



Draft resolution of a dispute  
between BT and Telewest about  
reciprocal charging arrangements  
for call termination rates

**Consultation**

Closing Date for Responses: **2 April 2004**

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# DRAFT

## **Determination under Section 190 of the Communications Act 2003 for resolving a dispute between the Telewest companies listed at Annex 1 to this Determination ('Telewest') and British Telecommunications plc ('BT') about reciprocal charging arrangements for call termination rates**

### **WHEREAS:**

- A. Section 188(2) of the Communications Act 2003 (the "Act") provides that where there is a dispute between different communications providers, and Ofcom have decided pursuant to section 186(2) of the Act that it is appropriate for them to handle the dispute, Ofcom must consider the dispute and make a determination for resolving it. The determination that Ofcom make 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. Section 190 sets out the scope of Ofcom's powers on resolving a dispute, which may include, in accordance with section 190(2) of the Act, a direction requiring the payment of sums by way of adjustment of an underpayment or an overpayment;
- B. On 13 July 2001 BT issued an Operator Charge Change Notice ("OCCN") to Telewest detailing the proposed charges payable by BT for calls passed from BT's network for termination on Telewest's network for the period commencing 1 October 2001 ("the Proposed Agreement");
- C. On 1 March 2002 the Director General of Telecommunications ("the Director") made final Directions under the provisions of Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 to resolve disputes between BT and a number of other parties concerning termination rates payable by BT to other electronic communications providers. At that point BT and Telewest were in dispute about the Proposed Agreement but agreed to seek to reach settlement through commercial negotiation;
- D. On 15 October 2003, BT wrote to the Director referring a dispute between BT and Telewest Communications plc and other electronic communications providers in the Telewest group of companies relating to the Proposed Agreement, as BT and Telewest had failed to reach commercial settlement of the Proposed Agreement;
- E. On 19 December 2003, after holding discussions with the parties, Ofcom decided pursuant to section 186(2) of the Act that it was appropriate for it to handle the dispute and informed the parties of this decision;
- F. By virtue of the Transitional Provisions the Director was able to exercise the powers under the Act for an interim period. Ofcom has now assumed those powers as of 29 December 2003;
- G. In order to resolve this dispute, Ofcom has considered, among other things, the information provided by the parties and the relevant duties set out in sections 3 and 4 of the Act;

- H. An explanation of the background to the dispute and Ofcom's reasons for making this Determination are set out in the explanatory statement accompanying this Determination;
- I. Ofcom issued a draft of this Determination and the explanatory statement on 19 March 2004 and responses were invited by 2 April 2004.

**NOW, THEREFORE, PURSUANT TO SECTION 190 OF THE ACT, OFCOM MAKES THE FOLLOWING DETERMINATION:**

- 1. The parties shall enter into the Proposed Agreement with an effective date of [date of publication] 2004.
- 2. For the period 25 July 2003 to [date of publication] the applicable payment by BT to Telewest for calls passed from BT's network for termination on Telewest's network shall be calculated according to the methodology set out in the Annex to the Proposed Agreement.
- 3. For the purposes of giving effect to paragraph 2 of this Determination:
  - a. where amounts have been paid by BT to Telewest which are greater than the amount due under the methodology and during the period set out in paragraph 2 for calls passed from BT's network for termination on Telewest's network, Telewest shall pay to BT such sums, as appropriate, by way of adjustment of any overpayment; and
  - b. where amounts have been or should have been paid by BT to Telewest which are lower than the amount due under the methodology and during the period set out in paragraph 2 for calls passed from BT's network for termination on Telewest's network, BT shall pay to Telewest such sums, as appropriate, by way of adjustment of any underpayment.
- 4. Words or expressions used in this Determination shall have the same meaning as in the Act, except as otherwise stated in this Determination and as follows:
  - a. "Transitional Provisions" means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003;
- 5. 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.
- 6. This Determination shall take effect on the day it is published.
- 7. This Determination is binding on BT and Telewest in accordance with section 190(8) of the Act.

**HEATHER CLAYTON**  
**DIRECTOR OF INVESTIGATIONS**  
[xx 2004]

## Annex 1

# Telewest companies which are parties to this dispute

Telewest Cen Lancashire	Telewest Midlands
Telewest Communications	Telewest Motherwell
Telewest Cotswolds	Telewest North East
Telewest Cumbernauld	Telewest North East
Telewest Dumbarton	Telewest North Thames
Telewest Dundee	Telewest North Thames
Telewest Edinburgh	Telewest Perth
Telewest Falkirk	Telewest South Thames
Telewest Glenrothes	Telewest South West
Telewest Liverpool Merseyside	Telewest South West
Telewest Liverpool North	Telewest South West
Telewest London Croydon	Telewest St Helens
Telewest London Croydon	Telewest Telford
Telewest London Kingston	Telewest Wigan
Telewest London Merton	

**DRAFT**

**Direction under Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 to resolve a dispute between the Telewest companies listed at Annex 1 to this Direction ('Telewest') and British Telecommunications plc ('BT') about reciprocal charging arrangements for call termination rates between 1 October 2001 and 24 July 2003**

