



Neutral citation [2011] CAT 24

IN THE COMPETITION
APPEAL TRIBUNAL

Case Numbers: 1151/3/3/10
1168/3/3/10
1169/3/3/10

Victoria House
Bloomsbury Place
London WC1A 2EB

1 August 2011

Before:

MARCUS SMITH QC
(Chairman)
PETER CLAYTON
PROFESSOR PAUL STONEMAN

Sitting as a Tribunal in England and Wales
BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

- and -

EVERYTHING EVERYWHERE LIMITED

Appellants

- v -

OFFICE OF COMMUNICATIONS

Respondent

TELEFÓNICA O2 UK LIMITED
VODAFONE LIMITED
CABLE & WIRELESS UK
HUTCHISON 3G UK LIMITED
OPAL TELECOM LTD

Interveners

Hearing dates: 4-6, 8, 11-15 and 19-20 April 2011

JUDGMENT

APPEARANCES

Mr Graham Read QC, Miss Sarah Lee and Mr Richard Eschwege (instructed by BT Legal) appeared for BT plc.

Miss Kassie Smith and Mr Philip Woolfe (instructed by Everything Everywhere Limited) appeared for Everything Everywhere Limited.

Mr Javan Herberg QC and Mr Mark Vinall (instructed by the Office of Communications) appeared for the Respondent.

Mr Tim Ward QC (instructed by Herbert Smith LLP) appeared for Vodafone Limited.

Mr Robert O'Donoghue (instructed by SJ Berwin LLP) appeared for Telefónica O2 UK Limited.

Mr Daniel Beard QC (instructed by Charles Russell LLP) appeared for Cable & Wireless UK.

TABLE OF CONTENTS

A. INTRODUCTION.....	1
B. THE APPEALS.....	5
C. MATERIAL BEFORE THE TRIBUNAL.....	8
D. THE ORIGINATION AND TERMINATION OF CALLS IN THE UNITED KINGDOM.....	12
E. REGULATION.....	37
F. THE PRICING OF 080, 0845 AND 0870 CALLS.....	45
G. NUMBER HOSTING.....	56
H. OFCOM'S APPROACH TO RESOLVING THE DISPUTES.....	63
I. THE CONTENTIONS OF THE PARTIES.....	74
J. OFCOM'S POWERS UNDER THE DISPUTE RESOLUTION PROCESS.....	76
K. APPEALS FROM OFCOM'S DETERMINATIONS PURSUANT TO THE DISPUTE RESOLUTION PROCESS...	78
L. RELEVANT OR POTENTIALLY RELEVANT FACTORS.....	79
M. WEIGHING THE RELEVANT FACTORS.....	163
N. REMISSION TO OFCOM AND DIRECTIONS.....	175

A. INTRODUCTION

1. This Judgment concerns three appeals to the Tribunal, under Case Number 1151/3/3/10 (“Case 1151”), Case Number 1168/3/3/10 (“Case 1168”) and Case Number 1169 (“Case 1169”). These appeals arise out of two decisions of the Office of Communications (“OFCOM”) in which OFCOM resolved disputes concerning the circumstances in which British Telecommunications plc (“BT”) was entitled to vary the termination charges that it demanded from other communications providers for terminating certain calls on its network (the “Disputes”). More specifically:

(1) On 5 February 2010, OFCOM issued a determination in respect of certain disputes between BT and various mobile network operators regarding BT’s termination charges for 080 calls (i.e. calls to numbers with an 080 prefix, referred to herein as “080 numbers”). The mobile network operators in question were:

- (i) T-Mobile UK Limited (“T-Mobile”);
- (ii) Orange Personal Communications Services Limited (“Orange”);
- (iii) Vodafone Limited (“Vodafone”); and
- (iv) Telefónica O2 UK Limited (“O2”).

OFCOM’s 5 February 2010 determination (“the 080 Determination”) is contained in a document entitled *Determination to resolve a dispute between T-Mobile, Vodafone, O2 and Orange about BT’s termination charges for 080 calls*.

(2) On 10 August 2010, OFCOM issued a determination in respect of certain disputes between BT and various mobile network operators regarding BT’s termination charges for 0845 and 0870 calls (i.e. calls to numbers with an 0845 or 0870 prefix, referred to herein as “0845 numbers” and “0870 numbers”). The mobile network operators in question were:

- (i) Vodafone;
- (ii) T-Mobile;

- (iii) Hutchison 3G UK Limited (“H3G”);
- (iv) O2;
- (v) Orange; and
- (vi) Everything Everywhere Limited (“EE”). EE is a 50%-50% joint venture between France Telecom and Deutsche Telekom, which was formed from the combination of their UK subsidiaries Orange and T-Mobile. Since 1 July 2010, the Orange and T-Mobile brands have both operated in the UK under the name EE as a single entity.

OFCOM’s 10 August 2010 determination (“the 0845/0870 Determination”) is contained in a document entitled *Determination to resolve a dispute between BT and each of Vodafone, T-Mobile, H3G, O2, Orange and Everything Everywhere about BT’s termination charges for 0845 and 0870 calls*.

2. The 080 and the 0845/0870 Determinations were each concerned with the circumstances in which BT was entitled to introduce new termination charges payable by communications providers in order to terminate 080, 0845 and/or 0870 calls on BT’s network. In all cases, a number of mobile network operators objected to the termination charges that BT was introducing, resulting in the reference of disputes to OFCOM under OFCOM’s statutory dispute resolution powers (the “Dispute Resolution Process”) contained in sections 185 to 191 of the Communications Act 2003 (the “2003 Act”).
3. In both the 080 and the 0845/0870 Determinations, OFCOM’s approach was to ask itself whether BT’s new termination charges were “fair and reasonable” (see, for example, paragraph 1.17 of the 080 Determination and paragraph 1.18 of the 0845/0870 Determination). In each of the Determinations, OFCOM articulated criteria according to which the “fairness and reasonableness” of BT’s new tariffs were to be judged. In each Determination, OFCOM found that BT’s new tariffs could not be shown to satisfy these criteria, and that BT was, therefore, not entitled to introduce the new tariffs that it was seeking to impose.
4. BT appealed OFCOM’s determinations in both the 080 and the 0845/0870 Determinations in Cases 1151 and 1169. BT essentially (albeit by no means completely) accepted the criteria according to which OFCOM had determined

that its charges were fair and reasonable. The thrust of BT's case was that OFCOM had misapplied these criteria, so as to reach the wrong conclusion.

5. EE, on the other hand, had no quarrel with the conclusion that OFCOM had reached in the Determinations: indeed, EE's secondary position was that if OFCOM's criteria for determining the fairness and reasonableness of BT's tariffs were correct, then they had been correctly applied and OFCOM's conclusions ought to be upheld by the Tribunal. In these circumstances, it might well be asked why EE was appealing at all. The reason is that EE's appeal – and its primary case – was based upon an attack on the criteria that OFCOM had used to determine the fairness and reasonableness of BT's new tariffs. EE contended that OFCOM's criteria had disregarded a basic principle (namely, that BT's prices should be orientated to its costs or be "cost reflective"), and so were unlawful. Thus, whilst EE did not disagree with the outcome of the Determinations, it disagreed essentially with OFCOM's reasoning and approach. It therefore appealed OFCOM's decision in the 0845/0870 Determination in Case 1168.
6. Plainly, the question of the criteria that OFCOM should have used to determine whether BT was entitled to impose its new tariffs or not is central to the resolution of these appeals. Our approach to this question is as follows:
 - (1) First, we describe the approach OFCOM adopted in resolving the Disputes. This is described in Section H below. As will be seen, OFCOM identified three cumulative principles according to which the fairness and reasonableness of BT's tariffs was to be judged.
 - (2) Secondly, in Section I below, we summarise the contentions of the parties before us and the various criticisms that were advanced in relation to the 080 Determination and the 0845/0870 Determination.
 - (3) Thirdly, we consider OFCOM's powers under the Dispute Resolution Process contained in the 2003 Act. This matters because the scope of OFCOM's powers under the Dispute Resolution Process has a direct bearing on the criteria that OFCOM must or should apply in resolving disputes such as the present Disputes. This question is considered in Section J below.

- (4) Fourthly, we consider in Section K below, the criteria that the Tribunal itself must apply when hearing appeals of OFCOM's determinations of disputes pursuant to the Dispute Resolution Process. This is important, because it determines the extent to which the Tribunal can or should interfere with such determinations.
 - (5) Fifthly, we consider how OFCOM resolved the Disputes. This we do through the prism of the parties' criticisms of OFCOM's approach. OFCOM's approach – as we describe it in Section H below – involved two stages. The first stage involved the identification and assessment of those factors that were, in OFCOM's view, relevant to the fairness and reasonableness of BT's tariffs. The second stage involved weighing these factors against each other in order to reach a conclusion: this was by no means straightforward because not all of the factors that OFCOM found to be relevant pointed in the same direction. Our review of OFCOM's approach is similarly structured: we first identify and assess (in Section L below) all of the factors that appeared to us, in the light of the submissions that were made to us, to be potentially relevant when considering whether BT should or should not be entitled to impose its tariffs. Thereafter, in Section M below, we consider how such factors as we have found to be relevant should be weighed in order to reach a determination. Finally, in Section N below, we identify the appropriate action for OFCOM to take in relation to the subject-matter of the Disputes.
7. Before considering OFCOM's determination of the Disputes, which, as we have described, forms the substance of Sections H to L below, it is necessary to consider a number of areas which form the essential background to these appeals. Thus:
- (1) Section B describes the appeals to the Tribunal, the parties to those appeals, and their case management.
 - (2) Section C describes the material that was before the Tribunal, and in particular the evidence, factual and expert, that was heard.
 - (3) Section D considers the manner in which calls are originated and terminated in the United Kingdom.

- (4) Section E describes the regulatory regime with specific reference to 080, 0845 and 0870 calls.
 - (5) Section F considers the pricing of 080, 0845 or 0870 calls.
 - (6) Section G describes the market for what we term “number hosting”, which is where a communications provider agrees to host a particular non-geographic number for the call recipient who can be reached by that number.
8. Annex 1 to this Judgment sets out the terms and abbreviations used in the Judgment, together with a cross-reference to that paragraph of the Judgment where the term is first defined.

B. THE APPEALS

I. CASE 1151

9. The 080 Determination was made pursuant to OFCOM’s power to resolve disputes under sections 185 to 191 of the Communications Act 2003 i.e. the Dispute Resolution Process. BT appealed the 080 Determination under section 192(2) of the 2003 Act, this being an appealable decision under section 192(1). The Tribunal must dispose of this appeal in accordance with the provisions of section 195.
10. On 13 May 2010, a case management conference took place. At this hearing:
- (1) The requests for permission to intervene by T-Mobile and Orange (who were jointly represented), Vodafone, O2 and H3G were granted.
 - (2) It was decided that a dispute as to the evidence that BT was entitled to adduce in support of its Notice of Appeal be heard on 22 June 2010.
 - (3) A date of 10 January 2011 was fixed for the substantive hearing of this dispute, with a time estimate of 8 days.
11. The hearing regarding BT’s evidence took place on 22 and 23 June 2010. The dispute was determined in BT’s favour in a judgment of this Tribunal dated 8 July 2010 ([2010] CAT 17). OFCOM’s request for permission to appeal was

refused by the Tribunal on 9 September 2010 ([2010] CAT 22), but permission to appeal was granted by Lloyd LJ on 29 October 2010, with an expedited hearing being ordered in view of the January 2011 trial date. A hearing was fixed for December 2010, but was adjourned. The appeal was ultimately heard on 22 and 23 February 2011, and was dismissed on 10 March 2011: *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245.

II. CASE 1168

12. The 0845/0870 Determination was also made pursuant to the Dispute Resolution Process. EE appealed the 0845/0870 Determination under section 192(2) of the 2003 Act; again, the Tribunal must dispose of this appeal in accordance with the provisions of section 195.

III. CASE 1169

13. BT also appealed the 0845/0870 Determination, and did so by way of this appeal.

IV. MANAGEMENT OF CASES 1151, 1168 AND 1169

14. On 13 October 2010, EE wrote to the Tribunal, noting the overlap between Cases 1168, 1169 and 1151 and suggesting that a case management conference be held to deal with this. A case management conference was held on 3 November 2010. At this hearing, the January 2011 trial date for Case 1151 was vacated and a new trial date, at which all three cases would be heard and determined, was fixed.
15. A number of requests for permission to intervene in Cases 1168 and 1169 were granted: to BT (to intervene in Case 1168); to EE (to intervene in Case 1169) and to O2, Vodafone, H3G, Opal Telecom Limited (“Opal”) and Cable & Wireless UK (“C&W”) (to intervene in both cases). Because the three cases were to be heard together, it was ordered that all interveners should be entitled to see (subject to appropriate confidentiality arrangements being put in place) materials in all three cases.

16. In the event, in addition to BT, EE and OFCOM, only O2, Vodafone and C&W were actually represented before the Tribunal, H3G and Opal electing not to appear, although their pleadings, and the evidence in support of those pleadings, were before the Tribunal, and were relied upon by the parties.
17. At the conclusion of the Court of Appeal's decision in *British Telecommunications plc v Office of Communications* [2011] EWCA Civ 245, Toulson LJ observed (at paragraph 87):

“Section 192(2) of the [2003 Act] gives a right of appeal to a person affected by a decision of Ofcom. It is the practice for Ofcom to be named as the respondent, but it does not follow that it needs to take an active part in the appeal. There may be cases in which Ofcom wishes to appear, for example, because the appeal gives rise to questions of wider importance which may affect Ofcom's approach in other cases or because it is the subject of criticism to which it wishes to respond. But Ofcom should not feel under an obligation to use public resources in being represented on each and every appeal from a decision made by it, merely because as a matter of form it is a respondent to the appeal.”
18. The decision of the Court of Appeal was handed down on 10 March 2011, relatively shortly before the hearing of these appeals in April 2011. In the light of that decision, OFCOM made it clear to the other parties in a letter dated 15 March 2011 that it would, given the observations of Toulson LJ, “not need to engage in the detail of all issues in dispute”, which might “in turn mean that those parties who have intervened in these proceedings may wish to take a more active role that they might otherwise have done”. The parties very helpfully and sensibly allocated who was to deal with what issues between them, and in the event, the Tribunal was not called upon to resolve any procedural difficulties that might have arisen out of OFCOM's (quite proper) decision to take a back seat on certain issues.
19. As we have noted, the decision of the Court of Appeal came only shortly before the substantive hearing of Cases 1151, 1168 and 1169, which meant that OFCOM's stance could only be made clear relatively late in the day. For the future, it would be appropriate for OFCOM to make its position clear at an early stage, so as to enable any interested party or parties to consider their position in the light of OFCOM's stance, and for such matters, if necessary, to be dealt with at a CMC.

C. MATERIAL BEFORE THE TRIBUNAL

20. The appeals were heard during the course of eleven days in April 2011. The Tribunal had the benefit of extensive pleadings and written submissions by all parties, as well as oral opening and closing submissions. Between oral opening and closing submissions, the Tribunal heard evidence from a total of eleven witnesses, both factual and expert.
21. BT called two factual witnesses: Mr Anthony Fitzakerly and Mr Darren Kilburn. Mr Fitzakerly is the Head of Narrowband Portfolio Regulation in the Product Division of BT Wholesale. Mr Fitzakerly gave evidence on 6 April 2011 (Day 3). Mr Kilburn, who is employed by BT as General Manager, TDM Voice, in the Product Division of BT Wholesale, gave evidence on 8 April 2011 (Day 4).
22. Additionally, BT made available for cross-examination three further witnesses: Mr Paul Richards, a Senior Regulatory Economist at BT, Mr Andrew Reid, a Chief Network Services Strategist at BT, and Mr Andrew Martin, a director of IV Response Limited (“IVR”). None of these witnesses was required to be called for cross-examination by either OFCOM or any of the interveners, and we accept the evidence contained in the witness statements adduced before us.
23. EE called one factual witness, Mr Stephen Ornel, the former Head of Carrier Services of EE. Mr Ornel gave evidence on 8 April 2011 (Day 4). EE made available for cross-examination one further witness of fact, Ms Robyn Durie, the Regulatory Director of EE. None of the other parties required Ms Durie to be called, and we accept the evidence contained in Ms Durie’s two witness statements.
24. OFCOM adduced evidence from three witnesses of fact. One of these, Mr Neil Buckley, the Director of Investigations at OFCOM, was not required for cross-examination, and we accept the evidence contained in his two witness statements. OFCOM’s other two factual witnesses, whilst strictly speaking witnesses of fact (because they are both employed by OFCOM, and were involved in the formulation of the 080 and/or 0845/0870 Determinations) are in reality expert economists, and we consider that the evidence which they gave

should be considered in that light. The evidence of the expert witnesses is considered in paragraphs 29 to 31 below.

25. Vodafone called one factual witness, Mr Robin Stone, a Senior Product Manager in Vodafone's Consumer Business Unit. Mr Stone gave evidence on 8 April 2011 (Day 4). Vodafone made available for cross-examination one further witness of fact, Mr Steve Bowey, a Senior Revenue Assurance Analyst in Vodafone's Finance Team. None of the other parties required Mr Bowey to be called, and we accept the evidence contained in Mr Bowey's two witness statements.
26. O2 made available for cross-examination Mr Lawrence Wardle, a Regulatory Manager employed by O2. None of the other parties required Mr Wardle to be called, and we accept the evidence contained in Mr Wardle's two witness statements.
27. The other interveners also adduced evidence from two factual witnesses: Mr Nicholas Harding, the Head of Regulatory Affairs at C&W, and Mr Andrew Aspinall, a Commercial Director employed by Opal. The evidence of these witnesses was not challenged, and, again, we accept the evidence contained in their witness statements.
28. All of the factual witnesses who gave evidence before us did their best to assist the Tribunal in their evidence, and gave that evidence honestly and frankly.
29. The Tribunal heard evidence from seven expert economists. Listing them in the order in which they were called, they were:
 - (1) Mr Geoffrey Myers, the Director of Competition Economics in OFCOM's Competition Group. Mr Myers gave evidence on 11 April 2011 (Day 5) and 12 April 2011 (Day 6).
 - (2) Mr Neil Pratt, the Director of Economic Analysis in OFCOM. Mr Pratt gave evidence on 12 April 2011 (Day 6).
 - (3) Dr Daniel Maldoom, a director of Dotecon Limited. Dr Maldoom gave evidence on 12 April 2011 (Day 6) and 13 April 2011 (Day 7).

- (4) Professor Ian Dobbs, Professor of Business Economics and Finance at Newcastle University Business School. Professor Dobbs gave evidence on 13 April 2011 (Day 7) and 14 April 2011 (Day 8).
 - (5) Professor Tommaso Valetti, Professor of Economics at Imperial College, London. Professor Valetti gave evidence on 14 April 2011 (Day 8).
 - (6) Dr Mike Walker, of Charles River Associates. Dr Walker gave evidence on 14 April 2011 (Day 8) and 15 April 2011 (Day 9).
 - (7) Mr Paul Muysert, a Partner in Competition Economists Group LLP. Mr Muysert gave evidence on 15 April 2011 (Day 9).
30. Dr Maldoom and Professor Dobbs were called by BT. Mr Muysert was called by EE. Dr Walker was called jointly by EE and the interveners. Mr Myers, Mr Pratt and Professor Valetti were called by OFCOM.
 31. We consider that all of the expert economists not only gave their evidence honestly and frankly, but with a high degree of expertise and competence. We have borne in mind that Mr Myers and Mr Pratt, as persons who contributed to the 080 and/or 0845/0870 Determinations, might have felt a degree of *amour propre* in defending their work; however, having considered their evidence, we consider that the evidence they gave – like that of the other experts – was objective and not partial.
 32. All eleven witnesses provided their evidence in-chief in the form of witness statements or expert reports. In total, some 49 witness statements and expert reports were adduced in evidence. In Annex 2 to this Judgment, we list this written evidence, and set out the abbreviations by which this evidence is referenced in this Judgment. There are two points to be made in relation to this written material:
 - (1) First, a number of these statements/reports are documents adduced only in relation to the appeals in relation to the 0845/0870 Determination (i.e. in Cases 1168 and 1169). These documents are shaded in Annex 2. The remaining, unshaded, documents, were adduced in relation to both the appeal in relation to the 080 Determination and the appeals in relation to the 0845/0870 Determinations (i.e. in Cases 1151, 1168 and 1169). Before us, OFCOM stressed the distinction between evidence relevant to the

0845/0870 Determination, on the one hand, and evidence relevant to both Determinations, on the other. We consider that OFCOM was right to do so. The 080 Determination pre-dates the 0845/0870 Determination by some five months, and it is clear that the evidence before, and the analysis applied by, OFCOM in the 080 Determination had developed by the time the 0845/0870 Determination was made. This is a material distinction between the two Determinations, which we have taken into account. There are also, as we describe, material differences between each of the three number ranges – 080, 0845 and 0870 – that were considered before us. Again, this is something that we have taken into account.

- (2) Secondly, the volume of statements before us was, at least in part, dictated by the fact that BT was appealing two, successive, OFCOM decisions, in circumstances where the scope of the first of these decisions – the 080 Determination – had been unclear. BT’s understanding of the scope of the dispute before OFCOM regarding 080 numbers was considered by the Tribunal in the evidential hearing referred to in paragraph 11 above ([2010] CAT 17, paragraphs 89 to 108). Without going too much over what is now immaterial history, until relatively late in the Dispute Resolution Process before OFCOM regarding 080 calls, BT reasonably considered that its specific charges for 080 calls were not under consideration, and that what was being determined was a question of an altogether more general nature. When it became clear that this was not the case, and that BT’s specific 080 charges were being considered by OFCOM, BT sought (in some haste) to adduce further evidence. This evidence comprised what we refer to as Dobbs 1 and Maldoom 1. This evidence was taken into account by OFCOM. Shortly thereafter, BT adduced Dobbs 2 and Maldoom 2. OFCOM considered this evidence only to the extent necessary to determine whether this material might constitute “exceptional circumstances” sufficient to justify an extension to the statutory four month timetable for disputes to be resolved under the Dispute Resolution Process (see section 188(5) of the 2003 Act). OFCOM considered that this material did not constitute such exceptional circumstances. Having reached this conclusion, OFCOM did not consider

Dobbs 2 or Maldoom 2 any further for the purposes of the 080 Determination. It is undoubtedly the case – as Professor Dobbs was the first to admit – that these early reports, because they were produced so quickly, were the subject of significant evolution, particularly when the dispute regarding 0845 and 0870 calls came to be considered by OFCOM, and when both Determinations came to be appealed. The result was a proliferation of reports, which certainly did not assist resolution, but for which responsibility cannot be attributed to any single party. Following the Tribunal’s ruling on admissibility ([2010 CAT 17]) and the Court of Appeal’s upholding of that ruling ([2011] EWCA Civ 245) all of this additional material was admitted as evidence before us.

33. In addition to the factual and expert evidence which we have described in the foregoing paragraphs, we had the benefit of the parties’ pleadings and written and oral submissions, which we have fully considered and taken into account.

D. THE ORIENTATION AND TERMINATION OF CALLS IN THE UNITED KINGDOM

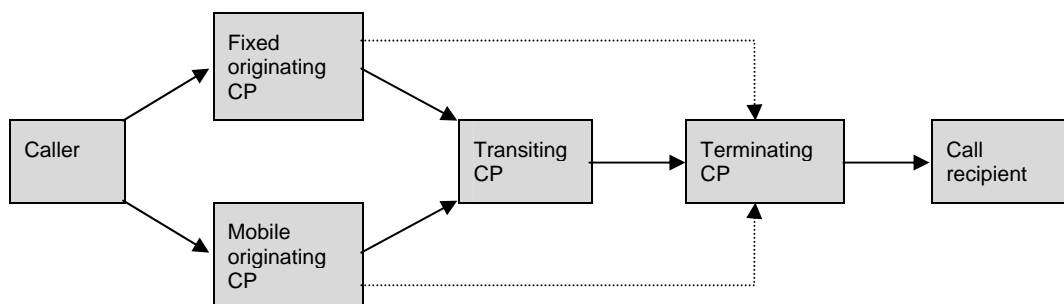
I. COMMUNICATIONS PROVIDERS AND END-TO-END CONNECTIVITY

34. Communications services in the UK are provided by a number of communications providers or “CP”s. Some operate fixed networks (such as BT and C&W); others operate mobile networks (such as EE, O2 and Vodafone). There is no reason why a communications provider should not operate both a fixed network and a mobile network, but in practice communications providers in the UK appear to specialise in one or the other.
35. Although communications services in the UK are provided by a number of communications providers, callers expect to be able to make calls from their telephone not merely to others subscribing to services from the same communications provider, but also to any other customer irrespective of the communications provider to which that customer subscribes. Equally, call recipients expect to be able to receive calls from all callers, irrespective of the identity of the caller’s communications provider. This outcome is described as

“end-to-end” connectivity and it describes the process of enabling customers to make calls to other customers, whether they are on the same network or on another communication provider’s network.

