alleged competition distortion or economic inefficiency.

- 3.56 We have also considered the potential impact on consumers. If we were satisfied that a repayment was likely to have a positive effect on consumers or competition, either directly or indirectly, this could alter the balance of relevant factors in favour of ordering a repayment. However, we note in this regard our view that, in the circumstances of these Disputes, a repayment would be unlikely to have a significant impact (positive or negative) on competition or consumers
- 3.57 On balance therefore, and on the specific facts of this case, we provisionally consider that the principles of legal and regulatory certainty and the potential unfairness to Openreach of requiring it to repay sums that it charged in compliance with binding regulation at the time, outweigh the arguments that suggest that not to require repayment would result in an unfair outcome for Opal and Sky. For the reasons set out above we consider that this is consistent with our statutory duties.

## Annex 1

# The Draft Determination

## 1.1 Disputes between BT and each of Opal and Sky

### **Determination under sections 188 and 190 of the Communications Act 2003 (“Act”) for resolving disputes between BT plc (“BT”) and each of Opal Telecom Limited (“Opal”) and British Sky Broadcasting Limited (“Sky”) concerning Local Loop Unbundling charges**

#### **WHEREAS—**

**(A)** section 188(2) of the Act provides that, where Ofcom has decided pursuant to section 186(2) of the Act that it is appropriate for it to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom makes for resolving the dispute must be notified to the parties in accordance with section 188(7) of the Act, together with a full statement of the reasons on which the determination is based, and publish so much of its determination as (having regard, in particular, to the need to preserve commercial confidentiality) they consider 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 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 Act sets out the scope of Ofcom’s powers in resolving a dispute which may, in accordance with section 190(2) of the 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 7 February 2011, Opal submitted a dispute to Ofcom, requesting that Ofcom exercise its discretion under section 190(2)(d) of the Act to order Openreach to repay an amount to Opal for charges for LLU services to reflect the suggested adjustments to Ofcom’s LLU price control set out in the Competition Commission’s 31 August 2010 determination for the period 20 June 2009 and 14 October 2010;

**(D)** on 21 March 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:

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

*“The scope of the dispute is should Ofcom exercise its discretion under s 190(2)(d) to direct Openreach to repay an amount to Opal for charges for Local Loop Unbundling services to reflect the suggested adjustments to Ofcom’s LLU price control set out in the Competition Commission 31 August 2010 Determination<sup>23</sup> for the period 20 June 2009 to 14 October 2004.”*

(E) on 8 April 2011, we received a dispute submission from Sky, which also disputed Openreach’s LLU charges between 20 June 2009 and 14 October 2010;

(F) on 19 April 2011, we joined Sky to the dispute;

(G) a non-confidential draft determination was sent to the parties on 14 June 2011 and published on Ofcom’s website on 15 June 2011;

(H) in order to resolve these disputes, 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 Act; and

(I) a fuller explanation of the background to the disputes 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 these disputes—**

### ***I Declaration of rights and obligations, etc.***

1 It is hereby declared that Openreach is not required to repay an amount to Opal or Sky for Local Loop Unbundling services to reflect the suggested adjustments to Ofcom’s LLU price control set out in the Competition Commission 31 August 2010 Determination for the period 20 June 2009 to 14 October 2004.

### ***II Binding nature and effective date***

2 This determination is binding on each of Opal, Sky and BT in accordance with section 190(8) of the 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) “**Act**” means the Communications Act 2003 (c.21);

---

<sup>23</sup> Carphone Warehouse Group PLC v Office of Communications Case 1111/3/3/09 [2010] CAT 26

Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

- b) **“BT”** means British Telecommunications plc, whose registered company number is 1800000, and any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by section 1159 of the Companies Act 2006;
- c) **“Ofcom”** means the Office of Communications;
- d) **“Opal”** means Opal Telecom Limited whose registered company number is 3849133, 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;
- e) **“Sky”** means British Sky Broadcasting Limited whose registered company number is 2906991, 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.

**Neil Buckley**

**Director of Investigations**

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

**[date of final determination]**



## Annex 2

# Responding to this consultation

## How to respond

- A2.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 29 June 2011**.
- A2.2 Ofcom strongly prefers to receive responses using the online web form at <http://stakeholders.ofcom.org.uk/consultations/draft-disputes-bt-opal-sky-llu/> as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A2.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email [Paul.Dean@ofcom.org.uk](mailto:Paul.Dean@ofcom.org.uk) attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A2.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Paul Dean  
4<sup>th</sup> Floor  
Competition Group  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA
- Fax: 020 7783 4109
- A2.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A2.6 It would be helpful if you can explain why you hold your views and how Ofcom's proposals would impact on you.

## Further information

- A2.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Paul Dean on 020 7981 3626.

## Confidentiality

- A2.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

## Draft Determination to resolve a dispute between BT and each of Opal and Sky about Local Loop Unbundling charges

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A2.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A2.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

### Next steps

- A2.11 Following the end of the consultation period, Ofcom intends to publish a final determination by no later than 20 July 2011.
- A2.12 Please note that you can register to receive free mail updates alerting you to the publications of relevant Ofcom documents. For more details please see: [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm)

### Ofcom's consultation processes

- A2.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 3.
- A2.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at [consult@ofcom.org.uk](mailto:consult@ofcom.org.uk) . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A2.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Graham Howell, Director England and Secretary to the Corporation, who is Ofcom's consultation champion:

Graham Howell  
Ofcom  
Riverside House  
2a Southwark Bridge Road  
London SE1 1EE

Tel: 020 7981 3000  
Fax: 020 7981 3333

Email [graham.howell@ofcom.org.uk](mailto:graham.howell@ofcom.org.uk)

## Annex 3

# Ofcom's consultation principles

A3.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

A3.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

A3.3 We will be clear about who we are consulting, why, on what questions and for how long.

A3.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened Plain English Guide for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A3.5 We will consult for up to 10 weeks<sup>24</sup> depending on the potential impact of our proposals.

A3.6 A person within Ofcom will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. Ofcom's 'Consultation Champion' will also be the main person to contact with views on the way we run our consultations.

A3.7 If we are not able to follow one of these principles, we will explain why.

### After the consultation

A3.8 We think it is important for everyone interested in an issue to see the views of others during a consultation. We would usually publish all the responses we have received on our website. In our statement, we will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

---

<sup>24</sup> In the case of disputes we will consult for ten working days from the publication date of the draft determination; this reflects the four month deadline for Ofcom to issue its final determination.

## Annex 4

# Consultation response cover sheet

- A4.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk).
- A4.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A4.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A4.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at [www.ofcom.org.uk/consult/](http://www.ofcom.org.uk/consult/).
- A4.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only, so that we don't have to edit your response.