**WHEREAS:**

- A. Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 (the "Regulations") provides that where there is a dispute concerning interconnection between organisations, the Director General of Telecommunications (the "Director") shall, at the request of either party, take steps to resolve the dispute within six months of the date of the request;
- B. The Regulations have been repealed as of 25 July 2003 by Schedule 19 of the Communications Act 2003 (the "Act"). The Director's dispute resolution powers under Regulation 6(6) of the Regulations have been replaced by Ofcom's dispute resolution powers under sections 185 to 191 of the Act. However, paragraph 22 of Schedule 18 of the Act has maintained in force the Director's powers under Regulation 6(6) of the Regulations, which are exercisable by Ofcom in certain circumstances;
- C. On 13 July 2001 BT issued an Operator Charge Change Notice ("OCCN") to Telewest detailing the proposed charges payable by BT for calls passed from BT's network for termination on Telewest's network for the period commencing 1 October 2001 ("the Proposed Agreement");
- D. On 1 March 2002 the Director General of Telecommunications ("the Director") made final Directions under the provisions of Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 to resolve disputes between BT and a number of other parties concerning termination rates payable by BT to other electronic communications providers. At that point BT and Telewest were in dispute about the Proposed Agreement but agreed to seek to reach settlement through commercial negotiation;
- E. On 15 October 2003, BT wrote to the Director General of Telecommunications ("the Director") referring a dispute between BT and Telewest relating to the Proposed Agreement, as BT and Telewest had failed to reach commercial settlement of the Proposed Agreement;
- F. On 19 December 2003, after holding discussions with the parties, the Director decided pursuant to section 186(2) of the Act that it was appropriate for him to handle the dispute and informed the parties of this decision;
- G. The Director informed the parties that he would make any direction he decided appropriate in relation to the period prior to 25 July 2003 under Regulation 6 of the Interconnection Regulations 1997, in accordance with paragraph 22(3) of Schedule 18 of the Act;
- H. By virtue of the Transitional Provisions the Director was able to exercise the powers under the Act for an interim period. Ofcom has now assumed those powers as of 29 December 2003;

- I. In resolving a dispute under Regulation 6(6) of the Regulations, Ofcom has a duty to encourage and secure adequate interconnection in the interests of all users in a way which provides maximum economic efficiency and gives maximum benefit to end-users;
- J. Ofcom has considered, inter alia, the information provided by the parties and the matters set out in Regulation 6(8) of the Regulations. The principle points are summarised in the explanatory document attached to this Direction;
- K. Ofcom issued a draft of this Direction and the explanatory statement on 19 March 2004 and responses were invited by 2 April 2004.

**NOW, THEREFORE, PURSUANT TO REGULATION 6(6) OF THE REGULATIONS, OFCOM MAKES THE FOLLOWING DIRECTION:**

1. For the period between 1 October 2001 and 24 July 2003 the applicable payment by BT to Telewest for calls passed from BT's network for termination on Telewest's network shall be calculated according to the methodology set out in the Annex to the Proposed Agreement.
2. For the purposes of giving effect to paragraph 2 of this Determination:
  - a. where amounts have been paid by BT to Telewest which are greater than the amount due under the methodology and during the period set out in paragraph 1 for calls passed from BT's network for termination on Telewest's network, Telewest shall pay to BT such sums, as appropriate, by way of adjustment of any overpayment; and
  - b. where amounts have been or should have been paid by BT to Telewest which are lower than the amount due under the methodology and during the period set out in paragraph 1 for calls passed from BT's network for termination on Telewest's network, BT shall pay to Telewest such sums, as appropriate, by way of adjustment of any underpayment.
3. Words or expressions used in this Direction shall have the same meaning as in the Act, except as otherwise stated in this Direction and as follows:

*"Transitional Provisions" means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003;*
4. For the purpose of interpreting this Direction:
  - a. headings and titles shall be disregarded; and
  - b. the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.

This Direction shall take effect on the day it is published.

**HEATHER CLAYTON**  
**DIRECTOR OF INVESTIGATIONS**  
[date] 2004

## Annex 2

# Telewest companies which are parties to this dispute

Telewest Cen Lancashire	Telewest Midlands
Telewest Communications	Telewest Motherwell
Telewest Cotswolds	Telewest North East
Telewest Cumbernauld	Telewest North East
Telewest Dumbarton	Telewest North Thames
Telewest Dundee	Telewest North Thames
Telewest Edinburgh	Telewest Perth
Telewest Falkirk	Telewest South Thames
Telewest Glenrothes	Telewest South West
Telewest Liverpool Merseyside	Telewest South West
Telewest Liverpool North	Telewest South West
Telewest London Croydon	Telewest St Helens
Telewest London Croydon	Telewest Telford
Telewest London Kingston	Telewest Wigan
Telewest London Merton	



## Explanatory statement

### Section 1

# Summary

1. Ofcom has published a draft determination under Section 190 of the Communications Act 2003 ('the Act') and a draft direction under Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 ('the Regulations') to resolve a dispute between a number of Telewest companies ('Telewest') and British Telecommunications plc ('BT').
2. This dispute relates to a Proposed Agreement between the parties for the charges that BT should pay Telewest for the termination of fixed geographic calls on Telewest's network.
3. BT referred the dispute to the Director General of Telecommunications ('the Director') on 15 October 2003. The Director brokered negotiations between the parties to clarify the scope of the dispute and explore options for resolution.
4. These negotiations did not lead to resolution of the dispute and the Director therefore accepted the dispute on 19 December 2003.
5. The office of the Director ceased on 29 December 2003 and his powers under the Act have now been assumed by Ofcom. For ease of reference, Ofcom has been referred to throughout. All references to Ofcom are therefore to be taken as including the Director where they relate to the period before 29 December 2003.
6. The background to the issues in dispute is set out in section 2. The history of the current dispute is set out in section 3.
7. In arriving at its proposed decision, Ofcom has considered submissions made by the parties. The parties' positions are set out in section 4.
8. Ofcom's proposed decision is set out in section 5.
9. Ofcom proposes to direct the parties to enter into the Proposed Agreement for the payment of charges by BT to Telewest for termination of fixed geographic calls on Telewest's network from the date on which Ofcom publishes its final resolution of the dispute.
10. For the period between 1 October 2001 and the date when it publishes its final direction and final determination, Ofcom proposes to direct the parties to retrospectively apply charges calculated in accordance with the terms of the Proposed Agreement. If there is a difference between these charges and the charges that BT has paid to Telewest over the period of the dispute, the parties will be required to make any necessary payments to each other to address the difference.
11. Ofcom's proposals for resolution of this dispute may have an impact on electronic communications providers (ECPs) other than the parties to the dispute, namely on those originating ECPs that have commercial arrangements with BT for transit and termination of calls on Telewest's network.