36. In order to achieve this end, communications providers enter into contractual arrangements with each other for the provision of access to each other’s networks. Thus, where the customer originating the call subscribes to a different network to the customer receiving the call, two communications providers will be involved, the communications provider on whose network the call originates, and the communications provider on whose network the call terminates. We shall refer to these to communications providers as, respectively, the “originating CP” and the “terminating CP”.
37. Pursuant to these contractual arrangements, the terminating CP makes a charge for each call terminated on its network, known as a “call termination charge”. The charge for call termination is expressed in “pence per minute” or “ppm”.
38. For the vast majority of calls, the UK operates a “calling party pays” or “CPP” system. This means that the entire cost of the call is paid for by the calling party. Where a call originates on one network and terminates on another network, the terminating CP charges the originating CP a call termination charge. One way or another (depending upon the contractual arrangements between the caller and the originating CP), this call termination charge is passed on by the originating CP to its customer, the caller.
39. BT is the major fixed network operator in the UK. As such, in addition to acting (as the case may be) as an originating CP or a terminating CP, BT also provides “transit services” between other communications providers. BT directly interconnects with many other communications providers, and many communications providers rely on BT to terminate calls with other communications providers, rather than having to negotiate their own termination agreement. In such cases, BT will pay the call termination charge of the terminating CP but, instead of passing that charge on to a caller, it will pass the charge on to the originating CP, plus a transit fee and an additional circuit charge for conveyance.

40. The importance of transit services may be illustrated by a short example. Suppose that a communications market comprises ten communications providers, *A* to *J*. Without transit services, each communications provider will – in order to achieve end-to-end connectivity – have to contract with nine other communications providers. Thus, communications provider *A* will have to conclude agreements with communications providers *B, C, D, E, F, G, H, I* and *J*, and so on for each of the other communications providers. The number of contracts that will have to be made will be enormous. Clearly, this is an onerous way of doing business.
41. Suppose, next, that communications provider *E* decides to offer a transit service. *E* will have to contract with all of the other communications providers (in short, *E* will have to conclude nine contracts), but all of the other communications providers will (should they choose to avail themselves of *E*'s service) only have to contract with *E*.
42. BT is not the only fixed network operator in the UK, nor the only provider of transit services. Two other fixed network operators were involved in these proceedings, C&W and Opal. C&W also provides transit services. Where a communications provider provides transit services, we shall refer to that communications provider as the “transiting CP”.
43. One consequence of the provision of transit services is that the originating CP and the terminating CP may actually be the same, with the transiting CP interposing.
44. There is thus a chain of persons between a caller and the recipient of that call, which may be represented diagrammatically as follows:



45. Where a caller seeks to make a call, the following steps are, or may be, involved:
- (1) Where a caller decides to make a call, he may either use a fixed line, in which case the call is originated on a fixed network, or he may use a mobile telephone, in which case the call is originated on a mobile network.¹ Often there will be a contract between the caller and the originating CP, be that communications provider a fixed or a mobile communications provider. This contract will regulate the basis upon which the communications provider provides its services to the caller, and the caller's obligations to pay for those services.
 - (2) The originating CP may, of course, enter into direct contractual relations with all terminating CPs, in order to provide end-to-end connectivity. This scenario is represented by the dotted lines in the diagram between:
 - (i) The fixed originating CP and the terminating CP; and
 - (ii) The mobile originating CP and the terminating CP.
 - (3) For the reasons described in paragraph 40 above, however, the existence of direct contractual relations between an originating CP and all terminating CPs is an unlikely scenario. Instead of contracting with all possible terminating CPs, the originating CP will likely avail itself of the services of one (or more) transiting CPs. On this basis, a call will originate with the originating CP, pass to the transiting CP, and will be terminated by the terminating CP on its network. In this case, there will be a contract between the originating CP and the transiting CP, and no contract will subsist as between the originating CP and the terminating CP.
 - (4) The terminating CP itself may, of course, be either a fixed or a mobile communications provider. This depends on the number that the caller is calling. The originating CP has no means of influencing the identity of the terminating CP: who the terminating CP is depends upon who the caller chooses to call, and how that call recipient chooses to receive calls.

¹ In theory, there are other possibilities (such as the use of satellite networks), but these are wholly irrelevant for the purposes of this Judgment.

46. As was noted in paragraph 38 above, for the vast majority of calls, the UK operates a calling party pays or CPP system. The payment structure for such calls is as follows:

<u>Caller</u>		<u>Originating CP</u>		<u>Transiting CP</u>		<u>Terminating CP</u>		<u>Call recipient</u>
Calls (assuming the involvement of a transiting CP)								
Payment of retail charge ²	⇒	Receipt of retail charge						
		Payment of termination charge	⇒	Payment of termination charge	⇒	Receipt of termination charge		
		Payment of transit charge	⇒	Receipt of transit charge				
Calls (assuming no transiting CP)								
Payment of retail charge	⇒	Receipt of retail charge						
		Payment of termination charge	⇒			Receipt of termination charge		

Table 1: Call payment structure in the case of CPP calls

II. BT'S STANDARD INTERCONNECT AGREEMENT

47. Since these appeals concern the circumstances in which BT may vary the call termination charges that it demands for terminating calls on its network, it is necessary to understand the terms on which BT does so.
48. When BT enters into an interconnection agreement with another operator, it does so on the terms of its “*Standard Interconnect Agreement*”. This is a substantial document, which sets out a wide range of services provided by BT to the counterparty and by the counterparty to BT. The Standard Interconnect Agreement is entered into for an indefinite term, and can be terminated only on 24 months’ notice (paragraph 2 of the Standard Interconnect Agreement).
49. A Standard Interconnect Agreement will be concluded between BT (as the provider of a Public Electronic Communications Network, referred to as the

² Precisely how the caller will pay for his calls will vary. The caller may not pay a price per call. For instance, a caller may pay monthly for a package or bundle of calls comprising a given number of minutes.

“BT System” in the agreement) and another communications provider, referred to in the agreement as the “Operator” (also providing a Public Electronic Communications Network, referred to as the “Operator System” in the agreement).

50. The Standard Interconnect Agreement sets out the terms and conditions relating to the connection between the BT System and the Operator System. Paragraph 12 of the Standard Interconnect Agreement provides as follows:

“12.1 For a BT service or facility the Operator shall pay to BT the charges specified from time to time in the Carrier Price List.

12.2 BT may from time to time vary the charge for a BT service or facility by publication in the Carrier Price List and such new charge shall take effect on the Effective Date, being a date not less than 28 calendar days after the date of such publication, unless a period other than 28 calendar days is expressly specified in a Schedule.

12.3 Notwithstanding the provisions of paragraph 12.2, BT may vary the charge which has retrospective effect for a BT service or facility by publication in the Carrier Price List if the variation is as a result of:

12.3.1 a variation of a charge which has retrospective effect payable by or to BT in respect of any Third Party Operator or an Authorised Overseas System; or

12.3.2 an order, direction, determination or requirement of OFCOM or any other regulatory authority or body of competent jurisdiction.

12.4 The date of publication in the Carrier Price List shall be the date that BT first makes the contents of the Carrier Price List available on the Internet or commences e-mail distribution of the Carrier Price List containing the relevant entries to persons other than BT including, without limitation the Operator, whichever is earlier.

...”

51. The “Carrier Price List” referred to in paragraph 12 of the Standard Interconnect Agreement is defined in Annex D to that agreement (which sets out the various definitions used in the Standard Interconnect Agreement) as follows:

“**Carrier Price List** the price list having that name which contains charges for a BT service or facility, charges in relation to Network Components (if required pursuant to a Condition), charges for services provided by the Operator and some other charges an information”.

52. The Standard Interconnect Agreement contains, in paragraph 26, a dispute resolution procedure. The procedure applies to all Disputes – defined in the

agreement as “a disagreement between the Parties excluding breaches of this Agreement” – except for:

- (1) Disputes relating to the accuracy of invoices (paragraph 26.1.1);
- (2) Disputes relating to BT’s credit management provisions (paragraph 26.1.2);
- (3) Disputes arising out of the service of a Charge Change Notice (paragraph 26.9).

The first two exceptions are not material to these appeals. The third exception – disputes arising out of a Charge Change Notice – is considered further below.

53. The paragraph 26 dispute resolution procedure contains a fairly standard “escalation” process, whereby BT and the Operator are obliged to seek to resolve the Dispute between them (paragraphs 26.2 to 26.5). Paragraphs 26.6 to 26.8 then provide:

- “26.6 If the Dispute is not resolved at any time, either Party may refer the Dispute to OFCOM and shall forthwith send a copy of the referral to the other Party. In the event of a reference to OFCOM, both Parties shall compile a detailed dispute report which shall include origin, nature, extent, issues and any proposals for resolution and make their respective reports available to OFCOM and each other within 28 days of the referral.
- 26.7 The above procedures are without prejudice to any other rights and remedies that may be available in respect of any breach of any provisions of this Agreement.
- 26.8 Nothing herein shall prevent a Party from:
- 26.10.1 seeking (including obtaining or implementing) interlocutory or other immediate relief;
- 26.10.2 referring the Dispute to OFCOM in accordance with any right (if any) either Party may have to request a determination or other appropriate steps for its resolution.”

54. Paragraph 13 of the Standard Interconnect Agreement deals with charges payable by BT to the Operator. It is the converse provision to paragraph 12. It provides as follows:

- “13.1 For an Operator service or facility BT shall pay to the Operator the charges specified from time to time in the Carrier Price List.
- 13.2 The Operator may from time to time by sending to such person, as BT may notify to the Operator from time to time, a notice in writing in duplicate request a variation to a charge for an Operator service or facility (“Charge Change Notice”). Such notice shall specify the proposed new charge and the

date on which it is proposed that the variation is to become effective (“Charge Change Proposal”). BT shall within 4 Working Days of receipt of such notice acknowledge receipt and within a reasonable time notify the Operator in writing of acceptance or rejection of the proposed variation.

- 13.3 BT may from time to time by sending to such person, as the Operator may notify to BT from time to time, a notice in writing in duplicate request a variation to a charge for an Operator service or facility (“Charge Change Notice”). Such notice shall specify the proposed new charge and the date on which it is proposed that the variation is to become effective (“Charge Change Proposal”). The Operator shall within 4 Working Days of receipt of such notice acknowledge receipt and within 14 days of receipt of such notice notify BT in writing of acceptance or rejection of the proposed variation. If the Operator has not accepted the Charge Change Proposal within 14 days of receipt of such notice (or such longer period as may be agreed in writing) the proposed variation shall be deemed to have been rejected.
 - 13.4 If the Party receiving a Charge Change Notice accepts the Charge Change Proposal the parties shall forthwith enter into an agreement to modify the Agreement in accordance with the Charge Change Proposal.
 - 13.5 If the Party receiving a Charge Change Notice rejects the Charge Change Proposal the Parties shall forthwith negotiate in good faith.
 - 13.6 If following rejection of a Charge Change Proposal and negotiation, the Parties agree that the Charge Change Notice requires modification, the Party who sent the Charge Change Notice may send a further Charge Change Notice.
 - 13.7 If following rejection of a Charge Change Proposal and negotiation the Parties fail to reach agreement within 14 days of the rejection of the Charge Change Proposal, either Party may, not later than 1 month after the expiration of such 14 days period, refer the matters in dispute to OFCOM.”
55. The remaining sub-paragraphs of paragraph 13 then spell out the consequences of OFCOM either upholding or not upholding the Charge Change Proposal. There is nothing in these paragraphs that articulates the criteria by which OFCOM is to determine whether or not a Charge Change Proposal is to be upheld or not.
56. There are significant differences between paragraphs 12 and 13 of the Standard Interconnect Agreement. These are considered in greater detail below (see paragraphs 68(3) below), but it is important to note at the outset that:
- (1) Sub-paragraph 12.2 gives BT a right to vary the charges for services or facilities provided by it under the Standard Interconnect Agreement (“...BT may from time to time vary the charge for a BT service or facility...”), subject to the paragraph 26 dispute resolution procedure should the Operator subject to the new charge not be inclined to accept it.

- (2) By contrast, paragraph 13 contains no right in either the Operator or BT to impose a variation in Operator charges. Such changes must be agreed and, if not agreed, are determined by OFCOM pursuant to sub-paragraphs 13.7 to 13.9. It is, no doubt, for this reason that disputes arising out of the service of a Charge Change Notice are excluded from the scope of the paragraph 26 dispute resolution procedure: absent actual agreement between BT and the Operator, it is inherent in the paragraph 13 procedure that OFCOM will uphold or not uphold a non-agreed Charge Change Notice.

III. THE NATIONAL TELEPHONE NUMBERING PLAN

57. At various times, OFCOM has published “National Telephone Numbering Plans”. It is OFCOM’s duty to publish such a plan under section 56 of the 2003 Act. Section 56(1) provides:

“It shall be the duty of OFCOM to publish a document (to be known as the “National Telephone Numbering Plan”) setting out –

- (a) the numbers that they have determined to be available for allocation by them as telephone numbers;
- (b) such restrictions as they consider appropriate on the adoption of numbers available for allocation in accordance with the plan; and
- (c) such restrictions as they consider appropriate on the other uses to which numbers available for allocation in accordance with the plan may be put.”

58. OFCOM published National Telephone Numbering Plans on 3 August 2009 and on 8 March 2010. These plans were not materially different. As regards the plan published by OFCOM on 3 August 2009:

- (1) A distinction was drawn between “Geographic Numbers” and “Non-Geographic Numbers”. Essentially, a Geographic Number is a number containing a “Geographic Area Code”, which serves to designate a particular geographic area. Thus, by way of example, a number beginning 01223 contains the Geographic Area Code for Cambridge. A Non-Geographic Number is, essentially, any telephone number that is not a Geographic Number.

- (2) Part A of the plan identified telephone numbers available for allocation. This makes clear that numbers beginning 01 and 02 are Geographic Numbers. All other number ranges are Non-Geographic Numbers, which include the following:

“Number(s) beginning	Designation
...	
080	Special Services - No charge to Customer (except where charges shall be notified to callers at the start of the call)
...	
0845	Special Services basic rate: charged (before discounts and call packages) at BT’s Standard Local Call Retail Price for BT customers inclusive of value added tax (the price charged by other Originating Communications providers may vary)
0870	Non-Geographic Number: charged at no more than the caller would pay for a call to a Geographic Number with calls to 0870 numbers counting towards inclusive call minutes to Geographic Numbers and included in any discount structures that apply to Geographic Numbers, except where call charges have been published in accordance with General Condition 14.2 or, in the case of Public Pay Telephones, where call charges are displayed in a manner that is reasonably accessible to a caller before making a call.”

59. Thus, 08 numbers form a number range defined under National Telephone Numbering Plans published by OFCOM. Whereas Geographic Numbers relate to a specific location or area, 08 numbers are Non-Geographic Numbers that relate not to a particular location or area, but to a particular service. When a non-geographic number is dialled by a caller, it is “translated” by the network to a geographic number to deliver the call to its destination. For this reason, non-geographic numbers are often also referred to as “number translation services” or “NTS” numbers.
60. The difference – as is evident from the description in the National Telephone Numbering Plan – between Geographic Numbers (on the one hand) and the 080, 0845 and 0870 number ranges (on the other) is that whereas for Geographic

Numbers, the CPP principle applies, with a payment structure as described in paragraph 46 above, that principle does not apply, or applies only in attenuated form, in the case of 080, 0845 and 0870 numbers.

61. There is, however, one point that needs to be made clear at the outset. Although National Telephone Numbering Plans may and do contain descriptions of the various different types of Non-Geographic Number ranges, such plans may not, under the present regulatory regime, impose price controls on communications providers. Thus, to take 080 calls as an example, it would not be permissible for OFCOM to oblige communications providers to provide such calls at no charge to the caller. The words in brackets in the 080 designation (i.e. “...(except where charges shall be notified to callers at the start of the call)”) are significant for this reason: they prevent the 080 designation being a form of price control. These questions of regulation – and, in particular, the limits on OFCOM’s regulatory powers – are considered further in Section E below.
62. We shall now consider the 080, 0845 and 0870 number ranges in greater detail.

IV. 080 NUMBERS

63. It is evident from the National Telephone Numbering Plan we referred to in paragraphs 57 to 62 above that the intention was for 080 calls to involve no charge to the caller. As OFCOM noted in paragraph 2.24 of the 080 Determination, as regards this type of call “there is no call revenue for the [originating CP] to recover its costs to make a payment to the [terminating CP] from. The costs of these calls must therefore be recovered at the other end of the [number translation services] value chain”, this is, from the recipient of the call.
64. In pricing, 080 numbers are thus intended to represent the precise converse of the CPP principle. The intention is that the call recipient pays for the call, which is then free to the caller. The payment structure for 080 calls is thus intended to be as follows:

Caller		Originating CP		Transiting CP		Terminating CP		Call recipient
080 calls (assuming the involvement of a transiting CP)								
						Receipt of service charge	↔	Payment of service charge
		Receipt of origination charge	↔	Payment of origination charge	↔	Payment of origination charge		
				Receipt of transit charge	↔	Payment of transit charge		
080 calls (assuming no transiting CP)								
						Receipt of service charge	↔	Payment of service charge
		Receipt of origination charge	↔			Payment of origination charge		

Table 2: Call payment structure in the case of 080 calls

65. Clearly, this sort of call payment structure involves an altogether different relationship between the terminating CP and the call recipient. Whereas, in the case of non-geographic calls, the call recipient is just that, a receiver of calls originated by another, the call recipient in the case of 080 numbers is himself seeking a service beyond merely the receipt of calls, namely a number on which he (the call recipient) can be called, without causing the caller to pay for the call. This implies a particular relationship between the call recipient and a terminating CP, whereby the terminating CP provides an 080 number to the call recipient, and the call recipient pays for this service – a service which we have described as number hosting. It is for this reason that call recipients in the case of non-geographic numbers are often called “service providers”, a term that we shall on occasion use in this Judgment.
66. We describe the number hosting market in a little greater detail in Section G below, but it is worth noting that, according to a report for OFCOM conducted by Analysys Mason dated 3 November 2010 and entitled *The flow of funds in the market for non-geographic calls* (the “Flow of Funds Report”), BT and C&W have the biggest shares of this market (BT having about 25%, and C&W about 20%), with a number of other companies having rather smaller market

shares. None of the mobile network operators are active in this market, at least to any significant degree (see Figure 5.3 of the Flow of Funds Report).

67. As noted above, the intention in the case of 080 calls was for the call to be free to the caller. So far as fixed network operators are concerned, that intention appears to have been complied with. However, the cost to callers of 080, 0845 and 0870 calls originating on fixed networks was not of primary relevance to the issues before us, and we heard relatively little evidence on the point: it is not a matter that we consider further in this Judgment.
68. So far as mobile network operators are concerned, the position is more complex:
 - (1) Although there was some evidence that, initially, mobile network operators did not charge callers for 080 calls (see Transcript Day 2, page 46 and paragraph 3.11 of Oftel's statement dated 21 September 2001 entitled *Orange/BT interconnection disputes: freephone origination and mobile number portability*), it was uncontroversial before us that at all times material to this Judgment, mobile network operators did charge callers for 080 calls, except in the case of calls using the prefix 0808 80. Calls to numbers with this 0808 80 prefix are, generally speaking, to charity helplines such as Age Concern and CarersUK. The arrangements between originating CPs and terminating CPs regarding 0808 80 numbers are generally brokered by The Helplines Association. The Helplines Association makes arrangements to ensure that calls to numbers with this prefix are free to the caller. In paragraph 2.38 of the 080 Determination, OFCOM noted that the mobile network operators "absorb the cost of origination for these calls, and receive no payment either from the caller or the called party". However, it must be stressed that it is not just mobile network operators that participate in these arrangements: calls on 0808 80 numbers are zero-rated on fixed lines, payphones, as well as on the networks of mobile network operators.
 - (2) There are call recipients, other than charities, who wish to offer their callers calls that are free to the caller. For example, a commercial organisation may wish to set up a helpline with regard to its own services. Such call recipients cannot benefit from the 0808 80 prefix; and, unless

special agreement can be reached, mobile network operators will charge callers making such calls. One example where a special agreement was reached concerned the Department of Work and Pensions, which successfully made calls to them regarding welfare payments free to the caller.

- (3) Originally, as well as receiving payment from the caller, mobile network operators also received an origination payment from the terminating CP, in line with the payment identified in Table 2 above. In response to this, so far as calls terminating on its network were concerned, BT varied certain charges in its Carrier Price List by Network Charge Change Notice 911 (“NCCN 911”), which was issued on and submitted to OFCOM on 2 October 2008, and which came into effect on 1 November 2008. We did not hear very much evidence about NCCN 911 because it formed part of the historical background and was not the subject of the 080 and 0845/0870 Determinations, and so not the subject of these appeals. Nevertheless, a few points need to be made:

- (i) The term “Network Charge Change Notice” is not a term of art under the Standard Interconnect Agreement. It is not a defined term in Annex D to that agreement (which sets out the various definitions used in the Standard Interconnect Agreement), and it is certainly not a term used in either paragraph 12 or paragraph 13 of the Standard Interconnect Agreement, although paragraph 13 does refer to Charge Change Notices. For reasons which will become apparent, we do not consider the term Network Charge Change Notice a helpful one.
- (ii) We do not know whether NCCN 911 was a charge variation by BT under paragraph 12 of the Standard Interconnect Agreement or a variation request by BT under paragraph 13. In relation to NCCN 911, the point is academic, because (as we have noted) NCCN 911 was not contentious before us, and formed part of the historical background. Nevertheless, which paragraph is the applicable paragraph does matter when we come to consider the Network

Charge Change Notices which were the subject-matter of the Disputes.

- (iii) Paragraph 12 of the Standard Interconnect Agreement applies to variations in the charges for a “BT service or facility”, whereas paragraph 13 applies to variations in the charges for an “Operator service or facility”. These terms are not defined in the Standard Interconnect Agreement, but their meaning is clear: a BT service or facility is a service or facility provided by BT and paid for by the Operator, whereas an Operator service or facility is a service or facility provided by the Operator and paid for by BT.
- (iv) Prior to NCCN 911, the charge for 080 calls in the Carrier Price List was expressed to be a negative one: -0.6261 (daytime), -0.2866 (evening), -0.2257 (weekend). This meant that BT paid charges to the originating CP for an Operator service or facility, namely the origination of calls, although admittedly the clarity of this is obscured by the use of negative prices.
- (v) From 1 November 2008, BT continued this arrangement as regards fixed network operators, but from this date paid mobile network operators nothing. A copy of NCCN 911 is at Annex 3(A) to this Judgment.