12. Should BT or Telewest be required to make adjustment payments as a result of Ofcom's proposed decision, BT has indicated to Ofcom that it is able to make the necessary adjustments to amounts it may owe to, or be owed by, other originating ECPs.
13. As Ofcom's proposals may have an impact on ECPs other than the parties to the dispute, Ofcom has decided to publish its proposals for wider consultation. Comments are requested on Ofcom's proposals by 2 April 2004. Details of the consultation are set out in section 6 of this document. Ofcom will take responses into account when making its final decision.

## Section 2

# Background

## Call termination

1. This dispute is about the charges that BT should pay Telewest for the termination of fixed geographic calls on Telewest's network.
2. ECPs buy call termination services from each other in order to provide their customers with end-to-end calls between different networks. In this case, BT pays Telewest for termination of calls on Telewest's network.
3. The network to which the caller is connected is called the 'originating network'. Not all originating networks have a direct connection to all terminating networks. Some ECPs who originate traffic therefore pass calls for termination via BT's network, purchasing a transit service from BT to do so. The total charge payable to BT by such ECPs for transit and termination on Telewest's network therefore reflects the level of Telewest's termination charge.

## The call termination externality

4. An externality is a cost or benefit that is imposed on one or more parties by a consumption (or production) decision taken by another party. Since the cost (or benefit) does not affect the party who makes the decision, the latter in general does not take this cost (or benefit) into account.
5. In the UK, the 'calling party pays' principle applies. Charges for call termination are included in the originating ECP's cost base and are reflected in the retail charge paid by the caller. In other words, the person calling, and not the person being called, pays for call termination.
6. This leads to what is known as the 'call termination externality'.

## SMP in fixed geographic call termination

7. On 28 November 2003 Ofcom published the findings of its Review of fixed geographic call termination markets<sup>1</sup> ('the market review').
8. Ofcom found that the provision of fixed geographic call termination services on each ECP's network constitutes a separate economic market.
9. BT and Kingston were designated<sup>2</sup> as having SMP in their respective fixed geographic call termination markets.
10. Other relevant ECPs<sup>3</sup>, including Telewest, were also designated as having SMP in their respective fixed geographic call termination markets.

<sup>1</sup> *Review of fixed geographic call termination markets Identification and analysis of markets, determination of market power and setting of SMP conditions: Final Explanatory Statement and Notification*, 28 November 2003

<sup>2</sup> Under Schedule 1 (BT) and Schedule 2 (Kingston) of the Notification set out at Annex B to the market review.

<sup>3</sup> The ECPs named under Annex A to Schedule 3 of the Notification to the market review.

11. Those other ECPs are consequently subject to SMP Condition BC1<sup>4</sup> which requires them to provide network access (in this case, fixed geographic call termination) on terms, conditions and charges that are fair and reasonable. This condition ensures that these ECPs do not exploit their SMP by setting charges that are not fair and reasonable.
12. BT is subject to SMP Condition BA1<sup>5</sup> which, similarly, requires it to provide network access (in this case, fixed geographic call termination) on terms, conditions and charges that are fair and reasonable.
13. In addition, BT is subject to SMP Condition BA3<sup>6</sup>, which requires it to base its charges for fixed geographic call termination on efficiently incurred long run incremental costs, and SMP Condition BA4<sup>7</sup>, which imposes a charge control on BT's fixed geographic call termination charges<sup>8</sup>.

### Reciprocal charging

14. Charges for fixed geographic call termination have since 1997<sup>9</sup> been calculated on the basis of a principle of reciprocal charging.
15. Ofcom has endorsed the principle of reciprocal charging in a number of past decisions and statements<sup>10</sup> as it considers that the principle of reciprocal charging prevents ECPs from exploiting their SMP by setting charges that are not fair and reasonable, that it provides them with an incentive to minimise costs and that it promotes competitive neutrality.
16. The details of the current reciprocal charging agreement were agreed between BT and other terminating ECPs, as was the previous agreement that ran from 1997 until 2001.
17. Under the current reciprocal charging agreement, fixed geographic call termination charges are calculated according to a formula which is based on BT's regulated termination charges, but which takes into account differences between BT's network and other ECPs' networks.
18. Before 28 November 2003, BT's charges for fixed geographic call termination were regulated under the Network Charge Controls imposed by Ofcom from 1997. The price cap imposed by the Network Charge Control was rolled over in SMP Condition BA4. BT's charges for fixed geographic call termination services are not only subject to a charge control, but must also reflect BT's forward looking long-run incremental costs, as noted at paragraph 18 above.
19. Other terminating ECPs' charges for fixed geographic call termination services are therefore based on BT's equivalent regulated, cost-oriented charges. Ofcom considers that this arrangement addresses the potential effects of SMP in fixed geographic call termination markets.

<sup>4</sup> As set out at part 2 of Schedule 3 of the Notification to the market review.

<sup>5</sup> As set out at part 2 of Schedule 1 of the Notification to the market review.

<sup>6</sup> As set out at part 2 of Schedule 1 of the Notification to the market review.

<sup>7</sup> As set out at part 2 of Schedule 1 of the Notification to the market review.

<sup>8</sup> The value of X has been set on the basis of a forecast of the efficient level of incremental cost that should prevail at the end of the charge control period.

<sup>9</sup> See the Oftel statement Network Charges from 1997, published July 1997.

<sup>10</sup> See *Network Charges from 1997, July 1997; Guidelines on the Operation of the Network Charge Controls from October 2001*, December 2001; the March 2002 Directions; the market review.

## Section 2

# History of the dispute

The proposed reciprocity agreement from 1 October 2001

1. In 1997 the industry negotiated a reciprocal charging agreement for fixed geographic call termination charges. This agreement ran from 1 October 1997 to 30 September 2001.
2. In March 2001, BT and other terminating ECPs opened negotiations on a new reciprocity agreement for fixed geographic call termination charges to run for four years from 1 October 2001.
3. On 13 July 2001, BT issued an Operator Charge Change Notice (OCCN)<sup>11</sup> to relevant ECPs for a new reciprocity agreement (referred to in this document as the Proposed Agreement) to run from 1 October 2001.
4. An Annex to the Proposed Agreement sets out the proposed method for calculating the charges that BT will pay to each terminating ECP. Applicable charges for fixed geographic call termination are based on BT's equivalent charge, taking into account differences between BT's network and other ECPs' networks.

## The March 2002 Directions

5. Several terminating ECPs, including Telewest, failed to sign the Proposed Agreement.
6. On 31 August 2001 BT referred a number of disputes about the Proposed Agreement to Ofcom for resolution. One of these disputes was between BT and Telewest.
7. On 1 March 2002 Ofcom published a number of Directions resolving these disputes ('the March 2002 Directions')<sup>12</sup>. Ofcom directed the majority of terminating ECPs in dispute with BT to enter into the Proposed Agreement with BT.
8. Ofcom did not direct Telewest to enter into the Proposed Agreement because BT and Telewest were still in the process of agreeing the necessary data to apply the charging methodology set out in the Proposed Agreement. Ofcom concluded that:

*"...it is more appropriate to await the conclusion of appropriate negotiations and apply any agreed rate retrospectively to the commencement date of the agreement, namely 1 October 2001.*

<sup>11</sup> The OCCN is the mechanism used by BT and other ECPs for proposing and amending charges for access to their networks, as set out in BT's Standard Interconnect Agreement.

<sup>12</sup> Directions under the provisions of Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 of disputes between British Telecommunications plc ("BT") and:

(i) Cable & Wireless Communications (Mercury) Limited ("C&W");

(ii) Telewest Communications plc & other Operators

in the Telewest group of companies as set out in Annex A to this Direction ("Telewest");

(iii) Inclarity plc ("Inclarity"); and

(iv) The Operators set out in Annex B to this Direction;

- concerning termination rates payable by BT to Operators based reciprocally upon BT's own termination charges under the Network Charge Controls, 1 March 2002.

[Ofcom] therefore concludes that Telewest should not be required to apply the charges set out in the OCCN of 13 July 2001 issued to it by BT. Should commercial negotiation of appropriate [...] charges fail then it remains open to either party to refer a dispute separately to [Ofcom] for resolution.<sup>13</sup>”

## The current dispute

9. BT and Telewest subsequently failed to reach agreement on the effective date from which the Proposed Agreement should apply and on the review provisions of the Proposed Agreement. On 15 October 2003 BT referred the matter to Ofcom as a dispute.
10. BT asked Ofcom to direct Telewest to sign the Proposed Agreement with an effective date of 1 October 2001.
11. On 19 November 2003, BT, Telewest and Ofcom met to discuss the dispute and to assess whether there were alternative means available for resolving the dispute.
12. While some of the issues in dispute were resolved at the 19 November 2003 meeting and by further correspondence between the parties and Ofcom, the parties failed to reach agreement on remaining issues.
13. Ofcom did not consider that resolution of the outstanding issues in dispute would be achieved by further commercial negotiation between the parties. On 19 December 2003 Ofcom therefore accepted BT’s referral and wrote to the parties informing them of its decision.
14. Ofcom published the scope of the dispute in its Competition Bulletin, setting out the two issues in dispute:
  - the effective date from which the reciprocity arrangement should be applied; and
  - the circumstances in which Telewest should be entitled to raise a review of the reciprocity agreement with BT, for example if there is a change to Telewest’s multi-switched operator status<sup>14</sup> or if there is a significant change in the volume of traffic which is terminated by BT on Telewest’s network (referred to below as ‘the second review clause’).
15. Ofcom invited BT and Telewest to comment on the scope of the dispute and invited other stakeholders to notify Ofcom of their interest in the dispute. Ofcom received submissions from BT and Telewest on the scope of the dispute but did not receive any representations from other stakeholders.

## The review provisions

16. The Annex to the Proposed Agreement (‘the Annex’) provides an opportunity for the parties to initiate a review (known as ‘the review clause’). The review clause states:

<sup>13</sup> Explanatory document to the March 2002 Directions, paragraphs 4.19-4.20.

<sup>14</sup> Under the proposed agreement, ECPs with more than a certain proportion of calls terminating via multi-switched routes (i.e. calls that pass through one or more switches after leaving the BT network) could apply for Multi-Switched Operator (MSO) status and receive higher termination payments from BT to reflect the additional work needed to terminate such calls.

*“A Party may initiate a general review of this Annex by serving a review notice during the period of three months commencing on 1 October 2002 and each 1 October thereafter.”*

17. One of the issues under negotiation between the parties was the circumstances in which Telewest should be entitled to raise a review of the reciprocity agreement with BT. In particular, the parties discussed whether the right to invoke the review clause should be dependent upon some kind of quantitative trigger.
18. In order to calculate the charges that should apply under the Proposed Agreement, Ofcom understands that a sample of traffic is taken every six months.
19. Telewest requested the addition of a second review clause, to align with the two data sampling points.
20. BT has indicated that it is prepared to amend the Proposed Agreement to incorporate a second review clause as requested by Telewest and that it does not consider the review provisions place any restrictions on the subject matter for any review.
21. The parties remain in dispute over the effective date from which the review provisions should apply.