69. It follows that NCCN 911 must have been a Charge Change Notice under paragraph 13.3 of the Standard Interconnect Agreement because it was the price BT was paying for an Operator service or facility (the origination of calls). It is to be inferred that either the mobile network operators who were affected by NCCN 911 acceded to it or – if they did not – the matter was resolved by OFCOM in BT’s favour.
70. Thus, so far as mobile network operators are concerned, the payment structure for 080 calls was as follows (looking at the position both pre- and post-NCCN 911):

Caller		Originating CP (a mobile network operator)		Transiting CP		Terminating CP		Call recipient
080 calls (based on pre-NCCN 911 arrangements and assuming the involvement of a transiting CP)								
Payment of retail charge	⇒	Receipt of retail charge				Receipt of service charge	⇐	Payment of service charge
		Receipt of origination charge	⇐	Payment of origination charge	⇐	Payment of origination charge		
				Receipt of transit charge	⇐	Payment of transit charge		
080 calls (based on pre-NCCN 911 arrangements and assuming no transiting CP)								
Payment of retail charges	⇒	Receipt of payment from caller				Receipt of service charge	⇐	Payment of service charge
		Receipt of origination charge	⇐			Payment of origination charge		
080 calls (based on NCCN 911 arrangements and assuming the involvement of a transiting CP)								
Payment of retail charges	⇒	Receipt of payment from caller				Receipt of service charge	⇐	Service charge
				Receipt of transit charge	⇐	Payment of transit charge		
080 calls (based on NCCN 911 arrangements and assuming no transiting CP)								
Payment of retail charges	⇒	Receipt of payment from caller				Receipt of service charge	⇐	Service charge

Table 3: Call payment structure in the case of 080 calls originated by mobile network operators

71. The differences between the call payment structure described in Table 2, and that described in Table 3 is stark. Whereas Table 2 describes a structure where the call recipient pays for the call, Table 3 describes a structure where both caller and caller recipient pay.
72. Network Charge Change Notice 956 (“NCCN 956”) was issued by BT on and submitted to OFCOM on 3 June 2009, and was to come into effect on 1 July 2009. It envisaged a charging structure for 080 calls as follows:

<u>Charge 1</u>	If no retail charge was payable by the originating Operator’s retail customers:	(i) -0.6481 ppm (daytime) (ii) -0.2967 ppm (evening) (iii) -0.2336 ppm (weekend)
<u>Charge 2</u>	If the retail charge payable by the originating Operator’s retail customers was greater than zero and less than 8.5 ppm (inc VAT)	(i) 0.0000 ppm (daytime) (ii) 0.0000 ppm (evening) (iii) 0.0000 ppm (weekend)
<u>Charge 3</u> Step 1 of the NCCN 956 ladder	If the retail charge payable by the originating Operator’s retail customers was 8.5ppm or greater, and less than 12.5 ppm (inc VAT)	(i) 2.0000 ppm (daytime) (ii) 2.0000 ppm (evening) (iii) 2.0000 ppm (weekend)
<u>Charge 4</u> Step 2 of the NCCN 956 ladder	If the retail charge payable by the originating Operator’s retail customers was 12.5 or greater, and less than 17.5 ppm (inc VAT)	(i) 4.5000 ppm (daytime) (ii) 4.5000 ppm (evening) (iii) 4.5000 ppm (weekend)
<u>Charge 5</u> Step 3 of the NCCN 956 ladder	If the retail charge payable by the originating Operator’s retail customers was 17.5 or greater, and less than 22.5 ppm (inc VAT)	(i) 7.0000 ppm (daytime) (ii) 7.0000 ppm (evening) (iii) 7.0000 ppm (weekend)
<u>Charge 6</u> Step 4 of the NCCN 956 ladder	If the retail charge payable by the originating Operator’s retail customers was 22.5 or greater, and less than 27.5 ppm (inc VAT)	(i) 10.0000 ppm (daytime) (ii) 10.0000 ppm (evening) (iii) 10.0000 ppm (weekend)
<u>Charge 7</u> Step 5 of the NCCN 956 ladder	If the retail charge payable by the originating Operator’s retail customers was 27.5 ppm or greater (inc VAT)	(i) 13.0000 ppm (daytime) (ii) 13.0000 ppm (evening) (iii) 13.0000 ppm (weekend)

A copy of NCCN 956 is at Annex 3(B) to this Judgment.

73. It was common ground amongst the parties that this form of charging structure was a novel one. The structure was described as “ladder pricing”, and the term is an apt one. Essentially, different prices are charged by BT for the same service (that is, terminating a call). The price that is payable depends upon what the originating CP charges to its retail customers. Thus:

- (1) Where no retail charge is payable at all (Charge 1 in the above table), an origination charge is payable by BT to the originating CP. In the Carrier Price List this is represented as a negative price to BT.
 - (2) Where there is a charge, but it is less than 8.5 ppm (Charge 2 in the above table), then the termination charge is zero, with no payment being made either way.
 - (3) Thereafter, termination charges increase with retail price. The increases are stepped, with Charges 3 to 7 comprising the five steps of the ladder. Thus, if the retail price lies between 8.5 ppm and below 12.5 ppm (Charge 3), then the termination charge levied by BT is on Step 2 at 2 ppm.
74. It is clear that, so far as the ladder pricing elements of NCCN 956 are concerned (i.e. Charges 3 to 7), BT was varying the charges for a BT service or facility – that is, the service or facility of terminating 080 calls on its network. It follows that NCCN 956 was a variation imposed by BT pursuant to paragraph 12.2 of the Standard Interconnect Agreement. Before us, this was common ground between the parties.

V. 0845 NUMBERS

75. The National Telephone Numbering Plan provides that 0845 numbers are to be charged (before discounts and call packages) at BT's Standard Local Call Retail Price for BT customers inclusive of value added tax, but that the price charged by other originating CPs may vary.
76. The description of 0845 numbers in the National Telephone Numbering Plan is thus quite vague, particularly as regards communications providers other than BT, who obviously will not use BT's Standard Local Call Retail Price for calls originated on their networks.
77. Nevertheless, we consider the general objective to be clear: the retail price of the call is to be at a local rate, even if the call itself is not local. Thus, unlike 080 numbers, the call is not free; but the intention appears to be that the retail price of the call is capped.

78. As regards 0845 numbers, BT is subject to what is known as the “NTS Call Origination Condition”. This is a significant market power or “SMP” condition, last imposed upon BT following publication of OFCOM’s document entitled *Review of the fixed narrowband services wholesale markets* dated 15 September 2009 (“Fixed Narrowband Services Statement”) as SMP Condition AAA11. A condition of this sort has been imposed upon BT since 1996. The numbers, however, to which the NTS Call Origination Condition applies have varied over time, although they are all number translation services numbers. For present purposes, it is important to note that the NTS Call Origination Condition applies to 0845 calls, and used to apply to 0870 calls. Since 1 August 2009, 0870 calls have been excluded from the NTS Call Origination Condition. It also applies to 080 calls: but this is of little practical importance for present purposes, simply because BT does not charge for 080 calls. The importance of the NTS Call Origination Condition for present purposes lies in the scope that it provides for “revenue sharing”.
79. SMP Condition AAA11 provides that BT (as a person having significant market power in the origination of NTS calls) is obliged to provide NTS call origination “on fair and reasonable terms and conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct” (SMP Condition AAA11.2).
80. In paragraph 11 of Fitzakerly 2, Mr Fitzakerly described the essence of the NTS Call Origination Condition as follows:
- “In essence, this condition stipulates that BT must only retain the efficient costs of originating and retailing NTS calls (including calls to 0845 numbers but not 0870 numbers) but no other costs or profits. This means that when BT sells to a customer a retail call to a 0845 number located on another CP’s network, BT must retain only the efficient costs of originating and retailing the call. BT must then pass the remaining revenue for that call to the terminating CP.”
81. The 0845/0870 Determination describes the position in the following way:
- “2.17 A key feature of some NTS numbers is that the regulatory framework makes revenue sharing possible between the [terminating CP] and the organisation or individual receiving the call, i.e. the service provider (“SP”). In this way, the regulatory regime supports the use of NTS as a micro-payment mechanism for the various services offered by SPs which can be accessed via 08 and 09 numbers. The caller pays the [originating CP] for the call. The [originating CP] passes on a terminating payment to the [terminating CP]

who is then able (subject to commercial viability) to share some of this revenue with the individual or organisation using the NTS number, either explicitly or implicitly in the form of additional hosting and call management services.

2.18 The regulatory mechanism that facilitates revenue sharing is the NTS Call Origination Condition (“NTS Condition”) which is one of a number of remedies for BT’s Significant Market Power (“SMP”) in ‘call origination on public fixed narrowband networks’. A key feature of the NTS Condition is an obligation on BT to originate and retail calls to NTS numbers on behalf of [terminating CPs]. BT is only permitted to retain cost-related charges for originating NTS calls (including costs of retailing) and must pass the remaining revenues over to the [terminating CP]. This generally allows the [terminating CP] to cover its costs of termination and hosting and pass on some of the termination charge to the SP in the form of a revenue share as described above.”

82. In short, whilst BT is permitted a discretion in what it charges a caller for originating an 0845 call (i.e. when BT is acting as an originating CP), BT’s interest in increasing such retail charges to the detriment of the caller is curtailed by the fact that any excess, over-and-above cost-related charges, must be passed on by BT to the terminating CP. Clearly, it would only be in BT’s interests to charge a caller more than its cost-related charges where this resulted in a service beneficial to the caller.
83. As paragraphs 2.17 and 2.18 of the 0845/0870 Determination note, where the call recipient is providing a service through its 0845 number, some kind of “revenue share” may be desirable. In such a case, excess revenue, being that revenue over-and-above BT’s cost-related charges, is passed on to the call recipient, enabling the call recipient to provide his service. Given that 0845 calls are intended to be charged (before discounts and call packages) at BT’s Standard Local Call Retail Price for BT customers, it is clear that any such excess revenue will not be great. Indeed, the payments of this sort to call recipients are often referred to as “micro-payments”. According to Mr Muysert, “most of that revenue sharing is what’s called “dial-up internet ISP activity”, it’s the old fashioned modem, and it goes “beep, beep, beep, beep”” (Transcript Day 9, page 45). In other words, many micro-payments go to paying for dial-up internet access, a rapidly declining business.
84. It must be stressed that the NTS Call Origination Condition is a condition that – as matters stand – applies only to BT. Thus, communications providers other

than BT are entitled to (and, in the case of mobile network operators, do) charge callers what they please for 0845 numbers, and can keep for themselves whatever revenue they generate. A number of BT witnesses were cross-examined on the meaning and scope of the NTS Call Origination Condition: all conceded that it only applied to BT (see, for example, the evidence of Mr Fitzakerly at Transcript Day 3, pages 63 and 85; and the evidence of Mr Kilburn at Transcript Day 4, page 9). We consider that BT's witnesses were correct in the views that they expressed regarding the meaning and scope of the NTS Call Origination Condition. However, because the meaning and scope of the NTS Call Origination Condition is a matter of legal construction, and not factual evidence, we have attached no weight to the evidence of BT's witnesses on this point.

85. The payment structure for 0845 calls is set out below. It is necessary to distinguish between those cases where BT is the originating CP (in which case the NTS Call Origination Condition applies) and those cases where the originating CP is a communications provider other than BT (in which case the NTS Call Origination Condition does not apply). Table 4 sets out the structure where BT is the originating CP:

Caller		Originating CP (BT)		Transiting CP		Terminating CP		Call recipient
0845 calls (assuming the involvement of a transiting CP)								
Payment of retail charge	⇒	Receipt of retail charge. BT retains its cost-related charges, but must pass on any excess				Receipt of service charge	⇐	Payment of service charge
		Payment of revenue share	⇒	Payment of revenue share	⇒	Payment of revenue share	⇒	Receipt of revenue share
		Payment of termination charge	⇒	Payment of termination charge	⇒	Receipt of termination charge		
				Receipt of transit charge	⇐	Payment of transit charge		
0845 calls (assuming no transiting CP)								
Payment of retail charge	⇒	Receipt of retail charge. BT retains its cost-related charges, but must pass on any excess				Receipt of service charge	⇐	Payment of service charge
		Payment of revenue share	⇒			Payment of revenue share	⇒	Receipt of revenue share
		Payment of termination charge	⇒			Receipt of termination charge		

Table 4: Call payment structure in the case of 0845 calls originated by BT

Table 5 sets out the structure where BT is not the originating CP. The crucial difference is that the originating CP is not obliged to pass on any excess, over-and-above its cost related charges.

Caller		Originating CP (not BT)		Transiting CP		Terminating CP		Call recipient
0845 calls (assuming the involvement of a transiting CP)								
Payment of retail charge	⇒	Receipt of retail charge.				Receipt of service charge	⇐	Payment of service charge
		Payment of revenue share	⇒	Payment of revenue share	⇒	Payment of revenue share	⇒	Receipt of revenue share
		Payment of termination charge	⇒	Payment of termination charge	⇒	Receipt of termination charge		
				Receipt of transit charge	⇐	Payment of transit charge		
0845 calls (assuming no transiting CP)								
Payment of retail charge	⇒	Receipt of retail charge.				Receipt of service charge	⇐	Payment of service charge
		Payment of revenue share	⇒			Payment of revenue share	⇒	Receipt of revenue share
		Payment of termination charge	⇒			Receipt of termination charge		

Table 5: Call payment structure in the case of 0845 calls originated by a communications provider other than BT

86. It was and is the practice of mobile network operators to charge 0845 callers more than the cost of an equivalent geographic call, and not to base the retail prices for such calls at any equivalent to BT's Standard Local Call Retail Price.
87. By Network Charge Change Notice 985 ("NCCN 985"), which was issued on and submitted to OFCOM on 2 October 2009 and which was to come into effect on 1 November 2009, BT varied its charges for terminating 0845 calls on its network. Effectively, from 1 November 2009, BT proposed a similarly laddered charging structure as had been proposed for 080 calls:

Charge 1	If the retail charge payable by the originating Operator's retail customers was less than 12.5 ppm (inc VAT)	(i) 2.6654 ppm (daytime) (ii) 0.8430 ppm (evening) (iii) 0.6422 ppm (weekend)
Charge 2 Step 1 of the NCCN 985 ladder	If the retail charge payable by the originating Operator's retail customers was 12.5 ppm or greater, and less than 17.5 ppm (inc VAT)	(i) 4.6654 ppm (daytime) (ii) 2.8430 ppm (evening) (iii) 2.6422 ppm (weekend)
Charge 3 Step 2 of the NCCN 985 ladder	If the retail charge payable by the originating Operator's retail customers was 17.5 ppm or greater, and less than 22.5 ppm (inc VAT)	(i) 7.6654 ppm (daytime) (ii) 5.8430 ppm (evening) (iii) 5.6422 ppm (weekend)
Charge 4 Step 3 of the NCCN 985 ladder	If the retail charge payable by the originating Operator's retail customers was 22.5 ppm or greater, and less than 27.5 ppm (inc VAT)	(i) 9.6654 ppm (daytime) (ii) 7.8430 ppm (evening) (iii) 7.6422 ppm (weekend)
Charge 5 Step 4 of the NCCN 956 ladder	If the retail charge payable by the originating Operator's retail customers was 27.5 ppm or greater, and less than 32.5 ppm (inc VAT)	(i) 12.6654 ppm (daytime) (ii) 10.8430 ppm (evening) (iii) 10.6422 ppm (weekend)
Charge 6 Step 5 of the NCCN 985 ladder	If the retail charge payable by the originating Operator's retail customers was 32.5 ppm or greater (inc VAT)	(i) 15.6654 ppm (daytime) (ii) 13.8430 ppm (evening) (iii) 13.6422 ppm (weekend)

A copy of NCCN 985 is at Annex 3(C) to this Judgment.

88. The only differences between this ladder, and the ladder for 080 calls, lie in the detail. Thus, no matter what price callers are charged by the originating CP, a termination charge is payable to BT. Charge 1 simply reflects the pre-existing termination rate that BT applied to all 0845 calls terminated on its network (see paragraph 1.5 of the 0845/0870 Determination). As the price to caller of 0845 calls increases, so too does the amount of the termination charge, which rises – on a stepped basis – as the price to callers increases. These charges (Charges 2 to 6) were new, and introduced as a result of NCCN 985.
89. Before us, there was no dispute that NCCN 985 had been introduced by BT pursuant to paragraph 12 of the Standard Interconnect Agreement. This is clearly right, because BT was varying the price of a BT service or facility (the termination of calls on its network).

VI. 0870 NUMBERS

90. Essentially, 0870 numbers are to be charged at no more than the caller would pay for a call to a geographic number. Thus, as with 0845 numbers, there is intended to be a limit to the amount that a caller is charged, that limit being defined by reference to the retail price for geographic numbers.
91. 0870 numbers now differ from 0845 numbers in one important respect: since August 2009, they are not subject to the NTS Call Origination Condition, and so do not benefit from the regulatory support for revenue sharing provided by that condition. That does not necessarily mean that revenue sharing cannot and does not take place in respect of these numbers. The diagram for revenue flows is as in Table 4 above.
92. By Network Charge Change Notice 986 (“NCCN 986”), which was issued on and submitted to OFCOM on 2 October 2009 and which was to come into effect on 1 November 2009, BT varied its charges in relation to 0870 calls. Effectively, from 1 November 2009, BT proposed a similarly laddered charging structure as had been proposed for 080 calls:

Charge 1	If the retail charge payable by the originating Operator's retail customers was less than 12.5 ppm (inc VAT)	(i) 0.5600 ppm (daytime) (ii) 0.2600 ppm (evening) (iii) 0.2000 ppm (weekend)
Charge 2 Step 1 of the NCCN 986 ladder	If the retail charge payable by the originating Operator's retail customers was 12.5 ppm or greater, and less than 17.5 ppm (inc VAT)	(i) 2.5600 ppm (daytime) (ii) 2.2600 ppm (evening) (iii) 2.2000 ppm (weekend)
Charge 3 Step 2 of the NCCN 986 ladder	If the retail charge payable by the originating Operator's retail customers was 17.5 ppm or greater, and less than 22.5 ppm (inc VAT)	(i) 5.0600 ppm (daytime) (ii) 4.7600 ppm (evening) (iii) 4.7000 ppm (weekend)
Charge 4 Step 3 of the NCCN 986 ladder	If the retail charge payable by the originating Operator's retail customers was 22.5 ppm or greater, and less than 27.5 ppm (inc VAT)	(i) 7.5600 ppm (daytime) (ii) 7.2600 ppm (evening) (iii) 7.2000 ppm (weekend)
Charge 5 Step 4 of the NCCN 986 ladder	If the retail charge payable by the originating Operator's retail customers was 27.5 ppm or greater, and less than 32.5 ppm (inc VAT)	(i) 10.5600 ppm (daytime) (ii) 10.2600 ppm (evening) (iii) 10.2000 ppm (weekend)
Charge 6 Step 5 of the NCCN 986 ladder	If the retail charge payable by the originating Operator's retail customers was 32.5 ppm or greater (inc VAT)	(i) 15.5600 ppm (daytime) (ii) 15.2600 ppm (evening) (iii) 15.2000 ppm (weekend)

93. Again, Charge 1 simply reflects the pre-existing termination rate that BT applied to all 0870 calls terminated on its network (see paragraph 1.5 of the 0845/0870 Determination). As with NCCN 985, the price to callers of 0870 calls increases, so too does the amount of the termination charge, which rises – on a stepped basis – as the price to callers increases. These charges (Charges 2 to 6) were new, and introduced as a result of NCCN 986.
94. Again, there was no dispute that NCCN 985 had been introduced by BT pursuant to paragraph 12 of the Standard Interconnect Agreement. This is clearly right, because BT was varying the price of a BT service or facility (the termination of calls on its network). A copy of NCCN 986 is at Annex 3(D) to this Judgment.

E. REGULATION

I. INTRODUCTION

95. A major part of EE's and O2's submissions before us was that OFCOM was using the Dispute Resolution Process illegitimately, as a means of regulating indirectly that which it could not regulate directly, namely the retail price of 080, 0845 and 0870 calls. The contention was that – absent a finding of significant market power – OFCOM had no power to regulate directly the retail prices for mobile network operators' calls, and could not, therefore, use the Dispute Resolution Process to do so indirectly. In short, the essence of EE's and O2's point was that OFCOM was using the Dispute Resolution Process for an illegitimate purpose.
96. This section does not consider EE's and O2's contentions regarding OFCOM's use of the Dispute Resolution Process: these contentions are considered in paragraphs 234 to 238 below. However, in order to consider EE's and O2's contention, it is necessary to understand which aspects of the provision of 080, 0845 and 0870 calls are regulated, and which aspects are not.

97. Section 45(1) of the 2003 Act confers on OFCOM a power to “set conditions under this section binding the persons to whom they are applied in accordance with section 46”. Section 45(2) specifies the various different types of condition (general condition, universal service condition, access-related condition, privileged supplier condition, and SMP condition) that OFCOM can impose. Each type of condition has different characteristics, which are described in sections 45ff of the 2003 Act.
98. A number of conditions have been imposed in respect of the provision of 080, 0845 and 0870 calls. These comprise:
- (1) Certain general conditions imposed upon communications providers generally.
 - (2) The National Telephone Numbering Plan, described in paragraphs 57 to 62 above.
 - (3) The NTS Call Origination Condition, described in paragraphs 78 to 85 above.

These three conditions are considered in turn in the following paragraphs. Thereafter, some consideration is given as to those areas where conditions have not been imposed.

II. GENERAL CONDITIONS

99. A general condition “is a condition which contains only provisions authorised or required by one or more of sections 51, 52, 57, 58 or 64” of the 2003 Act. Section 51(4) provides that it is not permitted to use general conditions to set the sort of conditions which are imposed as access-related conditions (under section 73 of the 2003 Act) or SMP conditions (under sections 87 to 92 of the 2003 Act). This is because access-related conditions and SMP conditions give OFCOM the right to impose conditions that are more intrusive than general conditions, and so OFCOM’s ability to impose such conditions is accordingly restricted.
100. Clearly, one of the most intrusive forms of condition is price regulation, and this is the province of SMP conditions: section 87(9) of the 2003 Act. Thus, a

general condition may not be used to impose price controls. (This was Miss Smith's submission (appearing on behalf of EE) as to the effect of section 51(4) at Transcript Day 2, page 50. No-one dissented from this, and it is plainly right.)

101. A number of general conditions have been imposed by OFCOM and notified under section 48(1) of the 2003 Act, and a number of these are relevant to the provision of 080, 0845 and 0870 calls. In particular:

(1) General Condition 10 provides:

“10.1 The Communications Provider shall ensure that clear and up to date information on its applicable prices and tariffs (which for the avoidance of doubt shall not include bespoke or individual prices and tariffs), and on its standard terms and conditions, in respect of access to and use of Publicly Available Telephone Services by End-Users is published, in accordance with paragraphs 10.2 and 10.3

10.2 The information published shall include at least the following:

...

(d) the Communication Provider's standard tariffs, including details of standard discounts and special and targeted tariff schemes, with regard to:

(i) access;

(ii) all types of usage charges; and

(iii) any maintenance services...”

(2) General Condition 14 provides:

“Basic Code of Practice regarding provision of Public electronic Communications Services

14.1 The Communications Provider shall produce a basic Code of Practice for its Domestic and Small Business Customers which sets out at least where such customers may avail themselves of the information required to be published under Condition 10.2, as relevant to the provision of Public Electronic Communications Services. The Code of Practice shall be drafted in plain English which is easy to understand, and copies of the Code of Practice shall be provided on request and free of charge to any Domestic and Small Business Customer.

Codes of Practice for Premium Rate Services, NTS Calls, calls to 0870 numbers and calls to Personal Numbers

14.2 Within two months of this Condition entering into force, all Originating Communications Providers who provide Premium Rate Services, NTS calls, calls to 0870 numbers or calls to Personal Numbers, as appropriate shall:

...

- (b) establish and thereafter maintain a Code of Practice for NTS Calls, calls to 0870 calls and calls to Personal Numbers for its Domestic and Small Business Customers, which conforms with the Guidelines set out in Annex 2 to this Condition; and
- (c) comply with the provisions of the Codes of Practice referred to at 14.2...(b) above...”

(3) Annex 2 to General Condition 14 provides as follows:

“Guidelines for codes of practice for the publication of prices of calls to Number Translation Services, 0870 calls and Personal Numbers

1.1 The key objective of these Guidelines is to ensure that Originating Communications Providers provide their Domestic and Small Business Customers with readily accessible and accurate information relating to the usage charges for NTS Calls, 0870 calls and calls to Personal Numbers on their networks.

1.2 These Guidelines seek to ensure that there is a clear framework within which Originating Communications Providers should be operating in relation to the publication and provision of information to domestic and small business customers about usage charges for NTS Calls, 0870 calls and calls to Personal Numbers.

...

3. Customer information and advice: published price lists and websites

3.1 The Originating Communications Provider that is responsible for the retail billing of NTS Calls, 0870 calls and calls to Personal Numbers to the end-user shall publish the usage charges required to be published under General Condition 10.2(d)(ii) for NTS Calls, 0870 calls and calls to Personal Numbers on its website and in published price lists in a way that gives those charges the same prominence in terms of location and format given to charges for geographic calls, calls to mobiles and call packages, including bundles.