## Section 4

# The parties' views on the issues in dispute

## BT

### The effective date from which the agreement should be applied

1. BT's view is that the Proposed Agreement should apply from 1 October 2001. This has been BT's view since negotiations began.
2. BT states that it has taken guidance as to the likely effective date of the agreement from Ofcom's statement, in the accompanying explanatory document to the March 2002 Directions, that:

*"[Ofcom] believes that it is more appropriate to await the conclusion of appropriate negotiations and apply any agreed rate retrospectively to the commencement date of the agreement, namely 1 October 2001"*
3. BT notes that other terminating ECPs, who have signed the agreement at different times and with different fixed geographic call termination charges, have all applied the agreement from 1 October 2001.
4. BT states that it has negotiated in good faith in an attempt to implement an agreement with Telewest from 1 October 2001.
5. BT argues that its original proposal for the new agreement to apply from 1 October 2001, Ofcom's statement in the accompanying document to the March 2002 Direction (see above), the acceptance of 1 October 2001 as the effective date by other terminating ECPs, and the course of correspondence between the parties to the dispute over the past two years, lead to the conclusion that the agreement should apply with an effective date of 1 October 2001.
6. Rather than entering into further negotiation over differences between the two parties' traffic data, BT proposes to use traffic data supplied by Telewest as the basis for calculating the charges that should apply from 1 October 2001.

### BT's views on the review provisions

7. BT has indicated that it does not consider the review provisions place any restrictions on the subject matter for any review. The right to invoke the review provisions would not, for example, depend on any quantitative 'trigger'.
8. BT has indicated that it is prepared to amend the Proposed Agreement to incorporate a second review clause as requested by Telewest. BT made this proposal to Telewest by letter of 10 December 2003.
9. BT argues, however that Telewest should not be able to invoke the review provisions retrospectively. BT's view is that this would generate an immediate retrospective contract review as soon as the agreement had been signed, and that the agreement would therefore have no effect.



## Telewest

### The effective date from which the agreement should be applied

10. Telewest does not consider that the Proposed Agreement should apply retrospectively from 1 October 2001. Telewest argues that the most pragmatic solution to the dispute regarding the effective date from which charges should apply would be for the parties to apply the rates that applied immediately before 1 October 2001 up to the date that the dispute is resolved by Ofcom. Telewest argues that the dispute could, alternatively, be resolved through commercial negotiation.
11. Telewest argues that negotiations between Telewest and BT failed to reach agreement on the review provisions, from 1 October 2001.
12. Telewest argues that the Proposed Agreement (or the charges determined) should not apply from 1 October 2001 because BT has continued, since the previous agreement expired on 30 September 2001, to make payments to Telewest based on the charges that applied at the expiry date of the previous agreement. Telewest notes that BT did not refer the dispute to Ofcom until October 2003, although it could have done so earlier.
13. Telewest considers that, had the parties agreed on the terms and charges in the Proposed Agreement (or if terms and charges had been determined), and if an agreement (or the charge determined) had been in place between the parties from 1 October 2001, Telewest might have exercised its right under the review provisions to initiate a review of the agreement. Since such a review did not take place, Telewest does not believe that it is possible to determine what charges would have applied over the period from 1 October 2001 without improperly favouring BT over Telewest.
14. Telewest states that traffic data relating to the period of the dispute (i.e. the data on which applicable charges will be calculated) has not yet been agreed between the parties. That being the case, Telewest cannot gauge its exposure to the potential loss of MSO status<sup>15</sup> under the Proposed Agreement, or the corresponding impact on its call termination revenues.
15. Telewest does not consider that BT has a legitimate expectation that the agreement should apply from 1 October 2001. Telewest argues that, as a general principle of contract law, both parties need to agree to a contract before it can take effect, and notes that there is currently no contract for retrospective application of the determined charges that exist between the parties in respect of Telewest's call termination charges.
16. Telewest argues that Ofcom's statement accompanying the March 2002 Directions (see paragraph 8 of section 3 above) refers only to the charges that should apply, and not to any other terms and conditions.
17. Telewest further argues that BT's arguments in favour of legitimate expectation rely on regulatory, rather than commercial precedents, i.e. previous statements by the regulator, rather than negotiations between the parties.
18. Telewest further argues that there must be some finite limit to the expectation that retrospection should apply, citing previous guidance published by Ofcom on reasonable timescales for negotiations relating to network access<sup>16</sup>. For instance, it

<sup>15</sup> See note 14.

<sup>16</sup> Operation of the network charge control from 1997, October 1997.

could be argued that since BT did not submit its determination request until October 2003, the scope of any determination should be limited to the six-month period preceding that – in other words, that the earliest date for any retrospective application of the contract would be 1 April 2003.

### **The second review clause**

19. Telewest supports BT's proposal for a second, unconditional, review clause. Telewest notes that it might invoke the second review clause if it wanted to propose an alternative agreement with BT for the calculation of charges for fixed geographic call termination on Telewest's network.
20. However, Telewest argues that, in the event that Ofcom determines the Proposed Agreement (or the charges determined) should apply retrospectively, Telewest's right to review should also apply with retrospective effect. If the charging mechanism (or the charges determined), but not the second review clause, were to apply retrospectively, Telewest's first opportunity for review would be in the three-month period from 1 April 2004. Telewest argues that, had it been presented with an agreement that set charges from 1 October 2001 but did not enable it to invoke review provisions (outside the standard review provisions under BT's Standard Interconnect Agreement) until April 2004, it would have rejected such an agreement. Telewest also puts forward this point in support of its argument that the Proposed Agreement (or the charges determined) should not apply with retrospective effect.
21. Telewest argues that, had there been an agreement in place between BT and Telewest allowing for retrospective charging over the period of the dispute, and had this agreement included a second review clause, then Telewest would have exercised the second review clause in order to initiate a review at some date since 1 October 2001.

### **Concerns outside the scope of the current dispute**

22. Telewest has long-standing concerns with the reciprocal charging agreement and has reminded BT and Ofcom of these concerns in its representations on the current dispute. Telewest's view is that the reciprocal charging agreement gives BT disproportionate control over the process, and over other terminating ECPs' termination charges.
23. Telewest acknowledges that its concerns with the reciprocal charging agreement per se will not be addressed within the scope of this dispute.

## Section 5

# Ofcom's proposed decision

1. This dispute was referred to Ofcom by BT under Section 185 of the Act. In accordance with Section 186(4) of the Act, Ofcom decided that it was appropriate for it to handle this dispute and published the scope of its investigation on 19 December 2003.

## Relevant market and the position of the parties to the dispute

2. The relevant market is fixed geographic call termination on Telewest's network.
3. Relevant ECPs<sup>17</sup>, including Telewest, have been designated as having SMP in their respective fixed geographic call termination markets, as discussed in the market review.
4. Telewest is required under SMP condition BC1 to provide fixed geographic call termination services on fair and reasonable terms. Ofcom considers that fair and reasonable terms include the provision of these services at a price that is fair and reasonable.

## Ofcom's proposed decision

5. To the extent that this dispute relates to the period since 25 July 2003, Ofcom has published a draft determination under section 190(2)(b) and (c) of the Act. To the extent that this dispute relates to the period before 25 July 2003, Ofcom has published a draft direction under Regulation 6(6) of the Interconnection Regulations (as provided for under Paragraph 22 of Schedule 18 of the Act).
6. Ofcom proposes:
  - to direct the parties to enter into the Proposed Agreement from the date of resolution of the dispute; and
  - to direct the parties to apply charges calculated in accordance with the Proposed Agreement for the period from 1 October 2001 to the date of resolution of this dispute.
7. In the event that the charges calculated differ from the amounts that BT has paid Telewest over the period of the dispute, the parties will be required to make any necessary payments by way of adjustment of an underpayment or overpayment.
8. Ofcom recognises that its proposed resolution may also have an impact on originating ECPs whose networks do not connect directly with Telewest's network and who therefore have an arrangement with BT by which they pay BT for transit and termination of their calls on Telewest's network. BT has indicated to Ofcom that it is able to make the necessary adjustments to amounts it may owe to, or be owed by, other originating ECPs as a result of applying the charging methodology set out in the Proposed Agreement from 1 October 2001.

<sup>17</sup> The ECPs named at Annex A to Schedule 3 of the Notification to the market review.

## Legal and analytical framework

9. In considering its options for resolving the dispute Ofcom has had regard to section 3(3) of the Act which states that regulation should be transparent, accountable, proportionate and consistent.
10. To the extent that this dispute relates to the period since 25 July 2003, Ofcom has considered its duties under section 3 of the Act, in particular its duties to further the interest of consumers, to have regard to the promotion of competition in relevant markets and to have regard to the desirability of promoting self-regulation.
11. To the extent that this dispute relates to the period since 25 July 2003, Ofcom has also considered its duties for the purpose of fulfilling Community obligations as set out in section 4 of the Act, in particular its duties to promote the interests of citizens and to promote competition.
12. To the extent that this dispute relates to the period before 25 July 2003, Ofcom has had regard to its obligations under Regulation 6 of the Interconnection Regulations 1997 ('the Regulations')<sup>18</sup>, inter alia its obligation to ensure that its proposals represent a fair balance between the interests of the parties, and to those factors set out in Regulation 6(8), inter alia the interests of users and the promotion of competition<sup>19</sup>.
13. In making these proposals Ofcom has had regard to the regulatory obligations of the parties to the dispute, i.e. Telewest's obligation to provide fixed geographic call termination on fair and reasonable terms and conditions (including fair and reasonable charges).
14. Telewest has argued that the dispute could be resolved through further commercial negotiation. However, since commercial negotiation of the Proposed Agreement has continued for over two years without resolution, Ofcom does not believe that this would lead to resolution of the dispute. Ofcom therefore considers that its proposals for resolution are proportionate, in line with its duty under section 3 of the Act.
15. Having brokered negotiations with the parties, and having taken the parties' views into account in making its proposals, Ofcom considers that its proposals represent a fair balance of the legitimate interests of the parties in line with the need to resolve the dispute under Regulation 6(6).
16. While it has set out its support for the principle of reciprocal charging, Ofcom has not directed the detail of the agreements between BT and terminating ECPs. In directing the parties to enter into an industry-negotiated agreement (instead of imposing detailed regulatory obligations), Ofcom considers that its proposed solution is in line with Ofcom's duty under section 3 of the Act to have regard to the desirability of promoting self-regulation.

<sup>18</sup> The Telecommunications (Interconnection) Regulations 1997 SI No. 1997/2931.

<sup>19</sup> While the Regulations have been repealed as of 25 July 2003 by Schedule 19 of the Act and the Director's dispute resolution powers have been replaced by Ofcom's dispute resolution powers under sections 185 to 191 of the Act, Paragraph 22 of Schedule 18 of the Act has maintained in force the Director's powers under Regulation 6(6) of the Regulations, which are exercisable by Ofcom in certain circumstances.