3.2 Without prejudice to the generality of paragraph 3.1, Originating Communications Providers shall give prominence to the following, in particular:

- (i) any usage charges that apply for calls to freephone numbers including details of when those charges will apply;
- (ii) usage charges for NTS Calls which include variations by time of day. For example, “08xx calls are charged at x pence per minute or per call during weekday evenings inclusive of value added tax”;
- (iii) except where these are charged at the Originating Communication Provider’s geographic price including discounts and packages, usage charges for 0870 calls which include variations by time of day. For example, “0870 calls are charged at x pence per minute or per call during weekday evenings inclusive of value added tax”;

...

- (v) whether or not any special offers, discount schemes or call bundling arrangements apply to NTS Calls, 0870 calls and calls to Personal Numbers, including details of which of those arrangements apply to which number range...”

(4) General Condition 17 provides:

“17.1 A Communications Provider shall not Adopt Telephone Numbers from the National Telephone Numbering Plan unless:

- (a) the Telephone Numbers have been Allocated to the Communications Provider; or
- (b) the Communications Provider has been authorized (either directly or indirectly) to Adopt those Telephone Numbers by the person Allocated those Telephone Numbers.

17.2 The Communications Provider may only use a Telephone Number from the National Telephone Numbering Plan where that Telephone Number has been Allocated to a person, unless the use in question is for the purposes of indicating that the Telephone Number has not been Allocated.

17.3 The Communications Provider may only use (or, where specified, Adopt) a Telephone Number listed in the Annex to this Condition where such use or Adoption is in accordance with the designation attributed to that Telephone Number in the Annex.”

- (5) The Annex to General Condition 17 lists various number ranges which may (pursuant to General Condition 17.3) only be used in accordance with the designation contained in that Annex. The 0845 and 0870 number ranges are not listed. The 080 number range is listed, and here the Annex provides (reiterating what is said in the National Telephone Numbering Plan) “Special Services – No charge to caller (except where charges shall be notified to callers at the start of the call)”.

III. THE NATIONAL TELEPHONE NUMBERING PLAN

102. The National Telephone Numbering Plans published by OFCOM were described in paragraphs 57 to 62 above. As noted, OFCOM has a duty (under section 56 of the 2003 Act) to publish such plans, and its power to do so is contained in sections 57 and 58 of the 2003 Act. Accordingly, by virtue of section 45(3) of the 2003 Act, National Telephone Numbering Plans are general conditions under the 2003 Act. It follows that a National Telephone Numbering

Plan cannot be used as a means of price control: that would be to usurp the function of the SMP condition.

IV. THE NTS CALL ORIGINATION CONDITION

103. The NTS Call Origination Condition was described in paragraphs 78 to 85 above. As noted, it is an SMP condition.

104. The procedure that must be followed, and the conditions that must be satisfied, before an SMP condition can be imposed by OFCOM are described in sections 78 to 93 of the 2003 Act. Without setting out or citing the entirety of these provisions, the following points may be noted:

- (1) Section 78(1) provides that “a person shall be taken to have significant market power in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market”.
- (2) By virtue of section 79(1), before making a market power determination, OFCOM must identify (by reference, in particular, to area and locality) the markets which in their opinion are the ones which in the circumstances of the United Kingdom are the markets in relation to which it is appropriate to consider whether to make the determination and carry out an analysis of the identified markets. This, as is clear (for example) from section 80, is a consultative process.
- (3) When, after this process is complete, OFCOM makes a determination that a person has significant market power in an identified market, it may impose such SMP conditions as are authorised by section 87 of the 2003 Act as it considers appropriate. Such conditions may include:
 - (i) A condition requiring the dominant provider not to discriminate unduly against particular persons: section 87(6)(a).
 - (ii) A condition requiring the dominant provider to publish all information as may be directed for the purpose of securing transparency in relation to such matters: section 87(6)(b).
 - (iii) Conditions imposed pursuant to section 87(9). This section provides:

“The SMP conditions authorised by this section also include (subject to section 88) conditions imposing on the dominant provider –

- (a) such price controls as OFCOM may direct in relation to matters connected with the provision of network access to the relevant network, or with the availability of the relevant facilities;
- (b) such rules as they may make in relation to those matters about the recovery of costs and cost orientation;
- (c) such rules as they may make for those purposes about the use of cost accounting systems; and
- (d) obligations to adjust prices in accordance with such directions given by OFCOM as they may consider appropriate.”

(4) Section 88 contains additional requirements that have to be satisfied where conditions are imposed pursuant to section 87(9). This section provides:

“(1) OFCOM are not to set an SMP condition falling within section 87(9) except where –

- (a) it appears to them from the market analysis carried out for the purpose of setting that condition that there is a relevant risk of adverse effects arising from price distortion; and
- (b) it also appears that the setting of the condition is appropriate for the purposes of –
 - (i) promoting efficiency;
 - (ii) promoting sustainable competition;
 - (iii) conferring the greatest possible benefits on the end-users of public electronic communications services.

(2) In setting an SMP condition falling within section 87(9) OFCOM must take account of the extent of the investment in the matters to which the condition relates of the person to whom it is to apply.

(3) For the purposes of this section there is a relevant risk of adverse effects arising from price distortion if the dominant provider might –

- (a) so fix and maintain some or all of his prices at an excessively high level, or
- (b) so impose a price squeeze,

as to have adverse consequences for end-users of public electronic communications services.”

105. As is evident, a number of pre-conditions need to be satisfied before an SMP condition can be imposed.

106. In the case of the NTS Call Origination Condition, BT was found to have significant market power in the wholesale fixed narrowband services market, and SMP Condition AAA11 was imposed by OFCOM's Fixed Narrowband Services Statement as a result.

V. AREAS THAT ARE NOT SUBJECT TO DIRECT REGULATION

107. For reasons that are obvious, given the nature of EE's and O2's contentions, we will consider those aspects of 080, 0845 and 0870 call provision which are free from price regulation. These may be listed as follows:

- (1) Mobile network operators are legally unconstrained in the prices that they may charge callers for 080, 0845 and 0870 calls.
- (2) Fixed network operators – with the exception of BT – are also legally unconstrained in the prices that they may charge callers for 080, 0845 and 0870 calls. BT is, of course, subject to the NTS Call Origination Condition as regards 080 and 0845 calls. As has been described, whilst this does not affect the retail price that BT may charge, the NTS Call Origination Condition requires that any excess, over-and-above cost-related charges must be passed on by BT to the terminating CP. The NTS Call Origination Condition thus imposes a very real constraint on BT. So far as 0870 calls are concerned, BT's retail price is legally unconstrained.
- (3) The prices at which terminating CPs agree to terminate 080, 0845 and 0870 calls on their network that have been originated by originating CPs are legally unconstrained.
- (4) The prices at which transiting CPs agree to transit 080, 0845 and 0870 calls are legally unconstrained. (We should say that we include this for completeness: the service provided by transiting CPs was not the subject of a great deal of argument before us.)
- (5) Call hosting CPs are legally unconstrained in the prices that they may charge call recipients who wish to have 080, 0845 or 0870 numbers hosted by them.

F. THE PRICING OF 080, 0845 AND 0870 CALLS

I. PRICES CHARGED TO CALLERS BY MOBILE NETWORK OPERATORS

108. In OFCOM's consultation document *Simplifying Non-Geographic Numbers* published on 16 December 2010 ("Simplifying Non-Geographic Numbers Consultation Document"), OFCOM provided (in Table 3.1 at pages 34-35) an overview of call prices, comparing the prices on fixed networks with those on mobile networks. The table provided the following information:

Number Range	Fixed Network Prices	Mobile Network Prices
01, 02 (geographic) and 03		
Price (ppm)	Inclusive – 8.5 ppm	Inclusive – 25 ppm
Call set up fee (p)	3 – 11p	None
080		
Price in ppm	Free	Free – 40 ppm
Call set up fee	None	None
0845 and 0870		
Price in ppm	Inclusive – 10 ppm	20 ppm – 40 ppm
Call set up fee	3 – 11p	None

109. Further detail as to pricing is contained in Annex 2 to *Simplifying Non-Geographic Numbers Consultation Document*. Although the mobile network operators represented before us disdained Mr Read QC's (representing BT) description of their charges as excessive and as representing a market failure, it was uncontentionous before us that the prices for 080, 0845 and 0870 calls that were charged by mobile network operators to their customers were in general:

- (1) Higher than the rates suggested in the National Telephone Numbering Plan.
- (2) Higher than the rates charged by mobile network operators for the equivalent geographic call.
- (3) Higher than the price of an equivalent call from a fixed network operator.

110. This is borne out by the following passage in Annex 2 of the *Simplifying Non-Geographic Numbers Consultation Document*:

“A2.21 [Non-geographic calls] represent a significant proportion of total call volumes and revenues in the UK. In total, across the fixed and mobile networks considered in The 2010 Flow of Funds Study, [non-geographic calls] accounted for about 12-13% of traffic volumes and generated approximately 10% of call revenues in 2009.

A2.22 However, the distribution of call volumes between fixed and mobile is significant...[non-geographic calls] represent a much greater proportion of total call minutes for fixed operators compared to mobile, and this is reflected in the fact that mobile originated [non-geographic calls] make up only approximately 11% of total [non-geographic call] minutes. Interestingly, however, of the total £1,865 million revenue (excluding VAT) entering the [non-geographic call] market in 2009..., the six mobile operators considered in this analysis generated £654 million. This equates to approximately 35% of total non-geographic retail call revenues generated, yet derives from only 11% of the volume of minutes originated.”

111. Price per minute charges to callers need to be treated with a degree of caution.

Although network operators have specific, price per minute, rates for calls to all numbers, including to 080, 0845 and 0870 numbers, matters are complicated by the fact that many callers buy “bundles” of inclusive minutes, which may or may not include calls to 080, 0845 and 0870 numbers. There is great variety in the bundles that are on offer to callers, in terms of the number of inclusive minutes offered, as well as in the particular types of call that are included in or excluded from the bundle.

112. Again, this is well-described in Annex 2 of the Simplifying Non-Geographic Numbers Consultation Document:

“A2.42 ...consumers access [non-geographic calls] as part of a wider bundle of services, and so the tariffs for each type of call will depend on what type of plan they purchase.

A2.43 Many consumers opt for call plans from their fixed provider which offer them unlimited calls at certain times of the day or week (for example weekends, evenings, or all day), while mobile consumers can purchase bundles of inclusive minutes (either through monthly subscription price for contract customers or individual bundles for [pay-as-you-go] customers) for which there do not tend to be time of day/week usage restrictions.

A2.44 However, more often than not, [non-geographic calls] are not included in inclusive bundles, and this is the case for both fixed and mobile [originating CPs].”

113. The evidence before us was that whilst it was not unknown for calls to 080, 0845 and 0870 to be included in bundles, this was the exception, rather than the rule. Annex 2 of the Simplifying Non-Geographic Numbers Consultation Document contains a table (Table A2.3) setting out (according to number range) the proportion of non-geographic calls that are sold in and out of inclusive

bundles, distinguishing between bundles of calls sold by fixed originating CPs and bundles of calls sold by mobile originating CPs. According to this table:

Number range	Bundles sold by fixed originating CP		Bundles sold by mobile originating CP	
	% of calls within bundle	% of calls out of bundle	% of calls within bundle	% of calls out of bundle
080	0	100	3	97
0845	20	80	3	97
0870	20	80	1	99

114. The source of this information was the responses of various communications providers to information requests made by OFCOM. Mr Stone, when cross-examined by Mr Read, accepted that the majority of 080, 0845 and 0870 calls were not in some form of package (Transcript Day 4, page 71). Mr Ornel was cross-examined about the figures in Table A2.3 by Mr Read (Transcript Day 4, pages 56-58). Mr Ornel was not prepared, from his experience, to accept that these figures reflected T-Mobile’s bundles: “...I previously said 3% reflected the industry and not the T-Mobile numbers...” (Transcript Day 4, page 58). However, his evidence was not based upon any analysis of T-Mobile’s figures, and was more impressionistic than anything else. T-Mobile had been one of the contributors of the information contained in Table A3.2, and our conclusion is that this table does broadly reflect the number of 080, 0845 and 0870 calls that are included within bundles.
115. No-one disputed that mobile network operators were legally entitled to charge the prices that they did for 080, 0845 and 0870 calls. However, Mr Read, in his submissions, frequently described these prices as excessive and as representing a market failure (e.g. Transcript Day 1, pages 3, 7, 9 and 16). Miss Smith, responding to this submission, said this (Transcript Day 2, page 39):

“...although in isolation the prices for 08 calls may appear high, one has to look at those prices in context. Competition between mobile operators has to be assessed and is properly assessed in terms of bundles of services rather than specific elements. Mobile operators compete for customers by offering a bundle of services. In our submission, that bundle of services include various tariff packages, which may or may not include 08 calls...”

Those bundles of services include higher prices and may include higher prices on services that customers are unconcerned about and lower prices for those that they are more concerned about. The competitive market ensures that the charges which matter most to consumers are kept as low as possible within the overall basket.

To put it more technically, although each of the services should and may cover its incremental costs, certain services may make a higher contribution to fixed and common costs than others. That does not mean that those services are overpriced or priced excessively. What is important is that over the bundle of services the prices are set at a level which is in the interests of consumers and competition.”

116. There are three important points which emerge from this passage, which we consider in greater detail in the following paragraphs:
- (1) First, there is the point that the manner in which a profit-maximising company may choose to price its services, in order to cover its costs, is in fact a rather nuanced question, capable of many answers.
 - (2) Secondly, the market for 080, 0845 and 0870 calls is what the parties before us termed an “after-market”.
 - (3) Thirdly, that competition between mobile network operators is, essentially, for the custom of subscribers.

These points are expanded upon in the following paragraphs.

II. PRICING DECISIONS

117. A rational communications provider will obviously seek to charge for the services it provides in a manner that will enable it to recover all of its costs and maximise its profit. In the case of a communications provider selling multiple services – as inevitably, all communications providers do – there are a number of ways in which this can be done. (Of course, a communications provider will be constrained in its pricing decisions by many factors, such as the competition it faces in the market, and the extent to which price increases to a given service may cause demand to fall away. These factors are not directly considered here. What is being considered is the various ways in which – all other things being equal – a communications provider may seek to price the services it sells.)
118. The total costs of a service are the sum of the “fixed costs” and the “variable costs”. Fixed costs are costs that do not change (in the time period being considered) as the amount of the service supplied is varied. Variable costs, on the other hand, do change with the amount of the service being supplied.

119. In a single-service firm (that is, a firm selling only one service), dividing the firm's total costs by the number of units of the service supplied defines the average total cost of the service, being the sum of the firm's average variable cost and average fixed cost. "Marginal cost" is the increase in total costs that is generated by a one-unit increase in the number of units supplied: by definition, it will involve only variable costs.
120. In a multi-service firm (that is, a firm selling more than one service), fixed costs will include "common costs", which arise from the provision of all services by the firm, as opposed to any one. Common costs are those costs which arise from the provision of a group of services, but which are not due to the provision of any individual service. "Incremental costs", on the other hand, are those extra costs that are incurred as a result of varying the number of services supplied by the firm. In other words, the incremental cost of a service is the difference between the total cost in a situation where that service is not provided, and the total cost where that service is provided.
121. In a multi-service firm, the cost of supplying a service can be analysed or broken down in various ways: supply of a service will involve the fixed and variable costs associated with that service; but it will also involve an appropriate share of common costs plus all incremental costs. Thus, by way of example, a communications provider will provide multiple services: originating and terminating geographic calls, 080 calls, 0845 calls and 0870 calls, to name but a few. All of these calls will be originated and terminated on the same network, and the cost of this network will be a common cost (as well as, for the most part, a fixed cost). On top of this common cost, there will be certain incremental costs, which will be specific to the provision of a particular service. In the case of this example, unsurprisingly, the vast bulk of the costs will be common.
122. Should a multi-service firm price in such a way as to cover only the incremental costs of each of its various services, the sales revenue generated would not be sufficient to cover the firm's common costs, and the firm would make a loss. On the other hand, if the firm were to price in such a way that each service it supplied was priced to cover all common costs, the firm would be attempting multiple recovery of common costs. (In a competitive market, such an approach would be inadvisable, since such prices would be easy to undercut.)

123. In practice, a multi-service firm will choose to price each of its services somewhere above that service's incremental cost, so as to contribute to the firm's common costs. In this way, taking all of the firm's services into account, common costs will be covered (and a profit realised).
124. Precisely how a multi-service firm chooses to charge for its services is essentially a matter for it. But there is no reason why such a firm may not chose to recover more of its common costs by way of one service, than another. Given that the preponderance of a communications provider's costs will be common, there is clearly considerable scope for a communications provider to decide how it will recover its common costs across multiple services.
125. We thus consider it perfectly comprehensible that, given freedom of action, mobile network operators set the prices for 080, 0845 and 0870 calls out of line with both the rates charged by them for the equivalent geographic call and the price of an equivalent call from a fixed network operator. We decline to regard such pricing as intrinsically either excessive or as evidence of a market failure.

III. THE MARKET FOR 080, 0845 AND 0870 CALLS IS AN "AFTER-MARKET"

126. There was a general consensus that the market for 080, 0845 and 0870 calls consisted of what they termed an "after-market". Mr Read put the point to Mr Myers (Transcript Day 5, page 61):

“Q (Mr Read) ...one of the problems is that there is effectively an after-market going on here, that retail customers tend on the whole to buy their mobile packages on the basis of a certain set of services, and the 08 numbers are not within the customer's line when they are actually purchasing the overall mobile package service, and that is what creates effectively the after-market. Would you agree with that?

A (Mr Myers) Yes, so in terms of customers' subscription choices between one mobile network or another, prices of non-geographic calls seem to play relatively little role in that and, really, the choice seems to be made on the basis of other prices and features.”

127. In other words, a consumer, when considering subscribing to a mobile network, will look at the various packages on offer, and choose the most attractive one to him, but the inclusion or otherwise of 080, 0845 or 0870 numbers does not appear to have a great bearing on his choice of package. Of course, later on, having made his choice, the consumer will have to pay the applicable tariff or not make the call from his mobile at all (choosing either to originate the call on a fixed network or not make the call at all).
128. Again, this aspect of the market for non-geographic calls (including 080, 0845 and 0870 calls) was well-described in Annex 2 to the Simplifying Non-Geographic Numbers Consultation Document:

“A2.23 Consumers do not purchase [non-geographic calls] as self-standing services. Rather, they can access voice services, including [geographic calls], [non-geographic calls] and international calls once they have subscribed to an [originating CP]. Therefore, it is only when a consumer has decided which [originating CP](s) to subscribe to (fixed and/or mobile) that it has access to [non-geographic calls]. Additionally, for an increasing number of consumers, telephony is not purchased on a standalone basis. Increasingly, fixed or mobile voice services are only one component of a bundle of communications services – including telephony, broadband and pay TV services. Around 50% of all UK households now buy two or more communications services from a single supplier in bundle (up from less than a third five years ago). Therefore, access to [non-geographic calls] follows from a prior subscription decision which includes a variety of services of which [non-geographic calls] are just one component.

A2.24 Therefore it is clear that [non-geographic calls] are sold as part of a wider fixed or mobile telephony service (or potentially wider still to include television and broadband), but unlike many geographic calls which are also provided as part of the subscription, [non-geographic calls] are (in the vast majority of cases) priced on a ppm (or flat rate) basis rather than included in bundles of inclusive minutes...”

IV. COMPETITION BETWEEN MOBILE NETWORK OPERATORS

129. Before us – and indeed in the Determinations – a distinction was drawn between “one-sided” and “two-sided” markets (see, for example, paragraph 18 of Myers 2; footnote 71 of the 0845/0870 Determination). Footnote 71 of the 0845/0870 Determination described a two-sided market as follows:

“In a two-sided market there are two sets of customers that are brought together by a “platform”. The value of the platform depends on the balance of prices between the two sets of customers, not just the level of the combined price (as in a single-sided market.”

130. There was some debate before us as to whether geographic calls and non-geographic calls represented a “one-sided” or a “two-sided” market. We did not find the debate especially instructive, essentially because the distinction between “one-sided” and “two-sided” markets (at least in this context) seems to be a non-existent one. In the case of all calls, there are two sets of customers: the caller and the call recipient. Because of the requirement of end-to-end connectivity, these two sets of customers are – in all cases – brought together by the co-operation of originating and terminating CPs, generally intermediated by a transiting CP.
131. We therefore reject the “one-sided” – “two sided” market distinction as unhelpful in this case. However, we do accept that the manner in which callers and call recipients are connected in the UK is capable of creating a disconnection, in the case of non-geographic calls, between the two sides of the market, that is to say a disconnection between the interests of callers and originating CPs operating mobile networks on the one hand, and the interests of call recipients and terminating CPs on the other hand.
132. In general, communications providers generate revenue from both originating and terminating calls. (As we have described, under the normal calling party pays approach, an originating CP will receive payment from the caller, but will have to make a termination payment to the terminating CP. Since all communications providers will both originate and terminate calls, they will receive both payments from callers and termination payments from originating CPs.) The greater the number of subscribers to a network, the more calls that are likely to be originated on that network, and the more calls that are likely to be terminated on that network. It is clear, however, that although an originating CP may (through promotional or other activity) encourage call origination by subscribers to its network, it does not have any means of encouraging more call termination on its network, except by encouraging more subscribers. This is especially the case since callers take for granted that they will be able to call anyone, irrespective of the network with which that person is contracted. In the UK, it is also the case that mobile network operators’ call termination rates are regulated as a result of an SMP condition, whereas call origination rates are not.

As such, mobile network operators have greater freedom in pricing originating calls.

133. There is, as a result, strong competition between mobile network operators for subscribers to their networks. Partly this is reflected in the price of originating calls, which is clearly a factor that is important in attracting subscribers. Communications providers offer callers an enormous variety of options in terms of how calls may be paid for. Thus, whilst any given call may have a retail price measured in ppm, call “packages” will be offered by communications providers, which will provide, for a fixed (say monthly) price, a defined “bundle” of calls that fall within this subscription.
134. Other ways of attracting callers lie in subsidising the cost of mobile handsets, so that, if a particular call package is purchased, a handset is offered at a discounted price or even free of charge. Another way lies in the length of time a caller must subscribe. Again, there are a range of options, from one/two year contracts to pay-as-you-go.
135. The market dynamics for calls where the revenue to communications providers is based upon a pricing system that is not (or not wholly) based upon the principle of calling party pays are different. In the case of 080, 0845 and 0870 calls, call recipients do pay for the privilege of receiving calls. Instead of simply being the non-paying recipients of calls, such call recipients will choose who is to host their number, and will pay accordingly. In the case of non-geographic calls, in contrast to geographic calls, terminating CPs will compete for the custom of call recipients on price and (no doubt) other aspects of service. This is a market in which – as we have noted (see paragraph 66 above) – mobile network operators do not participate to any significant extent.
136. In the case of 080, 0845 and 0870 calls, an important element in the service provided by the terminating CP to the call recipient is the fact that the price paid by the caller reflects the description of that call in the National Telephone Numbering Plan. Yet this is something that the terminating CP cannot guarantee: the price paid by a caller calling a number in the 080, 0845 or 0870 ranges is determined by the originating CP.

137. Where the originating CP is a mobile network operator, it will have little or no interest in the number hosting market; and terminating CPs offering number hosting will have no direct control over the prices that originating CPs charge. The former point is explicable simply by virtue of the absence of mobile network operators from the number hosting market, and by the fact that (for the reasons we have described in paragraph 132 above) competing for call recipients in the case of geographic calls is actually very difficult.
138. The fact that a terminating CP has no direct control over the prices offered by an originating CP arises out of the prevalence of transit services. As we have described (see paragraphs 39 to 41 above), if transit services did not exist, there would have to be contracts between all communications providers in order to procure end-to-end connectivity. In other words, each communications provider would have to contract with every other communications provider. Such contracts could (no doubt) contain provisions as to how calls to hosted numbers should be billed to callers. In short, it could be a term of such an agreement that a mobile network operator would not charge callers for 080 calls, and in return would receive a payment in respect of that call from the terminating CP. The problem arises when the transiting CP is interposed, because at that point the nexus between the originating CP and the terminating CP is lost, and their interests become detached.
139. Where such a system exists – as it does in the UK – the originating CP is only interested in call origination and in the revenue that it obtains from call origination. The originating CP is detached from and is not concerned with the terminating CP’s business and, what is more, has no obligations in relation to the terminating CP. Accordingly, the originating CP simply looks to its own interests, and disregards those of the terminating CPs.