## Ofcom's view on reciprocal charging

17. Ofcom supported the principle of reciprocal charging for fixed geographic call termination in the statement Network charges from July 1997. Ofcom reiterated its support for the principle in Guidelines on the Operation of the Network Charge Controls from October 2001<sup>20</sup> and in the accompanying statement to the March 2002 Directions.
18. The market review reiterated Ofcom's view that charges for fixed geographic call termination should be based on BT's charges, in order to prevent ECPs from abusing positions of SMP, to provide such ECPs with incentives for increased efficiency, and to promote competitive neutrality. Ofcom also stated that it did not intend to review the current reciprocal charging agreement for fixed geographic call termination, as it is a commercially negotiated settlement.
19. The market review noted that:

*"Any [terminating ECP] could [...] set other charges if it believed that they were "fair and reasonable". But [Ofcom's] view is that charges that were not based on BT's are unlikely to be "fair and reasonable". Nevertheless, [Ofcom] would need to consider any dispute on its relative merits. In any case, charges would have to be competitively neutral."*

Ofcom has not been asked by the parties to consider whether the charges calculated according to the methodology set out in the Proposed Agreement are "fair and reasonable", and the specific amount of Telewest's fixed geographic call termination charge is not therefore within the scope of this dispute. In any case, as discussed in the market review, Ofcom considers that charges that reflect BT's regulated charges are likely to be fair and reasonable. While ECPs could set other charges if they believed that they were fair and reasonable, Ofcom's view (as set out in the market review) is that charges that are not based on BT's charges would be unlikely to fulfil this condition.

## Retrospective application of the Proposed Agreement

20. Ofcom has considered whether it is proportionate to propose that the Proposed Agreement (or elements of the Proposed Agreement) should apply with retrospective effect. Ofcom has considered whether the parties can be reasonably expected to be aware, on the basis of previous statements, that Ofcom would direct that the Proposed Agreement (or certain elements of the Proposed Agreement) should apply with retrospective effect.
21. As noted above, Ofcom's support for the principle of reciprocal charging has been reiterated in a number of statements. Ofcom considers that the parties would therefore have a clear expectation that Ofcom would wish to maintain the reciprocal charging regime.
22. Ofcom considers, for the reasons set out below, that it is proportionate to apply the charging mechanism set out in the Proposed Agreement with retrospective effect.

## The history of the dispute

23. Ofcom considers that the history of the case has given rise to an expectation that charges will apply from 1 October 2001.

<sup>20</sup> *Guidelines on the Operation of the Network Charge Controls from October 2001*, 5 December 2001

24. As noted in the section above, Ofcom stated in its explanatory memorandum to the March 2002 Directions that:

*"[Ofcom] believes that it is more appropriate to await the conclusion of appropriate negotiations and apply any agreed rate retrospectively to the commencement date of the agreement, namely 1 October 2001.*

*"[Ofcom] therefore concludes that Telewest should not be required to apply the charges set out in the OCCN of 13 July 2001 issued to it by BT. Should commercial negotiation of appropriate ... charges fail then it remains open to either party to refer a dispute separately to [Ofcom] for resolution."*

25. Commercial negotiation of appropriate charges did, indeed fail, and BT subsequently referred a dispute to Ofcom for resolution.
26. In the absence of a commercial agreement, based on Ofcom's statement in March 2002, Ofcom considers that the parties have an expectation that Ofcom is likely to determine that the effective date of 1 October 2001 should apply.

### **Whether a date other than 1 October 2001 should apply**

27. Ofcom does not consider that there is any expectation that, in the event that charges apply retrospectively, any date other than 1 October 2001 should apply. On the basis of the available evidence, no other date since 1 October 2001 suggests itself as a 'milestone' from which it would be appropriate to apply charges. In any case, Ofcom considers that if it were to determine that any date other than 1 October 2001 were the effective date, this would still leave a period over which no applicable charge had been agreed by the parties.
28. Telewest has argued that since BT did not submit its determination request until October 2003, the scope of any determination should be limited to the six-month period preceding that date (i.e. to no later than 15 April 2003). However, Ofcom notes that Telewest chose to pursue commercial negotiations with BT, and that Telewest did not bring a dispute to Ofcom.

### **Whether pre-1 October 2001 charges should apply**

29. Telewest has indicated that a possible solution would be for pre-October 2001 charges to be extended to apply during the period over which the Proposed Agreement was in dispute.
30. As explained in section 2, under the Proposed Agreement ECPs' termination charges are calculated according to a formula which is based on BT's regulated termination charges. Since 2001, BT's termination charges have been subject to a price control<sup>21</sup>. BT's termination charge has therefore changed since 1 October 2001. Charges that were calculated prior to 1 October 2001 are, therefore, out-of-date, and would no longer reflect the principle of reciprocity. Ofcom does not therefore consider that it is appropriate to apply the charges that applied prior to 1 October 2001 for the period of the dispute.
31. As discussed above, Ofcom has endorsed the principle that ECPs' charges should be based on BT's regulated charge. The parties do not therefore have any

<sup>21</sup> BT's termination charge was regulated from 1 October 1997 under the Network Charge Control. The first cap lasted until 2001. The second, which will expire in 2006, was introduced and has been rolled over in Condition BA4.



expectation that Ofcom would direct the parties to apply charges that are not based on the regulated BT charge that applied over the period in question. This decision is also in accordance with the March 2002 Directions.

### **Whether the review provisions should apply with retrospective effect**

32. As noted in section 3, BT has indicated to Telewest that it is prepared to amend the Proposed Agreement to incorporate a second review clause as requested by Telewest. Ofcom has not, therefore, required BT to make such an amendment.
33. Ofcom considers that this approach is proportionate in line with its duty under section 3 of the Act.
34. Telewest has argued that the review provisions should apply with retrospective effect, giving Telewest the opportunity to propose a new charge with effect from some date in the past.
35. However, Ofcom does not consider that current review provisions have prevented Telewest from proposing an alternative arrangement, or that Telewest has been prevented from referring a dispute over the Proposed Agreement to Ofcom. Ofcom does not therefore propose to apply the whole of the Proposed Agreement retrospectively.

### **Competitive neutrality**

36. The reciprocal charging regime, by setting terminating ECPs' charges in relation to BT's regulated termination charges, also promotes competitive neutrality in fixed geographic call termination markets, which is in line with Ofcom's duty under section 3 of the Act to have regard to the promotion of competition in relevant markets and the first Community requirement, as set out in section 4 of the Act, to promote competition.
37. Were Ofcom to direct that the Proposed Agreement, including the charging methodology, should apply from any date other than 1 October 2001, the charges paid by BT to Telewest over the period would not be in line with the agreements for fixed geographic call termination signed by BT and other terminating ECPs, which would introduce a disparity between Telewest and other terminating ECPs.
38. Ofcom considers that it is therefore appropriate that charges calculated in accordance with the Proposed Agreement should apply from 1 October 2001, maintaining the principle of reciprocal charging. The proposed decision is also consistent with Ofcom's statements on reciprocal charging in the market review.

### **Incentive on terminating ECPs to negotiate in good faith**

39. As discussed above, Ofcom considers that the reciprocal charging principle prevents terminating ECPs with SMP from setting charges that are not fair and reasonable, that it promotes competitive neutrality and that it provides ECPs with incentives towards cost efficiency.

Ofcom notes that those terminating ECPs who have signed agreements with BT for fixed geographic call termination have all entered the agreement with an effective date of 1 October 2001.

40. Ofcom considers that, were it to direct BT and Telewest to apply the charging mechanism set out in the Proposed Agreement from any date other than 1 October 2001, it would reduce the incentive on other terminating ECPs to enter into future negotiations in good faith. It would, in fact, provide them with an incentive to delay the acceptance of new agreements. Ofcom considers that to create such an incentive would create an uncertainty in the relevant market that would not be consistent with its duties under sections 3 and 4 of the act to promote competition relevant markets, or with its equivalent duty under the Regulations to consider the promotion of competition and the interests of users.

### **Interests of consumers**

41. Ofcom considers that the current reciprocal charging regime (of which the Proposed Agreement is a part) benefits consumers, in line with its general duty under section 3 of the Act to further the interests of consumers in relevant markets. Ofcom considers that the proposed solution is in the interests of consumers as it prevents terminating ECPs with SMP from setting charges (which would, ultimately, be paid by consumers) that are not fair and reasonable. The proposed solution is therefore in line with Ofcom's specific requirement, under section 3, that Ofcom should have regard to the interests of consumers in respect of price. In addition, Ofcom considers that its proposed solution meets the first Community requirement, as set out in section 4 of the Act, to promote the interests of citizens.
42. Ofcom therefore considers that it is in the interests of consumers to direct the parties to apply the proposed charging mechanism with an effective date of 1 October 2001, thus maintaining the current agreement and providing the appropriate incentive for terminating ECPs, including Telewest, to negotiate reciprocal arrangements for fixed geographic call termination charges in good faith.



## Section 6

# Responding to this consultation

This consultation document seeks views on the draft determination and the draft direction published in this document and on Ofcom's proposals for resolution of this dispute.

This consultation is addressed primarily to the parties to the dispute. Ofcom also welcomes comments from other stakeholders interested in the outcome of this dispute.

Ofcom invites written views and comments on the questions raised in this document, to be made by **5pm on 2 April 2004**.

1. Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. Please send your response to [louise.marriage@ofcom.org.uk](mailto:louise.marriage@ofcom.org.uk).

Responses may alternatively be posted or faxed to the address below:

Louise Marriage  
Competition and Markets  
Third Floor  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Fax: 020 7981 3990

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

## Further information

2. If you have any questions about the issues raised in this consultation, or need advice on the appropriate form of response, please contact Louise Marriage on 020 7783 4333.

## Confidentiality

3. Ofcom thinks it is important for everyone interested in an issue to see the views expressed by other consultation respondents. We will therefore usually publish all responses on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), as soon as possible after the consultation period has ended.
4. All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Any confidential parts of a response should be placed in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Please also note that copyright in responses will be assumed to be relinquished unless specifically retained.

## Next steps

5. Ofcom will consider responses to this consultation in making a final decision for resolving this dispute. A final decision will be published before 19 April 2004.

Please note that you can register at [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm) to get automatic notifications when Ofcom documents are published,

## Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 1) which it seeks to follow.

If you have any comments or suggestions about 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 particularly welcome thoughts on how Ofcom could more effectively seek the views of particular groups or individuals, including small businesses and residential consumers, whose views are less likely to be obtained in a formal consultation exercise.

Alternatively, you can contact Philip Rutnam, Partner, Competition and Strategic Resources, who is Ofcom's consultation champion, with any concerns or comments about Ofcom's consultation processes:

Philip Rutnam  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA  
Tel: 020 7981 3585  
Fax: 020 7981 3333  
E-mail: [philip.rutnam@ofcom.org.uk](mailto:philip.rutnam@ofcom.org.uk)

## Annex 1

# Ofcom's consultation principles

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

### Before the consultation

1. 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.

### During the consultation

2. We will be clear about who we are consulting, why, on what questions and for how long.
3. We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
4. We will normally allow 10 weeks for responses, other than on dispute resolution.
5. There will be a person within Ofcom who 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. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.
6. If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

7. We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.