V. CONSUMER WELFARE IN RELATION TO 080, 0845 AND 0870 CALLS

140. In paragraph 4.4 of OFCOM’s Simplifying Non-Geographic Numbers Consultation Document, three related market failures are identified in relation to non-geographic numbers:

- (1) A lack of price awareness on the part of callers;
- (2) The fact that originating CPs do not sufficiently take into account the interests of call recipients in the case of non-geographic numbers; and
- (3) The mismatch between the prices for 080, 0845 and 0870 calls and the description of those calls in the National Telephone Numbering Plan.

We consider these in turn.

(i) **A lack of price awareness on the part of callers**

141. There is a lack of price awareness on the part of callers. As we have noted (see paragraph 111 above), call minutes are often sold by mobile network operators as part of a package, which may or may not include calls to 080, 0845 or 0870 numbers. Since, inevitably, this is a matter of “small print”, and since there are a great number of non-geographic call ranges, it is scarcely surprising that callers are confused both as to whether 080, 0845 or 0870 calls are included in their “package” and – if they are not – what the tariff for such calls is. Because, as we have described (see paragraphs 126 to 128 above), the demand for such calls forms part of an after-market, the pricing of 080, 0845 and 0870 calls is unlikely to be at the forefront of consumer’s minds when deciding what telephone service to buy.
142. Of course, the provisions contained in General Conditions 10 and 14 (described in paragraph 101 above) are intended to eliminate such confusion: but it doubtful whether many callers take the trouble – in advance of a call – to ascertain from a communication provider’s published documents whether a particular call is included or excluded from the caller’s packages and, if so, what the tariff for that call is. The ideal time for being told the cost of the call would be when making it. The National Telephone Numbering Plan certainly contains no such requirement in the case of 0845 and 0870 calls (the relevant parts of the plan are set out at paragraph 58(2) above). However, in the case of 080 numbers, the plan provides “Special services – No charge to Customer (except where charges shall be notified to callers at the start of the call”, and provision is repeated in the Annex to General Condition 17 (see paragraph 101(4) above). This, so it seems to us, requires disclosure of the actual charge being made, rather than disclosure of the fact that there is a charge.

143. The practice of mobile network operators appears only to be to state that a charge is being made, rather than express the precise tariff. (See the evidence of Mr Kilburn in paragraphs 24-25 of Kilburn 1.) We accept that the existence of call bundles may make it difficult (depending on the terms of the bundle in question) to state the actual charge to the caller. But, as we found in paragraph 111 above, the vast majority of calls to 080, 0845 and 0870 numbers from mobile networks will not be within a bundle. In these cases, a precise tariff could clearly be stated to the caller.

(ii) **Originating CPs do not sufficiently take account of the interests of call recipients in the case of non-geographic numbers**

144. Originating CPs who operate mobile networks do not, or do not sufficiently, take into account the interests of call recipients in the case of non-geographic numbers and – relatedly – the interests of the terminating CPs who provide call hosting services to such call recipients. This we described in paragraphs 131 to 139 above.

(iii) **The mismatch between the prices and the description of calls in the National Telephone Numbering Plan**

145. There is a mismatch between the prices of 080, 0845 and 0870 calls and the description of those calls in the National Telephone Numbering Plan. This is because – as we noted in paragraph 61 above – whilst the National Telephone Numbering Plan provides descriptions of non-geographic number ranges, it may not impose price controls. Where the description of a non-geographic number range is essentially in terms of price (as it is, in the case of 080, 0845 and 0870 numbers) there is an obvious difficulty where originating CPs disregard the description in the National Telephone Numbering Plan.

G. NUMBER HOSTING

I. INTRODUCTION

146. There are two aspects of the number hosting market that need to be considered. First, BT's market power in this market. Secondly, the extent to which revenue

sharing in fact occurs in respect of 080, 0845 and 0870 calls. These two points are considered in turn the following paragraphs.

II. BT'S MARKET POWER

147. In its *NTS call termination market review*, a consultation document published by OFCOM on 22 October 2004, OFCOM provisionally concluded that BT had significant market power in the number translation services call termination market (see paragraphs 1.8 and 4.8). Again, in OFCOM's *NCCN 500 Decision*, which concerned an investigation of BT in response to a complaint by C&W dated 1 August 2008, OFCOM found that BT was dominant in the market for number translation services call termination/hosting in the UK between 1 May 2004 and 31 December 2005.
148. The findings in these documents relate to BT's position as it was some years ago, and we consider them to be more of historical interest than anything else. In the words of Mr Herberg QC, appearing for OFCOM, (Transcript Day 3, page 43), "there was a finding of dominance, but it was getting quite old by the time one is looking at the position in 2010".
149. The evidence before us was that, as matters stand now, BT has a market share in the non-geographic call hosting market of around 25%. This was the finding of Analysys Mason in the Flow of Funds Report (see paragraph 66 above), and was the evidence of Mr Fitzakerley (Transcript Day 3, page 73) and Mr Kilburn (Transcript Day 4, page 29). This evidence was not the subject of challenge in cross-examination. Indeed, on this point, the questioning of BT's witnesses proceeded on the basis that the figure of 25% was correct, as this exchange between Miss Smith and Mr Kilburn demonstrates (Transcript Day 4, page 29):

“Q (Miss Smith) On Wednesday, Mr Fitzakerly said that BT has about 25 per cent of the market for termination of NTS calls?

A (Mr Kilburn) Yes.

Q (Miss Smith) You recall him giving that evidence?

A (Mr Kilburn) Yes.

Q (Miss Smith) So you cannot, in the light of that, seriously be suggesting that BT acting alone was intending to address the lack of confidence in the 080 brand by introducing NCCN 956? Whatever BT did could only affect 25 per

cent of the market?

A (Mr Kilburn)

But the concern remains.

Q (Miss Smith)

I am talking about your suggestion – I hope I am putting it fairly – that BT effectively thought, “OFCOM are not regulating this properly, we should take action to restore confidence in the 080 brand”, but I am suggesting to you that that could never have been a realistic intention or in fact an intention at all, given that you only have a small percentage, or 25 per cent of the market, for termination of NTS calls, and your wholesale pricing charging structure will, of course, only affect those calls that you terminate?

A (Mr Kilburn)

I think it would be fair to describe it as a good start.”

150. We heard no evidence as to BT’s conduct in the non-geographic call hosting market. Accordingly, we find that BT did have a share of this market of the order of 25%, but we make no other findings regarding competition in this market, in particular as regards BT’s possible market power or otherwise.

III. REVENUE SHARING IN RESPECT OF 080, 0845 AND 0870 CALLS

151. We have described the concept of revenue sharing in the context of Non-Geographic Numbers, and particularly, the 0845 number range, in paragraphs 81 to 83 above. As we describe below, BT placed a great deal of weight on the importance of revenue sharing. In particular, this was stressed by Dr Maldoom. However, before considering such points, it is a necessary factual preliminary to assess the extent of any revenue sharing in the case of 080, 0845 and 0870 numbers in the market as it stands.
152. The first point to note is that the 080, 0845 and 0870 number ranges are not intended to act as significant revenue generators. As has been described, according to the National Telephone Numbering Plan, 080 calls are intended to be free to the caller, 0845 calls are intended to be capped at local call rates, and 0870 calls are intended to be capped at national call rates. There seems to be little intention for significant revenue to flow to call recipients, a point that was made by Miss Smith in submission (Transcript Day 2, page 74):

“Miss Smith

...an objective to provide for revenue sharing pulls directly counter to OFCOM’s policy preference for 08

call prices to reduce down to the lowest tier or to reduce down to geographic call price levels.

The Chairman

Well, I suppose it depends on how these particular calls work, does it not? Because if you have a particular number which is providing a service for which the caller is prepared to pay a little bit more, presumably you would have a special tariff for that particular call to that particular number, or am I getting that completely wrong?

Miss Smith

There are such calls, for example, if you want to phone up and vote on “American Idol”, which I am sure you often do, there are premium rate calls, 09 calls, and those are set at a premium rate, they provide a clear payment mechanism for those sort of calls...”

153. The same point was made by OFCOM in the 0845/0870 Determination.

Paragraph 5.225 of that Determination reads:

“...given that revenue share is available on other [number translation services] number ranges, it is more likely that [call recipients] have chosen the 0845/0870 number ranges for reasons other than revenue share. For example, research among [call recipients] as part of the “NTS: A Way Forward” consultation in September 2005 found that “many of these businesses had chosen the 0845 and 0870 numbers because of the simple local rate and national rate pricing message”. Additionally, the business qualitative research found that the main reasons [number translation services] numbers were used was for convenience (e.g. ease of routing calls, number portability and to help customers remember the numbers) – most businesses did not claim to associate the small revenue gained from 0845 or 0870 numbers as actual income and most claimed they would not miss it if it was not there.”

154. The point, obviously, applies *a fortiori*, in the case of 080 calls.

155. Mr Muysert’s view was that revenue share on the 080, 0845 and 0870 ranges was something of a red-herring (Transcript Day 9, pages 44-45):

“Q (Mr Herberg)

Let me move on to a slightly different subject, which is the principle of revenue share and how that features in the decision. Just dealing generally first – we know that there obviously are a variety of information services being provided over the telephone, a whole range of different services, some of these services are ones where the callers are willing to pay the service provider for the information, are they not?

A (Mr Muysert)

Yes, particularly 09 type services, yes.

Q (Mr Herberg)

It may be very convenient for callers and for service providers for those services to be paid for via a micropayment system rather than, for example, making a credit card payment or something?

- A (Mr Muysert)** Yes, that may well be the case, particularly for 09 and for some other number ranges.
- Q (Mr Herberg)** It is also to some extent the case for 0845 at the moment, regulatory supported by 0845?
- A (Mr Muysert)** Yes, although I think there is quite an important factual question here. My view is that the revenue share function is a bit of a red herring on the mobile network, because really OFCOM has a policy preference that there is no revenue share on an 0870. 0845, that's right, I understand that there is still revenue sharing. As best as I have been able to find out from public documents, it appears that most of that revenue sharing is what's called 'dial-up internet ISP activity', it's the old fashioned modem, and it goes 'beep, beep, beep, beep'.
- Q (Mr Herberg)** A dying market?
- A (Mr Muysert)** That's right, a dying market. The issue with that is that this doesn't happen for a mobile phone, so I think that's just a factual question. It's not at all clear to me that there is a significant amount of revenue share left on 0845 calls from mobiles."

156. Dr Maldoom accepted that the aim of non-geographic numbers was to deliver a specific service, and that an element of this was certainty as to the price paid by the caller. (Everyone accepted that this aim was not being achieved in the context of 080, 0845 and 0870 numbers.) In the case of some non-geographic numbers, but not necessarily these number ranges, the generation of revenue might also be an objective (Transcript Day 7, pages 9-10):

- “Q (The Chairman)** ...What one has here is simply the OFCOM National Telephone Numbering Plan, which I am sure you are familiar with?
- A (Dr Maldoom)** Yes.
- Q (The Chairman)** Then could you turn to page 13? You will see there the description of the significance of various non-geographic numbers?
- A (Dr Maldoom)** Yes.
- Q (The Chairman)** Looking at the numbers that are at issue here, 080, 0845, 0870, is it not right that the profit following to the service providers is actually quite low when compared to, for instance, the 0871 numbers or the 090 numbers, which envisage much higher rates being paid by the caller, which obviously can be distributed, depending on how the chain operates, down the line, where one can see the revenue might be of importance to the service provider, whereas in the numbers we are looking at here,

I thought, and you will no doubt correct me if that thought is wrong, that the point was that the customer, according to the label of the description of these numbers, was, when calling, being assured that the rate would be either the local rate or the national rate, and that was what the customer would expect to pay. On that basis, though, the amount of revenue flowing down towards the [service provider] is surely not going to be that significant?

A (Dr Maldoom)

I think the clearest example is just simply to take 080. Essentially, there is a payment. Obviously, the NCCNs could change things in that that payment would get smaller. If I am offering a freephone number on this bottle of water, then the amount that I would have to pay out could potentially be reduced as a result of the NCCNs. So I think you are absolutely right, that essentially there is no magic in zero here. There might be payments as well as receipts here.

Q (The Chairman)

The point I think I am putting, and I think you are agreeing, is when one is looking at the intention behind these different codings, the profit going to the service provider one can see as being intended to be of significance in, let us say, 090 and 091 numbers. The intention is rather less significant, as I think you have just agreed, on 080 where the revenue flows are precisely the other way round. The aim is that the call is free to the caller, and that if anyone is paying it is the service provider?

A (Dr Maldoom)

Yes, that's the situation as we find it..."

157. The point is a simple one. Non-Geographic Numbers are intended to provide a service, which varies according to number range. In all cases, the call recipient is expected to make some kind of payment for the hosting of his particular non-geographic number. What the call recipient expects to get in return depends on the Non-Geographic Number in question. It may be that the call recipient expects the Non-Geographic Number to be a revenue generator – as in the case of 09 numbers, and Miss Smith's "American Idol" example. But that case is not this case. In the case of 080, 0845 and 0870 numbers, the aim is to achieve tariff certainty, whereby the caller knows that his call will cost a particular amount (nothing in the case of 080, local rates in the case of 0845 and national rates in the case of 0870).

158. This is borne out by the data. OFCOM's Simplifying Non-Geographic Numbers Consultation Document of 16 December 2010 contains data showing the flows

of revenues for various number ranges, including 080, 0845 and 0870 numbers.

This data shows:

- (1) That, in the case of 080 calls (Figure A7.2 on page 345), callers paid £77m for 080 calls in 2009. Service providers – that is, call recipients – paid £120m in respect of such calls in the same period. Such calls thus generated total revenues of £197m, of which originating CPs received £136m, and terminating CPs received £57m. (This does not total £197m because there were other participants in the market – like transiting CPs – who also shared in the revenue.)
- (2) That, in the case of 0845 calls (Figure A7.6 on page 376), callers paid £469m for 0845 calls in 2009. Service providers (or call recipients) received £16m in respect of such calls in the same period. Figure A7.6 does not, however, appear to take into account what such service providers/call recipients paid for call hosting, and so it may well be that the revenue that service providers/call recipients actually retained is rather lower.³ Paragraph A7.179 observes:

“According to the 2010 Flow of Funds study, calls to 0845 generated a total of £469m in 2009, the most from any non-geographic number range. £16 million, or 4%, was paid to [service providers]. [Terminating CPs] retained around 27%, while [originating CPs] retained 68% of all the revenue for this number range. Note that, where a call is part of a bundle of inclusive minutes, no revenue was attributed to that call.”

- (3) That, in the case of 0870 calls (Figure A7.8 on page 389), callers paid £182m for 0870 calls in 2009. Service providers (or call recipients) received £21m in respect of such calls in the same period. As with Figure A7.6, Figure A7.8 does not appear to take into account what such service providers/call recipients paid for call hosting, and so it may well be that the revenue that service providers/call recipients actually retained is rather lower.⁴ Paragraph A7.242 observes:

³ It is clear from Figure A7.6 itself that the £16m expressed to have been received by service providers/call recipients simply reflects that part of the overall figure of £469m paid by callers that was received by service providers/call recipients. The figure has not been adjusted to reflect countervailing payments made by service providers/call recipients.

⁴ As with Figure A7.6, it is clear from Figure A7.8 that the £21m expressed to have been received by service providers/call recipients simply reflects that part of the overall figure of £182m paid by callers

“Calls to 0870 generated £182 million of revenues in 2009. The pattern of revenue retention for 0870 numbers is very similar to that of 0845 numbers with [service providers] only retaining £21 million, or 12% of total revenues. This is well below the average over all ranges and is made mostly by the [originating CPs], which retain 57% of revenues. Note that, for the purpose of these calculations, where a call is part of a bundle of inclusive minutes, no revenue is attributed to that call.”

159. We consider that this data shows that revenue share is (unsurprisingly) non-existent in the case of 080 numbers, and remarkably insignificant in the case of 0845 and 0870 numbers. This is particularly so, when the volume of calls to these numbers is taken into account, and revenue per call to a service provider assessed. Data as to call volumes on 0845 and 0870 numbers are set out in Figures A7.5 and A7.7 respectively. Using this information, revenue to service providers per call can be calculated:

	Volume of calls to service providers (minutes)	Total revenue to service providers (£)	Revenue per call (ppm)
0845 calls	9,010,000,000	16,000,000	0.1776
0870 calls	2,477,000,000	21,000,000	0.8478

H. OFCOM’S APPROACH TO RESOLVING THE DISPUTES

I. OF COM’S SIX PRINCIPLES OF PRICING AND COST

160. OFCOM considered that its responsibility was to determine whether BT’s termination charges were “fair and reasonable”, and this informed OFCOM’s approach to resolving the disputes. As we explain further in paragraphs 433 to 438 below, this “fair and reasonable” test derives from the Tribunal’s decision in *T-Mobile (UK) Ltd v Office of Communications* [2008] CAT 12. In this case, OFCOM’s application of that test involved it identifying and assessing factors that were relevant to resolving the Disputes, and then weighing these factors, so as to reach a conclusion.

161. In previous disputes, OFCOM had used six principles of pricing and cost as a basis for an analytical framework. These were described as follows in paragraph

that was received by service providers/call recipients. The figure has not been adjusted to reflect countervailing payments made by service providers/call recipients.

4.56 of the 080 Determination (and are referenced in paragraph 1.17 of the 0845/0870 Determination):

- (1) *Cost causation.* Costs should be recovered from those whose actions cause the costs to be incurred.
- (2) *Cost minimization.* The mechanism for cost recovery should ensure that there are strong incentives to minimise costs.
- (3) *Effective competition.* The mechanism for cost recovery should not undermine or weaken the pressures for effective competition.
- (4) *Reciprocity.* Where services are provided reciprocally, charges should also be reciprocal.
- (5) *Distribution of benefits.* Costs should be recovered from the beneficiaries, especially where there are externalities.
- (6) *Practicality.* The mechanism for cost recovery needs to be practicable and relatively easy to implement.

162. In the case of the Disputes, these six principles were refined into three cumulative principles.

II. OFCOM'S APPROACH IN THE 080 DETERMINATION

163. In the 080 Determination, OFCOM's three cumulative principles were summarised as follows:

"1.17 The analytical framework that we used for reaching our final conclusions sets out three cumulative principles. This takes into account our preference that 080 calls ought to be free to the caller, and if they are not free, that they are as close to free as possible. We consider that each of these principles is an important consideration in order for a payment in either direction (i.e. to BT in the form of a termination charge or to the 2G/3G MNOs in the form of an origination payment) to be considered fair and reasonable. We further consider that all of these principles would need to be satisfied in order for a payment in either direction to be considered fair and reasonable. When applying these principles, we also considered the consistency of our analysis and conclusions with our previous decisions (and those of the Office of Telecommunications ("OfTel")), as well as relevant benchmarks.

1.18 In the context of the Dispute, the three cumulative principles are:

1.19 **Principle 1;** the 2G/3G MNOs should not be denied the opportunity to recover their efficient costs of originating calls to 080 numbers hosted on BT's network, this means either:

- (i) it is not fair and reasonable for BT to impose termination charges unless the average retention by each of the 2G/3G MNOs (which is the average retail price minus any termination charge) is greater than the efficient cost of mobile call origination; or
- (ii) it may be fair and reasonable for each of the 2G/3G MNOs to receive an origination payment if their average retention is less than the efficient cost of mobile origination.

1.20 **Principle 2;** the payment in either direction should, taking into consideration our statutory duties:

- (i) provide benefits to consumers, taking into account Direct, Indirect and Mobile tariff package effects;
- (ii) avoid a material distortion of competition either among OCPs or among terminating communications providers (“TCPs”).

1.21 **Principle 3;** following the submissions of the 2G/3G MNOs, it is also important that the payment in either direction should be reasonably practicable to implement.”

164. The three “effects” referenced in Principle 2(i) – “Direct”, “Indirect” and “Mobile tariff package” – will be considered in greater detail below. However, a brief explanation now is appropriate:

- (1) *Direct Effect.* A Direct Effect is an effect, whether up or down, on the price paid by the caller of the number in question (see paragraph 4.8 of the 080 Determination).
- (2) *Indirect Effect.* An Indirect Effect is an effect concerning the attractiveness to a service provider of offering a service through the number in question (see paragraph 4.9 of the 080 Determination).
- (3) *Mobile Tariff Package Effect.* A Mobile Tariff Package Effect is an effect, whether up or down, on mobile tariffs overall (see paragraph 4.15 of the 080 Determination).

165. OFCOM’s final conclusions are summarised in the 080 Determination as follows:

“1.24 Our final conclusions are the same as our provisional conclusions, i.e. that it could be fair and reasonable for BT to impose a termination charge for 080 calls, and it could also be fair and reasonable for the 2G/3G MNOs to receive an origination payment. We have not changed our view that in the present circumstance the three cumulative Principles are not satisfied in either case. As with our provisional conclusions, this is because:

- (i) **The 2G/3G MNOs have not been able to confirm to BT their average retail prices for 080 calls.** Without this information, we are unable to determine the level of the 2G/3G MNOs’ retentions. In

turn, although the 2G/3G MNOs' headline prices are generally above their efficient costs of origination, we are unable to determine whether their average retentions are above or below this level. As a consequence we are unable to conclude that Principle 1 is satisfied for a payment in either direction. We note though the implied retention estimates from the headline rates, which suggest that any average call price that was calculated by the MNOs would generally need to be significantly lower than these headline rates to reduce the implied retention below our current view of efficient costs of origination.

- (ii) **We have been unable to identify sufficiently clear benefits to consumers that would arise from a payment in either direction.** In particular we do not consider that NCCN 956 or an origination payment would necessarily result in lower retail prices for 080 calls. We therefore conclude that Principle 2 part (i) is not satisfied by the termination charge structure in NCCN 956 and that there is insufficient evidence to show that it is satisfied for the 2G/3G MNOs proposals for an origination payment in the present circumstances.
- (iii) **We consider that, in the current circumstances, the imposition of 080 termination charges by BT risks a distortion of competition among TCPs.** In particular we do not consider that other TCPs are currently able to match BT's termination rate increases, and we consider that this may have implications for competition, especially since a significant barrier to matching arises from BT (namely the limitations of its transit billing system). Principle 2 part (ii) is therefore not satisfied by the termination charge structure in NCCN 956.

- 1.25 We conclude that Principle 3 could be satisfied in each case. We consider that the Parties could reach a practical solution to these issues should it be agreed that a payment to BT was fair and reasonable. We further consider that it should be relatively straightforward to implement a payment from BT to the 2G/3G MNOs, should it be agreed that an origination payment was fair and reasonable. We conclude that these issues of practicality could and should be resolved between the Parties without further involvement from Ofcom.”

166. Thus, OFCOM decided that:

- (1) It was unable to conclude that Principle 1 was satisfied.
- (2) Principles 2(i) and 2(ii) were not satisfied.
- (3) Principle 3 could be satisfied.

III. OF COM'S APPROACH IN THE 0845/0870 DETERMINATION

- 167. As in the case of the 080 Determination, OFCOM distilled the six principles into three. Although these are broadly the same as the three principles expressed

in the 080 Determination, they are not identically formulated. For completeness, they are set out as follows:

“1.17 In analysing the matters in dispute we have taken due account of our statutory duties, in particular the effects on competition and consumers of the charging arrangements. Consistent with our approach in our recent [080 Determination], which concerned similar matters, we have adopted an analytical framework for assessing the matter in dispute based on three cumulative principles (“the three Principles”), as set out below. These principles substantively incorporate the six principles of pricing and cost recovery which we have often previously used as a basis for an analytical framework.

1.18 The three Principles we have considered are:

Principle 1: The MNOs should not be denied the opportunity to recover their efficient costs of originating calls to 0845/0870 numbers hosted on BT’s network. In the context of this Dispute, we consider that this means it is not fair and reasonable for BT to impose variable termination charges unless the average retention by each of the MNOs (which is the average retail price minus the termination charge) is sufficiently large relative to the retention obtained on geographic calls.

Principle 2: The charges in NCCN 985 and 986 should:

- provide benefits to consumers, taking into account (i) the impact on retail 0845/0870 call prices (the Direct effect) (ii) the impact on service providers and, through improved services, callers, i.e. consumers of 0845/0870 calls (the Indirect effect) and (iii) the impact on the overall MNO offering to its customers (the Mobile tariff package effect); and
- avoid a material distortion of competition among: (i) TCPs; (ii) transit operators; (iii) OCPs in retail services and (iv) MNOs in wholesale sales to MVNOs.

Principle 3: The charges in NCCN 985 and 986 should be reasonably practicable to implement.”

168. OFCOM’s conclusions are summarised as follows in the 0845/0870

Determination:

“Our final conclusion on Principle 1

1.22 Our final conclusion is that Principle 1 is met; this is the same as our provisional conclusion in the Draft Determination. Our analysis suggests the Principle 1 is met by NCCNs 985 and 986 because they allow the MNOs to obtain a sufficiently large retention on 0845 and 0870 calls relative to their retention on geographic calls.

Our final conclusion on Principle 2

1.23 Principle 2 relates to consumer and competition effects. Our final conclusion [is] that Principle 2 is not met, for the following reasons:

Consumer effects

- 1.24 As set out in the Supplementary Consultation, we consider that it is more likely that NCCNs 985 and 986 will lead to price decreases for 0845/0870 calls rather than price increases. This represents a change from our provisional conclusion in the Draft Determination. However, we are still uncertain about the magnitude of the Direct effect and still consider that there will be a negative Mobile tariff package effect, which leads us to consider there is a risk of an overall adverse effect on consumers. We consider it reasonable, in the light of our overriding statutory duties to further the interests of consumers, to place greater weight on this potential risk than on the potential benefits of allowing the charges in NCCNs 985 and 986 to stand.

Competitive effects

- 1.25 Our final conclusion is the same as our provisional conclusion in the Draft Determination. The risk of competitive distortions between TCPs is relatively low and there may be no significant distortion to competition in MNOs' wholesale sales to MVNOs. However, there are possible concerns about the potential distortion of OCPs' choice of transit provider, and about competition between MNOs and MVNOs in retail services (relating to disincentives to pricing innovations and potential for the range of retail packages to be reduced, although the nature of these effects depends on the method to derive the MNOs' average retail price).

Overall view

- 1.26 Taking the issues raised by our analysis of consumer benefits and competitive distortion in the round, we consider that, on the evidence currently before us, Principle 2 is not sufficiently likely to be met. A more detailed statement of our conclusion on Principle 2 is set out in Section 9 below.

Our final conclusion on Principle 3

- 1.27 Our final conclusion is that NCCNs 985 and 986 would not be reasonably practicable to implement, and therefore Principle 3 is not met. This is the same as our provisional conclusion set out in the Supplementary Consultation, and differs from the prior provisional conclusion we set out in the Draft Determination. A more detailed statement of our conclusion on Principle 3 is set out in Section 9 below.

Our final conclusion on whether NCCNs 985 and NCCN 986 are fair and reasonable

- 1.28 Taking into consideration our assessment across the three Principles, our final conclusion is that it is not fair and reasonable for BT to apply the new termination charges for calls to 0845 and 0870 numbers hosted on its network as set out in NCCNs 985 and 986 dated 2 October 2009.
- 1.29 We consider that the Parties should revert to the terms on which they were trading prior to the imposition of NCCNs 985 and 986 which gave rise to this dispute.”

169. Thus, OFCOM concluded that:

- (1) Principle 1 was satisfied.
- (2) Principle 2 was not sufficiently likely to be met.

- (3) Principle 3 was not met.

IV. EVOLUTION OF OFCOM'S POSITION

170. OFCOM's conclusions, as expressed in the two Determinations, are rather different. Setting it out, rather crudely, in a table, the position is as follows:

	080 Determination	0845/0870 Determination
Principle 1	Not satisfied	Satisfied
Principle 2	Not satisfied	Not demonstrated, and therefore not satisfied
Principle 3	Could be satisfied	Not satisfied

171. Although, of course, we appreciate that the dynamics regarding 080 numbers on the one hand, and 0845/0870 numbers on the other, are different, there is (as counsel for OFCOM rightly recognised) a degree of inconsistency in these conclusions. In particular:

- (1) The divergent conclusions regarding Principle 1 are in principle impossible to justify: the charges for 080 and 0845/0870 numbers are not sufficiently different so as to justify different conclusions. This OFCOM fully recognized. Mr Herberg stated (Transcript Day 3, page 53):

“We accept that in the light of the way in which the argument moved on, on the 0845 case, the 080 conclusion on Principle 1, that, we say, it did not need to be decided, that it could not be satisfied, cannot be right. The battleground here must be on Principle 2.”

The change is explained by the fact that the evidence and OFCOM's understanding moved on as time passed. The 0845/0870 Determination reflected a more mature understanding.

- (2) Although, in the case of both Determinations, OFCOM found Principle 2 not satisfied, the reasons for this changed. Again, this reflected additional evidence and a more mature understanding. In the 080 Determination, OFCOM simply concluded that NCCN 956 would not necessarily result in lower prices. In the 0845/0870 Determination, OFCOM's conclusion was much more nuanced: it concluded that it was more likely than not that prices would fall, but that the magnitude of such a decrease was uncertain.

In short, it concluded that compliance with Principle 2 could not be demonstrated. Again, this reflected a growing understanding arising out of the debate that occurred in the series of expert reports that we have referred to in paragraph 32 above, and which are listed in Annex 2.

- (3) As regards Principle 3, OFCOM found this satisfied in the 080 Determination, and not satisfied in the 0845/0870 Determination. This difference is curious, since the mechanics of implementation must be the same, whichever number is called. In the 080 Determination, OFCOM concluded (in paragraph 6.11) that “while we recognise the issues of practicality raised by the [mobile network operators], we expect that it should be possible to reach a practical solution within the parameters that we have set out and that this solution can be achieved through further commercial negotiation. We therefore consider that Principle 3 should not be a barrier to NCCN 956 being considered fair and reasonable.” By contrast, OFCOM’s reasoning on this point in the 0845/0870 Determination was as follows:

“Assessment of Principle 3

- 9.44 Principle 3 states that the charges in NCCNs 985 and 986 should be reasonably practicable to implement. The following considerations are relevant to our assessment of practicability.
- 9.45 NCCNs 985 and 986 represent a substantial change in the approach to termination charges for NTS numbers or more generally, because the [terminating CP’s] termination charge varies with the [originating CP’s] retail call price. BT itself recognises that it is a “*radical departure from the existing pricing practice*”.
- 9.46 Notwithstanding that the Parties in the Dispute have failed to have any meaningful dialogue on the issue of [average retail prices], we consider that each [mobile network operator] should be in a position to estimate its own [average retail price] for 0845/0870 calls to an acceptable degree of accuracy and subject to a reasonable verification procedure (although we are unable to reach a firm conclusion because further negotiation is required between the Parties...). We also consider that the Parties should be able to ensure billing accuracy without distorting competition in incorporating [average retail prices] for 0845/0870 calls into the overall average. The details of the methodology to derive each [originating CP’s] [average retail price] would be matters for commercial negotiation and it would be premature for us to impose on the Parties a specific method.
- 9.47 A number of practical difficulties of implementation remain unresolved...

- 9.48 We acknowledge that NCCNs 985 and 986 would introduce significant additional complexity (in part reflecting the implementation issues)...
- 9.49 We consider that the complexity of real-world pricing decisions by the [mobile network operators] (and the limitations in any model of economic theory in capturing them adequately), coupled with the inherent difficulty in analysing operators' pricing responses and their implications, might lead to unintended and unforeseen consequences...
- 9.50 The potential for significant wider implications is also relevant to our consideration of this Dispute. BT has introduced NCCNs for tiered termination charges for 080 calls as well as for 0845 and 0870 calls. We note that another [terminating CP], IVR, has introduced tiered termination charges in relation to other 08 numbers, such as 0844 and 0871. In addition, both O2 and T-Mobile/Orange have raised the question of tiered mobile termination charges being introduced in relation to fixed-to-mobile calls...Some respondents have also questioned whether such a fundamental change of a move to termination charges linked to retail prices should be introduced through the process of dispute resolution rather than the process of regulatory policy development, taking a broad perspective of issues, involving a wider range of policy options, allowing more time for analysis and including full consultation with all affected stakeholders that is not feasible in the context of a dispute.
- 9.51 Given a free choice, a policy development process (for example our ongoing NGCS Review) would represent a more desirable approach to such a substantial and important change with wide-ranging implications. However, we must resolve this dispute now and do not consider that it would be appropriate for us instead to wait until the outcome of the NGCS Review, as this would entail a significant delay during which time the MNOs would continue to have to pay BT's new charges.
- 9.52 Nevertheless it is relevant that the NGCS Review, which includes policy options beyond the scope of this Dispute, may implement a set of changes to industry arrangements for 0845/0870 calls. We are therefore concerned about the potential for a major and potentially disruptive set of changes in industry arrangements to implement NCCNs 985 and 986, which may subsequently be rolled back or substantially affected following the conclusion of the NGCS Review next year.
- 9.53 If we were in a position to conclude that there were clear and unequivocal benefits to consumers from NCCNs 985 and 986, we might place less weight on the practicability concerns outlined above. However, given our conclusion that Principle 2 is not met, we consider that these concerns are relevant.

Our conclusion on Principle 3

- 9.54 In light of the above, we consider that there is insufficient evidence to conclude that the charges in NCCNs 985 and 986 would be reasonably practicable to implement. We therefore conclude that Principle 3 is not met."

Whereas the difference in the headline conclusions regarding Principle 3 in the two Determinations is stark (“could be satisfied” in the 080 Determination versus “not satisfied” in the 0845/0870 Determination), it is clear that OFCOM’s conclusions as expressed in the 0845/0870 Determination are rather more nuanced, and that the difference between the two Determinations is, in fact, not that great. Again, the development in OFCOM’s thinking, as reflected in these paragraphs, represents a more mature understanding on the part of OFCOM, reached after careful consideration.

172. Mr Read submitted (for instance, at Transcript Day 1, page 55) that this sort of change reflected in OFCOM’s conclusions regarding Principle 3 suggested that “there is a bias built-in against BT, and when I use the word “bias”, I do not mean it in the pejorative normal legal sense, i.e. I mean it is a burden as such, I do not want there to be any mistake between OFCOM and BT”. No-one, least of all Mr Read, was seeking to accuse OFCOM of any kind of bad faith: the proposition only needs to be stated to be rejected. That said, we do not consider that Mr Read’s point can be dismissed out of hand. OFCOM’s approach in assessing whether the termination charges that BT was proposing by (variously) NCCN 956, NCCN 985 and NCCN 986 were “fair and reasonable” was, as we described in paragraph 449 below, characterized by a pre-disposition in favour of the *status quo*. Where radical changes are contemplated in charging structures, such an approach may be no bad thing, and we consider this in paragraphs 445 to 450 below. All that Mr Read was saying was that this predisposition was a burden that BT had to contend with in seeking to persuade OFCOM that NCCN 956, NCCN 985 and NCCN 986 should be implemented.

V. FACTORS CONSIDERED BY OFCOM AND THEIR WEIGHT

173. It is clear from the Determinations that OFCOM identified the following as relevant factors to take into account:
- (1) *The ability of mobile network operators to recover their costs.* As has been described (see paragraphs 163 and 167 above), the ability of mobile

network operators to recover their costs forms the substance of Principle 1.

- (2) *The Direct Effect.* The meaning of the Direct Effect was briefly described in paragraph 164(1) above. The Direct Effect formed an element (together with the Indirect Effect and the Mobile Tariff Package Effect) within Principle 2(i) (see paragraphs 163 and 167 above).
- (3) *The Indirect Effect.* The meaning of the Indirect Effect was briefly described in paragraph 164(2) above. The Indirect Effect formed an element (together with the Direct Effect and the Mobile Tariff Package Effect) within Principle 2(i) (see paragraphs 163 and 167 above).
- (4) *The Mobile Tariff Package Effect.* The meaning of the Mobile Tariff Package Effect was briefly described in paragraph 164(3) above. The Mobile Tariff Package Effect formed an element (together with the Direct Effect and the Indirect Effect) within Principle 2(i) (see paragraphs 163 and 167 above).
- (5) *Effect on Competition.* As has been described (see paragraphs 163 and 167 above), the effect on competition forms the substance of Principle 2(ii).
- (6) *Practicality.* As has been described (see paragraphs 163 and 167 above), the practicalities of implementation form the substance of Principle 3.

174. OFCOM's three principles for assessing whether a charge was "fair and reasonable" were cumulative. In other words, if one principle was not passed, the price could not be "fair and reasonable". Principle 1 and Principle 3 each contained but a single factor (the ability of mobile network operators to recover their costs: Principle 1; and practicality: Principle 3). It is Principle 2 that is much the most complex:

- (1) In the first place, it is not clear how Principles 2(i) and 2(ii) inter-related. This is a matter that we consider specifically in paragraphs 380 to 384 below.
- (2) Secondly, Principle 2(i) involves consideration of three factors, the Direct Effect, the Indirect Effect, and the Mobile Tariff Package Effect. The Direct Effect and the Indirect Effect were both potentially beneficial to

consumers (defining these, for the present, as callers and call-recipients). The Mobile Tariff Package Effect represented an effect adverse to callers, in that it involved an increase to prices offered by mobile network operators other than the price of the call under consideration. OFCOM placed a greater weight on the Direct Effect on prices than on the Mobile Tariff Package Effect. Thus, if OFCOM concluded that there was an incentive on mobile network operators to reduce prices for 080, 0845 or 0870 calls (the Direct Effect), it would have concluded that this was more important than a negative effect on mobile customers of a similar scale through increases in other mobile prices: paragraph 105 of Myers 1; paragraph 215 of Myers 2. Of course, it is worth noting at the outset that the persons benefiting from the Direct Effect may very well be different from the persons suffering from the Mobile Tariff Package Effect. In particular, callers on mobile networks to 080 numbers who do not have easy access to fixed lines (with their cheaper access to 080, 0845 and 0870 calls) may be particularly disadvantaged and particularly in need.

I. THE CONTENTIONS OF THE PARTIES

175. In their appeals, BT and EE took radically different stances. BT's position was essentially based upon an acceptance of the principles by which OFCOM assessed whether the termination charges proposed in NCCN 956, NCCN 985 and NCCN 968 were "fair and reasonable", although BT did contend that OFCOM had placed insufficient weight on its contractual rights under the Standard Interconnect Agreement (see, for example, paragraphs 11, 25(2), 46 of BT's Opening Skeleton Argument, and the references in those paragraphs). The thrust of BT's case was that OFCOM had misapplied these principles so as to reach the wrong conclusion.
176. EE on the other hand, as its secondary position, defended OFCOM's application of its principles, and contended that, if these principles were correct, then they had been correctly applied. However, by way of its primary case, EE mounted a fundamental attack on these principles, contending that different principles

should have been applied to this dispute. Essentially, EE contended that OFCOM had disregarded the fundamental principle that prices should be orientated to cost, and that BT's tariffs (as stated in the various NCCNs) were, plainly, not orientated to cost.

177. BT's position was (broadly speaking) supported by C&W, and EE's by O2 and Vodafone, although we stress that not every party took every point; nor did every party advance points they did take in identical fashion. In Sections L and M, we identify more specifically the precise attacks that were made on the Determinations, before setting out our conclusions.

178. However, there are two points that we can deal with now:

(1) In paragraphs 127-135 of its Notice of Appeal in Case 1151, BT contended that OFCOM incorrectly defined the scope of the dispute in relation to 080 calls which it accepted for resolution in October 2009. BT contended that OFCOM expressly excluded consideration of BT's specific charges introduced by NCCN 956 and instead purported to resolve the dispute by reference to whether it was fair and reasonable for BT to impose any termination charges. We have adverted to BT's (understandable) misapprehension as to the scope of the dispute being resolved by OFCOM in relation to 080 calls in paragraph 32(2) above. That misapprehension resulted in BT's initial failure to adduce evidence to OFCOM regarding its specific charges for the termination of 080 calls and, when such evidence was adduced, in OFCOM's decision not to extend the Dispute Resolution Process so as to enable all of this additional evidence to be admitted. That evidence – and more – has been admitted before this Tribunal, and fully considered in the course of a lengthy hearing. We consider this to be a case where the scope of the dispute that OFCOM was resolving was initially insufficiently articulated to BT. But any prejudice that BT might have suffered was obviated long ago, when BT's evidence was admitted. We reject as unarguable the contention that this appeal should now simply be confined to the general question of whether it was fair and reasonable for BT to impose any termination charges.

- (2) In paragraphs 148-152 of EE’s Notice of Appeal in Case 1168, it was contended that OFCOM’s procedure was unfair in that EE was not provided with a non-confidential copy of BT’s submissions regarding T-Mobile’s dispute reference submission of 5 March 2010. We consider that since a confidential copy of this document was subsequently provided by OFCOM to EE that this point has become academic.

J. OFCOM’S POWERS UNDER THE DISPUTE RESOLUTION PROCESS

179. These Disputes are disputes within section 185(1)(a) of the 2003 Act (dispute between communications providers). Where there is a dispute, OFCOM must consider it and make a determination for resolving it: section 188(2)(b). On determination, OFCOM’s powers are contained in section 190(2).
180. A crucial question, not specifically resolved by the 2003 Act is precisely how – that is, according to what criteria – a dispute is to be resolved or determined by OFCOM. Ordinarily, the determination of a dispute involves a tribunal determining or adjudicating upon the rights and obligations of the parties to the dispute. In short, a dispute is resolved by determining whether one party has rights over, or owes duties to, the other.
181. The Dispute Resolution Process under the 2003 Act obviously embraces this sort of resolution. Section 190(2)(a) provides that OFCOM has the power “to make a declaration setting out the rights and obligations of the parties to the dispute”.
182. However, it is clear that the Dispute Resolution Process goes well beyond this. Section 185(1) defines the disputes to which section 185 applies as, essentially, disputes “relating to the provision of network access”. Section 185(8)(a) provides that:
- “(a) the disputes that relate to the provision of network access include disputes as to the terms or conditions on which it is or may be provided in a particular case; and
 - (b) the disputes that relate to an obligation include disputes as to the terms and conditions on which any transaction is to be entered into for the purpose of complying with that obligation.”

183. These provisions suggest that a dispute extends beyond a dispute as to respective rights and obligations, extending to cases where the dispute is whether one party, who is under no obligation to do something for another, is nevertheless being asked to do this, and is refusing. In other words, where the dispute is not whether a party is obliged to do something, but where the dispute is whether the party should do something it is under no legal obligation to do.

184. This extended aspect of the Dispute Resolution Process is made extremely clear by sections 190(2)(b) and (c) of the 2003 Act, which provide that OFCOM has, at the conclusion of a dispute, the power:

- “(b) to give a direction fixing the terms or conditions of transactions between the parties to the dispute;
- (c) to give 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...”

185. Clearly, the Dispute Resolution Process entitles OFCOM not merely to determine disputes in the traditional sense of adjudication, but to resolve disputes that may not be about legal rights at all by creating new rights, and imposing them on the parties to the dispute.

186. Given that OFCOM has these powers, the question then arises as to how OFCOM is to exercise them. It seems clear – and it was common ground before us – that OFCOM could, as a matter of law, override the parties’ strict legal rights. The question that needs to be considered is in what circumstances OFCOM should do so.

187. As we noted in paragraph 6(5) above, we consider that this question must be addressed in two stages:

- (1) First, it is necessary to identify and assess potentially relevant factors.
- (2) Secondly, it is necessary to consider how such factors as are relevant need to be weighted in order to reach a conclusion.

These questions are addressed in Sections L and M below.

188. Before this, it is necessary to consider the standard of review on dispute resolution appeals.

K. APPEALS FROM OFCOM'S DETERMINATIONS PURSUANT TO THE DISPUTE RESOLUTION PROCESS

189. Section 195(2) of the 2003 Act provides that section 192 appeals shall be decided “on the merits and by reference to the grounds of appeal set out in the notice of appeal”. As was noted in paragraphs 66 to 78 of *British Telecommunications plc v Office of Communications* [2010] CAT 17, section 195(2) contains two separate and distinct requirements.
190. The second requirement (“...by reference to the grounds of appeal set out in the notice of appeal...”) makes clear that the Tribunal considers (“on the merits”) the decision that is being appealed to it by reference only to the grounds of appeal set out in the notice of appeal.
191. The first requirement (“...on the merits...”) makes clear that the appeal be conducted “on the merits” and not in accordance with the rules that would apply on a judicial review. In *Hutchison 3G UK Limited v Office of Communications* [2008] CAT 11, the Tribunal stated (at paragraph 164):
- “However, this is an appeal on the merits and the Tribunal is not concerned solely with whether the 2007 Statement is adequately reasoned but also with whether those reasons are correct. The Tribunal accepts the point made by H3G in their Reply on the SMP and Appropriate Remedy issues that it is a specialist court designed to be able to scrutinise the detail of regulatory decisions in a profound and rigorous manner. The question for the Tribunal is not whether the decision to impose price control was within the range of reasonable responses but whether the decision was the right one.”
192. We consider that this correctly states the approach we are obliged to take: the question is whether OFCOM’s determination was right, not whether it lies with the range of reasonable responses for a regulator to take.
193. That said, we are mindful of two other important *dicta* regarding the Tribunal’s role on a section 192 appeal. First, Jacob LJ in *T-Mobile (UK) Limited v Office of Communications* [2008] EWCA Civ 1373 made absolutely clear that the section 192 appeal process is not intended to duplicate, still less, usurp, the functions of the regulator. In paragraph 31, he stated:

“After all it is inconceivable that Article 4 [of the Framework Directive], in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator has got something materially wrong. That may be very difficult if all that is impugned is an overall value judgment based upon competing commercial considerations in the context of a public policy decision.”

194. Secondly, and following on from this point, in *T-Mobile (UK) Limited v Office of Communications* [2008] CAT 12, the Tribunal noted (at paragraph 82):

“It is also common ground that there may, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination. There may well be no single “right answer” to the dispute. To that extent, the Tribunal may, whilst still conducting a merits review of the decision, be slow to overturn a decision which is arrived at by an appropriate methodology even if the dissatisfied party can suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.”

195. We have taken the approach indicated in the above paragraphs in this appeal.

L. RELEVANT OR POTENTIALLY RELEVANT FACTORS

I. A LIST OF FACTORS

196. The factors that OFCOM ought to have taken into account in the 080 and 0845/0870 Determinations, and the weight that OFCOM should have given to those factors in those Determinations, was naturally a matter of considerable controversy between the parties.

197. This Section lists, and provides our findings in relation to, all factors that appear, in the light of the submissions that have been made to us, to be potentially relevant for consideration in the present Disputes. We stress the word “potentially”. In this Section we identify and describe, in the context of the facts of this case and the Disputes that have arisen, potentially relevant factors. Whilst we do determine, in this Section, which factors we consider to be relevant and which factors we consider to be irrelevant, we do not seek to attribute weight to such factors. The question of how relevant factors inter-relate is considered in Section M below.

198. The potentially relevant factors that we consider are as follows:

- (1) *OFCOM's general statutory obligations under the 2003 Act.* Sections 3 to 7 of the 2003 impose on OFCOM a range of duties that it must have regard to when carrying out its functions. We consider these duties in Section L(II) below.
- (2) *OFCOM's "policy preferences".* In both the 080 and the 0845/0870 Determinations, OFCOM articulated a policy preference: in short, OFCOM's policy preference was that 080 calls ought to be free to the caller and, if not free, as close to free as possible; and that 0845 and 0870 calls should be charged at or as close as possible to each originating CP's local (in the case of 0845 calls) or national (in the case of 0870 calls) rates. We consider policy preferences in general, and this policy preference in particular, in Section L(III) below.
- (3) *BT's rights and obligations under the Standard Interconnect Agreement.* We have found that the NCCNs here in issue were all introduced by BT pursuant to paragraph 12 of the Standard Interconnect Agreement (see paragraphs 74, 89 and 94 above). Paragraph 12, as we have described, gives BT the right "from time to time [to] vary the charge for a BT service or facility". We consider this right in Section L(IV) below.
- (4) *BT's motivation in introducing NCCN 956, NCCN 985 and NCCN 986.* BT's motivation in introducing the NCCNs was explored in the evidence before us. We consider this in Section L(V) below.
- (5) *Regulatory obligations and duties on the parties to the dispute.* We have described the regulatory framework within which mobile network operators set their retail prices for non-geographic calls and within which BT sets its termination charges for such calls in Section E above. We consider this factor further in Section L(VI) below.
- (6) *Welfare assessment.* By "welfare assessment" we mean an assessment of the economic effects of the introduction of the NCCNs on persons whose interests OFCOM should take into account. We consider this factor in Section L(VII) below.

- (7) *The effect on competition.* This is a factor that OFCOM considered distinctly from its welfare assessment, and we have done likewise in this Judgment. However, as will be seen, we consider there to be a very close relationship, at least in this case, between welfare assessment and an assessment of competitive effects. We consider this factor in Section L(VIII) below.
- (8) *The ability of mobile network operators to recover their efficient costs.* We consider this factor in Section L(IX) below.
- (9) *Practicality.* By this we mean whether the NCCNs were, or would be, reasonably practicable to implement. We consider this factor in Section L(X) below.
- (10) *The forthcoming review of non-geographic numbers.* OFCOM's Simplifying Non-Geographic Numbers Consultation Document was published on 16 December 2010. OFCOM's considerations on this topic continue, but at some point in the reasonably near future there is likely to be a new regime in respect of non-geographic numbers. We consider this factor in Section L(XI) below.
- (11) *The nature of the Dispute Resolution Process.* The Dispute Resolution Process is intended to be complete within a period of not more than four months, unless exceptional circumstances exist. Clearly, such a limited time frame must constrain OFCOM in the investigations it can undertake when seeking to resolve disputes. We consider this factor in Section L(XII) below.

II. **OF COM'S GENERAL STATUTORY OBLIGATIONS UNDER THE 2003 ACT**

199. OFCOM's general statutory obligations – by which we mean factors that OFCOM is by statute obliged to take into account – are obviously a relevant factor. They underpin all that OFCOM does.
200. The 2003 Act lists a number of general duties on OFCOM that pertain when OFCOM carried out its functions:

“3 **General duties of OFCOM**

- (1) It shall be the principal duty of OFCOM, in carrying out their functions –
- (a) to further the interests of citizens in relation to communications matters; and
 - (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- (2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following –
- (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
 - (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
- ...
- (3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to –
- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - (b) any other principles appearing to OFCOM to represent the best regulatory practice.
- (4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances –
- ...
 - (b) the desirability of promoting competition in relevant markets;
 - (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
 - (d) the desirability of encouraging investment and innovation in relevant markets;
- ...
- (f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;
- ...
- (h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
 - (i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- ...
- (k) the opinions of consumers in the relevant markets and of members of the public generally;
 - (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and urban areas;

- (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.
- (5) In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

...

- (7) Where it appears to OFCOM that any of their general duties conflict with each other in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances.

...

4 **Duties for the purpose of fulfilling Community obligations**

- (1) This section applies to the following functions of OFCOM –
 - ...
 - (c) their functions under Chapter 3 of Part 2 in relation to disputes referred to them under section 185;
 - ...
- (2) It shall be the duty of OFCOM, in carrying out any of those functions, to act in accordance with the six Community requirements (which give effect, amongst other things, to the requirements of Article 8 of the Framework Directive and are to be read accordingly).
- (3) The first Community requirement is a requirement to promote competition –
 - (a) in relation to the provision of electronic communications networks and electronic communications services;
 - (b) in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks or electronic communications services; and
 - (c) in relation to the supply of directories capable of being used in connection with the use of electronic communications networks or electronic communications services.
- (4) The second Community requirement is a requirement to secure that OFCOM's activities contribute to the development of the European internal market.
- (5) The third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 17 of the Treaty establishing the European Community).
- (6) The fourth Community requirement is a requirement to take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour –
 - (a) one form of electronic communications network, electronic communications service or associated facility; or
 - (b) one means of providing or making available such a network, service or facility,over another.

- (7) The fifth Community requirement is a requirement to encourage, to such extent as OFCOM consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability.
- (8) That purpose is the purpose of securing –
 - (a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities; and
 - (b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available.
- (9) The sixth Community requirement is a requirement to encourage such compliance with the standards mentioned in subsection (10) as is necessary for –
 - (a) facilitating service interoperability; and
 - (b) securing freedom of choice for the customers of communications providers.
- (10) Those standards are –
 - (a) standards or specifications from time to time drawn up and published in accordance with Article 17 of the Framework Directive;
 - (b) the standards and specifications from time to time adopted by –
 - (i) the European Committee for Standardisation;
 - (ii) the European Committee for Electrotechnical Standardisation;
 - (iii) the European Telecommunications Standards Institute; and
 - (c) the international standards and recommendations from time to time adopted by –
 - (i) the International Telecommunication Union;
 - (ii) the International Organisation for Standardisation; or
 - (iii) the International Electrotechnical Committee.
- (11) Where it appears to OFCOM that any of the Community requirements conflict with each other, they must secure that the conflict is resolved in the manner they think best in the circumstances.

...

6 Duties to review regulatory burdens

- (1) OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve –
 - (a) the imposition of burdens which are unnecessary; or
 - (b) the maintenance of burdens which have become unnecessary.
- (2) In reviewing their functions under this section it shall be the duty of OFCOM–
 - (a) to have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered

or secured, or are likely to be furthered or secured, by effective self-regulation; and

- (b) in the light of that, to consider to what extent it would be appropriate to remove or reduce regulatory burdens imposed by OFCOM.

...”

201. We have only set out the statutory duties that appear to us most pertinent in the present case. These duties are general ones – and in the context of the Dispute Resolution Process – will underlie OFCOM’s consideration of all factors.

202. In the Determinations, OFCOM clearly had regard to its statutory duties, as is clear from paragraph 2.8 of the 080 Determination and paragraph 2.10 of the 0845/0870 Determination.

III. OFCOM’S POLICY PREFERENCES

(i) OFCOM’s policy preferences in these Cases

203. OFCOM had a policy preference, both in relation to 080 numbers and 0845 numbers. As regards 080 numbers, this policy was articulated in the 080 Determination as follows:

“2.32 Ofcom considers that 080 numbers have a number of distinct features from other types of NTS numbers. First, callers to 080 numbers have (in general) historically not paid a charge (although callers from mobile networks may now incur a charge, calls generally remain free to call from fixed networks). Secondly, 080 numbers are designated in the NTNP as “Special Services”, which means that callers cannot be charged for 080 numbers except where charges are notified to callers at the start of the call.

2.33 Our preference is that 080 calls ought to be free to the caller, and if they are not free, that they are as close to free as possible. This preference is consistent with our general duties under section 3 of the Act and the six Community requirements set out in section 4 of the Act and with our earlier view that, “*in principle, 0800 calls should be paid for entirely and should be completely free to caller*” [a quotation from Annex 6 of Oftel’s “Determination of Interim Charges for BT’s Initial Standard Services for the Year Ending 31 March 1996” (January 1996)]. In addition, this preference reflects:

- (i) the benefits of free calls to 080 numbers to consumers in terms of price transparency;
- (ii) consumer research...regarding the connection between 080 numbers and “Freephone”. This suggests that the interests of citizens and consumers are furthered where they can rely on their expectation that calls to 080 numbers will be free (or, if they are not free, as close to free as possible); and

- (iii) the benefits, in terms of access to services and cost savings, of consumers facing no retail charge for calls to 080 numbers (or a very small retail charge only).

- 2.34 In particular, we note the importance to certain callers to 080 numbers of being able to access charitable or essential services by NTS SPs at no charge (i.e. services that provide a social benefit to citizens and consumers). In accordance with our statutory duties, we consider that it is important that such services should remain free to caller and mobile providers, and that prospective callers are able to rely on continued free provision...
- 2.35 Our preference is that 080 calls ought to be free or as close to free as possible to the caller is not altered by the fact that MNOs now charge for some 080 calls.”

204. As regards 0845 and 0870 numbers, OFCOM’s policy preference was articulated in the 0845/0870 Determination as follows:

- “2.39 Oftel introduced 0845 and 0870 numbers in the mid 1990s with the aim of providing a non-geographic number range where calls would be charged on the same basis as local geographic calls and national rate calls. When originally introduced there was an expectation that calls to 0845 numbers would be charged at each originating operator’s local call rate and 0870 numbers would be charged at each originating operator’s national call rate.
- 2.40 The third issue of the National Numbering Conventions, November 2001, set out designations for 08 numbers and operators in more detail than previous editions. It:
 - (i) Specified that operators should offer services at the stated tariffs (paragraph A6.2); and
 - (ii) Designated 0845 to be charged at originating operators’ local rates; and 0870 to be charged at originating operators’ national rates (paragraph A6.4).
- 2.41 It is clear from this that the link between 0845/0870 and geographic call prices was intended to apply to calls made from any network.
- 2.42 However, by 2003 it had become apparent that the linkage between 0845/0870 prices and geographic call prices was under strain. Consequently Oftel published a consultation on 0845 and 0870 pricing. Oftel presented evidence that only BT maintained the linkages to geographic charges and even then only for a subset of its customers who paid full standard rates. Oftel also stated that under the regulatory regime that applied to numbering (then recently introduced under the 2003 Act) the designations in the National Telephone Numbering Scheme applied to TCPs to whom the numbers were allocated and not OCPs. It went on to explain that, whilst the Numbering Scheme specified that 0845 and 0870 calls should be charged at the OCPs’ local and national rates, it did not impose a direct obligation on them to act in accordance with the Numbering Scheme. It therefore set out a policy preference rather than an enforceable condition.
- 2.43 In 2004, Ofcom published a policy statement in which we decided to maintain the linkage in its current form pending a wide ranging review of NTS regulation. In this document Ofcom set out two measures in relation to 0845 and 0870 numbers at paragraph S6, namely:

- a) *“The current link on the BT network between BT’s retail price for 0845 and 0870 calls and BT’s standard (pre-discount and call package) retail price for geographic local and national calls respectively will remain in place”;* and
 - b) *“Ofcom will work with the industry to produce guidance to NTS Service Providers using 084 and 087 numbers on how these numbers (and in particular, pricing indications for calls to services on these numbers) can be advertised so that they are not misleading to consumers.”*
- 2.44 Ofcom supported the maintenance of the pricing link by identifying that the primary purpose of the link is not to provide transparency for consumers; rather it is to protect consumers’ interests by maintaining reasonable retail prices for all 0845 and 0870 calls from all OCPs.
- 2.45 At paragraph 5.3 Ofcom stated that:
- “... Ofcom has set out its current policy position on retail pricing of 0845 and 0870 calls on the BT network, to serve as a clear starting point for Ofcom’s future work with consumers and industry to review the NTS framework in the interests of all stakeholders.”*
- 2.46 In the April 2006 Statement Ofcom further acknowledged that the linkage to geographical prices was still broken for 0845 and 0870 calls. Ofcom set out its decision to take steps to repair the linkage to geographic call prices for 0870 calls and indicated that it would be likely to make similar changes to 0845 once dial-up internet traffic volumes had declined. This delay recognized that repairing the linkage would force dial-up ISPs and some 0845 users to migrate to other number ranges, at considerable cost. In the event the 0845 review is now being undertaken as part of the wider NGCS Review, which is currently underway.
- 2.47 Following on from the April 2006 Statement, Ofcom published the ‘Changes to 0870 Statement’ (the “0870 Statement”) in April 2009. These changes were aimed at restoring the geographic linkage for 0870 calls.
- 2.48 In order to restore the linkage, Ofcom changed the designation for 0870 numbers in the NTNP to reflect its policy preference that calls to 0870 numbers should be treated in the same way as calls to geographic numbers, and where geographic calls are included in bundles, 0870 calls should also be included. OCPs must also ensure:
- (i) call charges have been published in accordance with General Condition 14.2; or
 - (ii) in the case of Public Pay Telephones, call charges are displayed in a manner that is reasonably accessible to a caller before making a call.
- 2.49 By repairing this linkage and changing the designation for 0870 numbers in the NTNP, Ofcom aimed to promote the inclusion of these calls in flat rate packages offered by most major OCPs, including BT. When considering this option, it became clear that there would be a risk of arbitrage should CPs follow this policy preference. To avoid the risk of arbitrage Ofcom removed 0870 calls from the scope of the NTS Condition, and this consideration was also taken into account in the calculation of the termination rates in the 0870 Determination.
- 2.50 Removing 0870 calls from the NTS Condition has made it very unlikely that TCPs are able to share any revenue with SPs. BT have confirmed to us that

since August 2009 it does not revenue share on 0870 numbers. However, revenue-sharing is not banned on the 0870 number range; rather, the regulatory mechanism (the NTS Condition) underpinning the ability to revenue share no longer exists.

Regulatory obligations and policy preferences

- 2.51 Considering the policy work outlined above, Ofcom's regulatory policy for 0870 numbers has been more recently reviewed than the policy for 0845 numbers. Our policy preference for both number ranges is that calls to these numbers should be treated the same as calls to geographic numbers, but in the case of 0870 calls we have more recently amended the regulatory framework in line with our policy preference.
- 2.52 Specifically, for 0845 numbers the current regulatory obligation comes from the 2004 policy statement which sets out that the link on the BT network between BT's retail prices for 0845 calls and BT's standard (pre-discount and call package) retail price for geographic local and national calls will remain in place. This is further reflected by the designation for 0845 numbers in the NTNP...
- 2.53 This obligation only applies to BT; all other OCPs are free to depart from this. However, if they do, they are departing from our policy preference that all calls to 0845 numbers should be treated the same as calls to geographic numbers, regardless of the OCP. This policy preference has been expressed most recently in the April 2006 Statement.
- 2.54 For 0870 numbers the current regulatory policy comes from the 0870 Statement and the designation for 0870 numbers in the NTNP. This states that all CPs should price 0870 numbers in the same way as they price geographic numbers, except where they have complied with General Condition 14.2.
- 2.55 This obligation applies to all OCPs. Where they comply with General Condition 14.2, OCPs are free to set different prices for calls to 0870 numbers than for their geographic calls. However, if they do, they are departing from our policy preference that all calls to 0870 numbers are treated the same as calls to geographic numbers."
205. In short, OFCOM's policy preference was that 080 calls ought to be free to the caller, and if they are not free, that they are as close to free as possible; and that 0845 and 0870 calls should be charged at or as close as possible to each originating CP's local (in the case of 0845 calls) or national (in the case of 0870 numbers) rates.

(ii) The nature of a "policy preference"

206. A policy preference is clearly not a rule. A rule is absolutely binding on the person to whom it applies, and can in no way be described as a "preference". A

policy preference, unlike a rule, is intended to inform the discretion of the administrative or regulatory body that has adopted it.

207. In *R (Alconbury Developments) Ltd v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, Lord Clyde stated (at paragraph 143) that:

“The formulation of policies is a perfectly proper course for the provision of guidance in the exercise of administrative discretion. Indeed policies are an essential element in securing the coherent and consistent performance of administrative functions. There are advantages both to the public and the administrators in having such policies. Of course, there are limits to be observed in the way policies are applied. Blanket restrictions which leave no room for particular circumstances may be unreasonable. What is crucial is that the policy must not fetter the exercise of the discretion. The particular circumstances always require to be considered. Provided that the policy is not regarded as binding and the authority still retains a free exercise of discretion the policy may serve the useful purpose of giving a reasonable guidance to both applicants and decision-makers.”

208. The aim of a policy is thus to “promote consistency of practice” (*Secretary of State for the Home Department, ex parte Hastrup* [1996] Imm AR 616 at 623-624); it must not act as a fetter on discretion (*Alconbury*, above; *R v Police Complaints Board, ex parte Madden* [1983] 1 WLR 447); and it ought to be published (*R (Walmsley) v Lane* [2005] EWCA Civ 1540, [2006] LGR 280 at paragraph 57). Inevitably, this may give rise to a legitimate expectation that a policy will be followed. If the policy is not followed, but departed from, reasons ought to be given (*Gransden v Secretary of State for the Environment* (1987) 54 P&CR 86 at 93-94). Whenever resolving an individual question where a policy has been articulated, it is the duty of the decision-maker to act fairly, and to decide the matter both by reference to the policy and the individual circumstances of the case.
209. This leads on to a particularly important point in the context of the present appeals. No policy can ever be comprehensive, and seek to deal with every future case. That is why policies cannot, and should not, act as fetters on discretion: there will always be some individual circumstances that the policy did not anticipate.

(iii) **Questions arising out of OFCOM's policy preferences**

210. A number of questions arose out of OFCOM's policy preferences. First, O2 contended that OFCOM's policy preference had not been articulated prior to the Determinations. All of the other parties accepted that OFCOM's policy preferences had previously been articulated.

211. Secondly, EE and O2 contended that OFCOM's policy preferences were not consistent with its statutory obligations or in some other way unlawful.

212. We consider these issues in turn below.

(iv) **Was there an articulation of a policy preference prior to the Determinations?**

213. O2's contention, as summarised in paragraph 48 of its written Opening Submissions and as set out more fully in paragraphs 10-12 of its Statement of Intervention in Case 1151 and paragraphs 9-22 of its Statement of Intervention in Cases 1168 and 1169, was that whilst OFCOM might have made a number of statements regarding 080, 0845 and 0870 numbers, these simply did not amount to a clear enough statements as to its policy. In other words, there had been an insufficient articulation of OFCOM's policies before these came to be set out in the Determination.

214. We consider O2's contention to be fundamentally misconceived. OFCOM's policy regarding 080, 0845 and 0870 numbers can be extremely shortly stated (see paragraph 198(2) above), and we consider was clearly articulated in the documents cited by OFCOM in the passages from the Determinations that we have quoted in paragraphs 203 and 204 above. Indeed, we consider that OFCOM's policy preference was explicitly stated in the National Telephone Numbering Plans referred to in paragraphs 57 to 62 above.

215. Of course, as we noted in paragraph 209 above, no policy can hope to cater for each and every future circumstance. As was common ground, BT's "ladder" pricing for the termination of 080, 0845 and 0870 calls as set out in NCCN 956, NCCN 985 and NCCN 986 was novel, and so raised novel questions. These novel questions had to be considered by OFCOM in the course of the Dispute Resolution Processes that lead to the 080 and 0845/0870 Determinations. They

were not considered in any anterior OFCOM policy, and OFCOM had to determine such questions during the course of the Dispute Resolution Process, and it did so. In particular, OFCOM decided:

(1) That, in an appropriate case, “ladder” pricing could be an acceptable form of pricing.

(2) That, in an appropriate case, tariffs did not have to be cost reflective.

216. In doing so, OFCOM may very well have further elucidated or expanded upon the policy preference in respect of 080, 0845 and 0870 calls that it has had for many years. Again, we consider that no complaint can possibly be made of this, provided that – in the course of the Dispute Resolution Process – the affected parties can comment on such elucidation or expansion.

217. Whether OFCOM’s decisions were legal is, of course, an altogether different question, and it is to that question that we now turn.

(v) Legality of the policy preference

218. As we noted in paragraph 73 above, BT’s pricing for the termination of 080, 0845 and 0870 calls as set out in NCCN 956, NCCN 985 and NCCN 986 was, in a very fundamental sense, not cost reflective. It requires no particularly lengthy or detailed analysis to reach this conclusion, and it is not surprising that the 080 and 0845/0870 Determinations do not consider BT’s costs of termination in any great detail. Fundamentally, BT did not seek to justify NCCN 956, NCCN 985 or NCCN 986 by reference to the cost of terminating calls, and they could not be justified on this basis. OFCOM clearly recognised this.

219. OFCOM did accept that tariffs based upon ladder pricing could, in principle, be acceptable, as the price for terminating 080, 0845 and 0870 calls. In an exchange with Professor Stoneman, Mr Herberg stated the position very clearly (Transcript Day 3, page 60):

“Q (Professor Stoneman) ...What was in front of OFCOM was the three NCCN notices which, as you have said, contained a rather new and unusual pricing structure: ladder pricing in wholesale markets. Although you have pointed out that OFCOM have decided such a system is not

discriminatory, what I am not quite sure about is whether OFCOM has said there is nothing wrong in principle with ladder pricing, but the parameters being introduced with these three particular schemes are not acceptable; or whether OFCOM has said: we object to ladder pricing whatever the parameters; or whether what you said is we do not want to answer the general question: we have three schemes in front of us, we reject those three schemes and we are not going to tell you whether it is particularly because of the pricing structure. Can you enlighten me as to where OFCOM stands on this?

A (Mr Herberg)

Sir, I think I can. I think our submission is firmly and squarely – and we were decisive on this, we did not try to take refuge in uncertainty – the first. We accepted that there was no problem in principle, or we did not identify any problem in principle with ladder pricing. That is why EE and the interveners effectively cross-appealed, despite the fact the decision was in their favour, because they say you should have found a problem in principle with ladder pricing, and simply said: we will not be approving this or any other ladder pricing scheme, because they are fundamentally wrong and incompatible with OFCOM’s duties. We did not do so; we accepted they were in principle legitimate, we looked at how this particular scheme would work, the consequences and the welfare analysis and, doing the best we can, we decided on the particular facts of these particular schemes they were not welfare beneficial, or we could not be satisfied that they were, and so we rejected them. We certainly did not say that there was any problem with ladder pricing, which may explain the profusion of further ladder pricing schemes that now appear to be appearing...”

In short, OFCOM was not persuaded that NCCN 956, NCCN 985 or NCCN 986 were “fair and reasonable” and so the NCCNs were rejected by OFCOM.

220. EE’s and O2’s contention that OFCOM’s in principle acceptance of ladder pricing amounted to an improper policy preference, and that the NCCNs should be rejected on this basis alone, amounted to a very bold submission. In essence, the submission was that ladder pricing was so unacceptable that it should be rejected out of hand.
221. Miss Smith sought to soften the boldness of this submission by suggesting that OFCOM’s error lay in failing to place sufficient weight on cost reflectivity. Thus, she stated (Transcript Day 2, page 20):

“...BT’s costs of termination should have been at the very least the starting point for OFCOM’s analysis of the termination charges set out in the NCCNs. We say that OFCOM erred in not taking those costs into account in determining whether those charges were fair and reasonable.

We do not make a positive case for the purposes of this appeal that BT termination charges should necessarily have been limited to its costs, we do not need to make such a case. Our argument is that OFCOM’s approach was flawed as a matter of principle in that OFCOM failed to take any or any proper account of a relevant consideration, i.e. BT’s costs of termination.”

222. Again, at Transcript Day 10, page 41, Miss Smith stated that “BT’s costs of termination should have been the starting point for OFCOM’s analysis of the termination charges set out in the NCCNs”.
223. It is difficult to understand what this means. As we have noted, it is obvious that BT’s proposed pricing cannot have been cost orientated. OFCOM itself noted this in paragraphs 4.44 to 4.47 of the 0845/0870 Determination, where it observed (paragraph 4.47) that what it was considering was “whether or not revenue share is reasonable”. Inevitably, that involves a departure from OFCOM’s first principle of pricing and cost (which we have set out in paragraph 173(1) above). OFCOM articulated very carefully and clearly the criteria that would have to be satisfied were a departure from cost reflectivity to be capable of justification: that was the point of the three principles which we have set out in paragraphs 163 and 167 above. In short, OFCOM’s departure from cost reflectivity was a reasoned one. Moreover:
- (1) Applying the criteria that it had formulated, OFCOM concluded that none of the NCCNs satisfied all three of its principles.
 - (2) Those three principles, as Professor Stoneman pointed out (Transcript Day 3, pages 38-39), did contain an element of cost reflectivity. As we explain in greater detail below (in what was described as the partial reduction scenario), OFCOM hypothesised a possible situation where BT’s ladder pricing caused mobile network operators to reduce their retail prices, but only to one of the steps on the ladder where BT’s termination charges would rise relative to the *status quo*. In that case, there would be additional revenue to BT, which BT might or might not pass on to the call recipient/service provider from whom it was hosting. This is the so-called Indirect Effect, and OFCOM’s approach was only to attach weight to this

additional revenue to the extent that it resulted in an improvement in service by call recipients/service providers. Revenue retained by BT (or, indeed, taken by a call recipient/service provider as profit) would not be counted as benefit. This does, of course, result in a cost reflective element in OFCOM's assessment.

- (3) EE's alternative case was that OFCOM's approach and rejection of the NCCNs was correct (Transcript Day 2, page 19: "...if the Tribunal is not persuaded by our primary case, then our secondary case is that OFCOM was correct to reject BT's NCCNs; it was correct to find that the proposed termination charges were not fair and reasonable...").

224. In these circumstances, given that EE did not formulate a positive case as to how OFCOM might permissibly have departed from the principle of cost reflexivity apart from supporting (as its secondary case) OFCOM's own criteria, it is very difficult to read EE's primary case as anything other than a contention that ladder pricing *per se* amounts to an improper policy preference. Indeed, that does seem to be where Miss Smith ended up: at Transcript, Day 10, pages 50-51, Miss Smith submitted that OFCOM's approach was a wrong one, and that, therefore, OFCOM fell into error.

225. O2's position was more clear-cut: O2 contended that there was, quite simply, no legal basis for OFCOM's approach.

226. EE and O2 advanced three arguments in support of the proposition that OFCOM's in principle acceptance of ladder pricing amounted to an improper policy preference:

- (1) First, ladder pricing was essentially wrong because it was not "cost-reflective".
- (2) Secondly, ladder pricing amounting to retail price regulation "through the back door".
- (3) Thirdly, ladder pricing leads to the possibility of different prices being charged to different mobile network operators for the provision by BT of precisely the same service: such a difference in pricing is discriminatory.

227. We consider these three points in turn below.

1. Not cost reflective

228. In paragraph 194 above, we noted the Tribunal's statement in paragraph 82 of *T-Mobile (UK) Limited v Office of Communications* [2008] CAT 12 that there might, in relation to any particular dispute, be a number of different approaches which OFCOM could reasonably adopt in arriving at its determination, and that there might well be no single "right answer" to the dispute. To that extent, the Tribunal might be slow to overturn a decision arrived at by an appropriate methodology even if the dissatisfied party could suggest other ways of approaching the case which would also have been reasonable and which might have resulted in a resolution more favourable to its cause.
229. We consider that a "cost-orientated" or "cost-reflective" policy is one of a range of policies that OFCOM could properly adopt. However, we do not consider that it should be OFCOM's "default" policy, even in cases of disputes involving pricing and costs. That would, in our view, be fettering OFCOM's discretion too much.
230. We consider questions of policy preference to be, *par excellence*, the sort of question where there is no single "right answer", and we agree with the Tribunal's statement in *T-Mobile* that the Tribunal should be slow to overturn such decisions. This is particularly the case here, where OFCOM is seeking to articulate policy preferences that are compliant with its statutory duties under the 2003 Act. We remind ourselves that these duties, which are broadly framed and clearly give OFCOM a measure of discretion, are duties imposed upon OFCOM itself and not on this Tribunal.
231. Accordingly, we consider that we must ask ourselves not whether a "cost-orientated" or "cost-reflective" policy represents a "correct" approach for OFCOM to adopt, but whether the approach in fact adopted by OFCOM was a "wrong" approach. As we have noted, OFCOM's policy preference was that 080 calls ought to be free to the caller, and if not free, then as close to free as possible; and that 0845 and 0870 calls should be charged at or as close as possible to each originating operator's local (in the case of 0845 calls) or national (in the case of 0870 numbers) rates.

232. We consider that a policy that forsook cost reflectivity in favour of a tariff structure that sought to cause the prices charged by mobile network operators for 080/0845/0870 numbers to move closer to their description in the national telephone numbering plan to be an entirely reasonable and proper one for OFCOM to adopt in the circumstances of this case.
233. Accordingly, we reject EE’s and O2’s first point. We should stress that we say nothing, at this stage, about OFCOM’s precise articulation of its three principles: we are simply holding that it was open to OFCOM, in this case, to consider pricing approaches that were not cost reflective, such as ladder pricing.

2. Price regulation “through the back door”

234. It was common ground amongst all the parties that OFCOM has no power to impose price controls over the prices of mobile network operators. As the law stands, such a power would only exist were there to be a finding of significant market power in respect of a mobile network operator – and there has been no such finding.
235. In these circumstances, EE and O2 contended that OFCOM’s policy – which was expressly informed by a desire to cause mobile network operators to align their retail prices for 080, 0845 and 0870 calls with the description as to what such calls should cost in the National Telephone Numbering Plan – amounted to an indirect form of price control. Given that OFCOM had no power to impose such controls directly, so the argument went, it should not be entitled to use the dispute resolution process to impose such a result indirectly.
236. This point was put forcefully and neatly in O2’s Consolidated Skeleton Argument:

“3. The Tribunal can dismiss BT’s appeals very quickly by assuming, hypothetically, that BT is fully correct in its argument as to the prospective effects of its NCCNs. According to BT, the upshot of its NCCNs is that it would be economically irrational for a profit-maximising mobile network operator to price 08x retail calls above a certain maximum price, due to the “penalising” nature of the wholesale charges set out in BT’s NCCNs. This is the positive Direct Effect and we assume, for present purposes, that the mobile tariff package effect (“MTPE”) does not arise or, if it arises, is less than or the same as the Direct Effect. (O2 disputes this contention but for purposes of this first point is content to tackle it head on.) Consumers,

according to BT, are net beneficiaries in such a scenario because there is a price cap on MNOs' 08x call prices.

4. What BT clearly posits therefore is that MNOs' 08x retail prices would (and should) be subject to a maximum price cap. It would, according to BT, be economically irrational for MNOs to price higher than a certain level in BT's NCCNs. Moreover, because *all* MNOs would be subject to BT's retail price cap, the NCCNs would be indistinguishable from a general regulatory price cap on the mobile industry, not least because, as the non-MNO interventions show, other TCPs will follow BT's suit and impose similar charges. The NCCNs are therefore a quasi-legislative measure.
5. But BT's argument cannot succeed, since Ofcom has no legal power to impose industry-wide retail price caps on MNOs' 08x calls, maximum or otherwise. By contrast, it has such power to impose *ex ante* regulation on fixed line operators, and has in fact done so in the case of BT via the NTS Call Origination Condition. Even if Ofcom's dispute resolution function involves it acting in a "*regulatory*" role, such a role must clearly be constrained by the scope of the regulatory powers it possesses under the EU Common Regulatory Framework ("*CRF*"), as implemented by the Communications Act 2003 (the "*Act*"). In particular, it would be fundamentally wrong to say that just because Ofcom has general duties towards consumers under Sections 3 and 4 of the Act, this grants Ofcom the legal power to impose terms and conditions, in dispute resolution, that it would otherwise have no legal power to do under the Act."

237. We have considered the nature and scope of OFCOM's powers under the Dispute Resolution Process in Section J above. It is our conclusion that even if the NCCNs amounted to a form of price control, it would be open to OFCOM to allow them to take effect pursuant to the Dispute Resolution Process. Whether OFCOM should – in the exercise of its discretion – allow them to take effect in such circumstances is, of course, a different question.

238. Here, we consider whether the NCCNs do in fact amount to a form of indirect price regulation. We are unpersuaded that they do, and we reject EE's and O2's contentions to this effect. We do so for the following reasons:

- (1) *The NCCNs do not impose a compulsory form of price regulation.* The NCCNs do not oblige mobile network operators to set their retail prices for 080, 0845 or 0870 calls at any particular level: mobile network operators are free to set their tariffs at the rates that suit them. All that the NCCNs do is to create an incentive on the part of the mobile network operators to set their price at a lower level. (We note that this begs a very important question – considered further in paragraphs 378 to 379 below – as to whether the NCCNs do indeed have this price-reducing effect. For

the purposes of the present point, however, we assume that the NCCNs do incentivise mobile network operators to reduce their prices.) Even on the basis of this assumption, however, it strains language to regard a BT tariff-structure, according to the terms of which mobile network operators may price as they please, as a form of price regulation imposed by OFCOM.

- (2) *BT's wholesale prices for terminating 080, 0845 and 0870 numbers are unconstrained by regulation.* EE and O2 are perfectly correct when they assert that the retail prices for 080, 0845 and 0870 calls set by mobile network operators are unconstrained by direct regulation. OFCOM has, as we have stated, no power to impose price regulation. Exactly the same, however, is true of BT's prices for the termination of 080, 0845 and 0870 calls. In these circumstances, BT seeks to impose on the mobile network operators these NCCNs. The question, rhetorically speaking, is why should it not be able to do so? For OFCOM to refuse to allow BT to implement these NCCNs on the grounds that this constitutes a form of indirect price control over mobile network operators would itself amount to a form of direct price control over BT.
- (3) *The imposition or not of the NCCNs is the outcome of a Dispute Resolution Process.* The question of whether BT may, or may not, implement these NCCNs has come before OFCOM via the Dispute Resolution Process. Pursuant to sections 185 to 191 of the 2003 Act, OFCOM is obliged to resolve the dispute: OFCOM did not seek the dispute out. Had OFCOM decided that the NCCNs could be implemented by BT, all it would have been doing was deciding a dispute between BT and certain mobile network operators one way, rather than the other. This is very much not like regulation, which entails the imposition of a binding norm on a specific person or persons. EE's and O2's contention is tantamount to asserting that, in this dispute between BT and the mobile network operators, OFCOM was obliged to decide that dispute one way, and not the other, simply because an outcome in favour of BT looks like a form of indirect price regulation. The problem with the contention, as we

have noted, is that the other outcome – against BT – can equally well be characterized as a form of direct price discrimination.

- (4) *BT's market share is limited.* In paragraphs 149 to 150 above, we described the Non-Geographic Number hosting market, and found that BT had around a 25% share of this market. We made no other findings regarding competition in this market, in particular as regards BT's dominance or otherwise. Accordingly, BT's NCCNs can only directly affect around 25% of the number hosting market: the rest of the market may follow BT's lead or it may not. Either way, it cannot be said that BT is imposing its tariffs or even its tariff structure on the whole market.

3. *Ladder pricing is discriminatory*

239. It was contended that the lack of cost reflectivity of ladder pricing led to the possibility of different prices being charged to different mobile network operators for the provision by BT of precisely the same service. Such a difference in pricing, so it was said, could not be objectively justified and was discriminatory.
240. The essence of discrimination is that it fails to treat like cases alike, but rather treats them differently. In the present case, the NCCNs impose a different price for the termination of calls on communications providers according to the level of that provider's retail price. Communications providers charging the same retail price pay the same termination price. In short, we consider this contention to be misconceived. The ladder pricing in the NCCNs treats like cases alike, and different cases differently. No communications provider, charging a given price to a caller, will be treated any differently from any other communications provider charging the same price. The fact that ladder pricing involves a departure from cost-based pricing does not mean that it is discriminatory.

IV. BT'S RIGHTS AND OBLIGATIONS UNDER THE STANDARD INTERCONNECT AGREEMENT

(i) Introduction

241. We consider that BT's rights and obligations under the Standard Interconnect Agreement to be a potentially relevant factor. Before us, no-one seriously questioned this as a matter of general principle. Equally, it was common ground before us that OFCOM had – as part of its powers under the dispute resolution process – the power to override contractual arrangements made by the parties before it. We agree with this, for the reasons we gave in Section J above. The more difficult question – considered in Section M below – is if there is a clear contractual right in a person, in what circumstances is it right for OFCOM to override it? We do not consider this difficult question in this section: this section is rather concerned with an anterior question, namely precisely what right was vested in BT pursuant to the Standard Interconnect Agreement. It is necessary to answer this anterior question first: if OFCOM is going to use its dispute resolution powers to override a party's contractual rights, it is important for OFCOM to know precisely what rights are being overridden.
242. In this case, this anterior question is a particularly necessary and important one, as there was considerable divergence between the parties as to the significance of BT's rights and obligations under the Standard Interconnect Agreement in the present case. Thus, BT contended that the effect of OFCOM's determinations was to constrain BT's contractual right under paragraph 12 of the Standard Interconnect Agreement to introduce new termination charges (see, e.g., paragraphs 15 and 46 of BT's Skeleton Argument).
243. On the other hand, OFCOM and the mobile network operators contended that BT's contractual rights under the Standard Interconnect Agreement were, in this case, irrelevant and added nothing to the analysis. This was essentially for the following reasons:
- (1) First, it was contended that, according to its proper construction, paragraph 12 in fact conferred no rights of any significance on BT, and simply subjected BT to OFCOM's dispute resolution jurisdiction. In short, it was OFCOM which determined whether BT was, or was not, entitled to introduce a particular change.

- (2) Secondly, it was contended that BT's rights under paragraph 12 were so wide as to be effectively meaningless.
- (3) Thirdly, it was contended that paragraph 18 of the Standard Interconnect Agreement, when read in conjunction with paragraphs 12 and 19.17, acted as a limit on BT's rights under paragraph 12.
- (4) A fourth point was that the Standard Interconnect Agreement was imposed on BT's contractual counterparties, who had no choice (if they wanted access to BT's services) but to accept its terms.

244. We will consider these points in turn below.

(ii) **Paragraph 12 of the Standard Interconnect Agreement confers no rights of any significance on BT**

245. Paragraphs 12 and 13 of the Standard Interconnect Agreement have been set out in paragraphs 50 and 54 above. In paragraph 56 above, we noted that whereas sub-paragraph 12.2 conferred on BT a right to vary the charges for services or facilities provided by it under the Standard Interconnect Agreement – subject always to the paragraph 26 dispute resolution procedure should the Operator subject to the new charge not be inclined to accept it – paragraph 13 contained no right in either the Operator or BT to impose a variation in Operator charges. Such changes had to be agreed and, if not agreed, were determined by OFCOM pursuant to sub-paragraphs 13.7 to 13.9. This, we inferred, was why disputes arising out of the service of a Charge Change Notice are excluded from the scope of the paragraph 26 dispute resolution procedure: absent actual agreement between BT and the Operator, it is inherent in the paragraph 13 procedure that OFCOM will uphold or not uphold a non-agreed Charge Change Notice.

246. We have also noted that the NCCNs in the present case were variations under paragraph 12.2 of the Standard Interconnect Agreement. In this regard, we should note that the title given to these NCCN's – Network Charge Change Notices – is in fact an unhelpful and positively misleading one. Paragraphs 13.2 and 13.3 of the Standard Interconnect Agreement refer to Charge Change Notices. These are notices whereby the Operator or BT (as the case may be) may request a variation to a charge for an Operator service or facility. As we

have noted (see paragraphs 56(2) above), such variations only take effect if agreed or – absent agreement – if OFCOM determines that the variation should take effect. The NCCNs in this case were not Charge Change Notices under paragraph 13, because they did not relate to Operator services or facilities.

247. Rather, the NCCNs related to BT services or facilities, and the mechanism for changing the charges for such services or facilities is laid down in paragraph 12.2: changes take effect 28 days after publication of the change in the Carrier Price List. For this reason, we should stress that the exclusion in paragraph 26.9 of the Standard Interconnect Agreement – which excludes from the paragraph 26 dispute resolution procedure disputes arising out of the service of a Charge Change Notice – is not applicable in the case of the NCCNs considered here.

248. EE, Vodafone and OFCOM all contended that there was no material difference between paragraph 12 of the Standard Interconnect Agreement and paragraph 13: both provisions, so it was said, were explicitly subject to OFCOM’s dispute resolution jurisdiction: paragraph 12 by virtue of the dispute resolution process in paragraph 26; and paragraph 13 because of the provisions contained within that paragraph (see Miss Smith’s submissions at Transcript Day 2, pages 27-28, and Mr Ward QC’s submissions (appearing for Vodafone) at Transcript Day 10, page 2). The point was most attractively put by Mr Herberg (Transcript Day 3, pages 15-16):

“Q (The Chairman)

...could it not be said that clause 12 gives a margin of appreciation, as it were, to BT, which the regulator ought to give at least some respect to?

A (Mr Herberg)

I see the point but we do say that that would be a wrong reading of clause 12. It looks at clause 12 alone and does not look at the entire contractual position between the parties. One has to look at clause 12 with clause 26 and with the dispute resolution procedure shot through.

The other way that these contracts are often designed is that BT has an unfettered right to make the change and then the other party has an unfettered right to object and then there is deadlock and then you go to OFCOM. Our proposition is that this is not really different from that situation... What you have is BT making the change and then the other parties are able to refer it to OFCOM. So there is no magical significance in what appears to be an unfettered contractual right to BT.”

249. Whilst it is clearly right to say that paragraph 12 of the Standard Interconnect Agreement is subject to paragraph 26 – and would, even absent paragraph 26, be subject to OFCOM’s Dispute Resolution Process – there nevertheless remains a crucial point of difference between paragraph 12 and paragraph 13, in that the former confers on BT the right unilaterally to vary the prices for its services, whereas the latter does not. In our view, that represents – contractually speaking – a substantial and significant difference. Although it is true to say – as Mr Herberg submitted – that (unless the parties can agree) OFCOM gets involved whether the provision in question is paragraph 12 or paragraph 13, the fact is that in the latter case it is OFCOM that has the right to determine what the new charges should be, whereas in the former case OFCOM is reviewing (pursuant to the Dispute Resolution Procedure) BT’s right to determine what the new charges should be. The fact that BT has a right under paragraph 12 to vary prices, which it does not have under paragraph 13 cannot, in our view, be ignored and is, we conclude, a relevant factor that needs to be weighed by OFCOM when seeking to resolve a dispute.

250. *Ludgate Insurance Company Ltd v Citibank NA* [1998] LLR (I&R) 221 concerned a provision in the London Market Letter of Credit Scheme (a scheme which facilitated reinsurers in the London market and later, European reinsurers, to conduct business in the United States) giving a bank a broad power or discretion to retain collateral in support of letter of credit issued by it pursuant to this scheme. The provision in question was very different from paragraph 12 in the present case, and there is no parallel to be drawn in terms of construction. However, Brooke LJ had this to say in respect of broad contractual discretions in paragraph 31:

“It is very well established that the circumstances in which a court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. We were referred to *Weinberger v Inglis* [1919] AC 606; *Dundee General Hospitals Board of Management v Walker* [1952] 1 All ER 896; *Docker v Hyams* [1969] 1 Lloyd’s Rep 487; and *Abu Dhabi National Tanker Company v Product Star Shipping Company Limited* [1993] 1 Lloyd’s Rep 397 (“*The Product Star*”). These cases show that provided that the discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be characterised as perverse, the courts will not intervene.”

251. As this passage notes, even a widely framed contractual discretion is not unlimited. By way of example, no doubt an NCCN issued by BT pursuant to paragraph 12 in circumstances where the NCCN infringed either Articles 101 or 102 of the Treaty on the Functioning of the European Union or the Chapter I or Chapter II prohibitions under the Competition Act 1998 would be illegal and ineffective. No doubt there are other limits to BT's powers under paragraph 12: however, since no submissions were made to us that BT's NCCNs exceeded BT's discretion in this way, it is not necessary, for the purposes of this Judgment, to explore the precise limits of the right in BT, and we do not do so.

(iii) **BT's rights under paragraph 12 are so wide as to be effectively meaningless**

252. Before us, OFCOM accepted that there were certain contractual rights that it would be relevant for OFCOM to take into account during the course of dispute resolution. The following example was put to Mr Herberg during opening submissions (Transcript Day 3, pages 11-12):

“Q (The Chairman) Suppose I have a provision for the adjustment of termination charges by reference to some kind of inflationary measure. I will take that as an example. There was a dispute between the parties to the agreement as to how that measure operated. One party was saying you look at X figure and the other party was saying you look at Y figure. They cannot agree and they say: there is a dispute, off it goes to OFCOM. Would you say that it was a permissible course for OFCOM to say: we are going to look at the relevant test for the inflationary uplift, but I can look at all the other factors and perhaps impose an altogether different form of solution on the parties, ignoring the terms of this very specific provision of the contract?

...

A (Mr Herberg) ...Sir, the answer is that of course OFCOM, and therefore of course the Tribunal, would give weight (and it might be substantial weight) where there was a specific dispute like that, to the commercial intentions of the parties. It would be promoting OFCOM's overall duties to, as far as possible, assist commercial certainty, and to insist that the bargains of the parties were given weight. But one only has to think one can have a bargain which is anti-competitive between two parties who are colluding to see that it would not necessarily be bound by what the parties had decided was going to be the way they would

price. But in a particular case, and particularly the example you have given to me, where you have a specific and presumptively unobjectionable way of deciding, one would expect that OFCOM, and one would have expected the Tribunal, would want to give very special weight to the parties' expectations as a matter to take into account in deciding what to do, most obviously because there has to be good reason for upsetting commercial certainty and the expectations of the players in the market.

So, Sir, yes, weight would transfer to them. One would, therefore, in an appropriate case, have that certainty. But it is precisely because this is a case so far at variance from that – not simply because we are dealing with a term which gives BT untold powers but because I suppose that is not the case. One cannot see it in that way. I come back to the submission one sees it with OFCOM's dispute resolution procedure being an important part of the mix."

253. Pausing there, it is plain that where an agreement or a provision in an agreement is illegal then (simply as a matter of private law) it does not bind the parties and should not be taken into account. Agreements that are lawful are a different matter: here, the agreement is binding as between the parties to it and – as Mr Herberg conceded – should be taken into account as part of the Dispute Resolution Process.
254. We have already held in paragraphs 249 above that paragraph 12 of the Standard Interconnect Agreement confers a right on BT unilaterally to vary charges. The question is whether, as OFCOM contended (see Transcript Day 3, page 16, and Transcript Day 11, pages 38-40), such a wide discretion is one that is so wide as to be given no weight.
255. We have found that paragraph 12 confers a genuine discretion on BT. That being the case, we fail to understand how it can be said that a specific discretion (for instance, a provision in paragraph 12 stating that BT was entitled to impose any form of price, at its discretion, "including ladder pricing") should be entitled to greater weight than a clearly formulated, broad, discretion. The parties to an agreement are entitled to expect that their agreements be given due weight – whether the provision in question is a specific one or whether it confers a broad discretion or power. The specificity of the provision will be relevant in

determining whether the provision is abusive or being abused. For instance, it is difficult to conceive of a provision in an agreement fixing a termination charge for 080 calls at 5,000 ppm (to take a truly extreme example) as being anything other than an abuse. On the other hand, the exercise of a discretion to charge by way of issuing an NCCN may be abusive (e.g. if the NCCN is used to fix a termination charge of 5,000 ppm), but need not be (e.g. if a costs-based charge is levied). We fail to see why, in the latter case, the discretionary provision should be accorded less weight than the non-discretionary provision.

(iv) **Paragraph 18 of the Standard Interconnect Agreement**

256. Paragraph 18 of the Standard Interconnect Agreement provides as follows:

“Each party shall use numbers in accordance with the National Telephone Numbering Plan and shall comply with the numbering provisions in Annex A.”

257. Paragraph 19.1 provides:

“A Party may seek to amend this Agreement by serving on the other a review notice if:

...

19.1.7 either Party reasonably considers that this Agreement or any part thereof is not or has ceased to be reasonable.”

Service of a “review notice” triggers a review of the agreement regulated by paragraphs 19.3 to 19.6.

258. As regards these provisions, O2 contended as follows in its Written Closing Submissions (submissions to the same effect were made orally by Mr O’Donoghue on behalf of O2 at Transcript Day 10, pages 34-35):

“21. Clause 12 of the Agreement determines the terms under which BT may charge MNOs for a BT service or facility. There is a right available to either party under Clause 26 to refer “*Disputes*” between the parties to Ofcom, with “*Dispute*” being defined in Annex D as “*a disagreement between the Parties excluding breaches of this Agreement*”. A dispute relating to the ability of BT to impose a particular set of charges under Clause 12 is therefore referable to Ofcom under Clause 26 of the Agreement, and Ofcom is entitled to approve or disapprove those charges.

22. However, the dispute in the present case turns, in substance, on the level of charges that the MNOs may charge their retail customers. Both sets of parties have proceeded on this basis.

23. It is apparent that the attempt by BT to impose charges with such an aim and determined on such a basis fall outside the proper scope of Clause 12, which clearly relates to charges levied by BT for a BT service, not for charges levied by the MNOs in the retail market. Such an interpretation would clearly be contrary to the intentions of the parties, as derived from the factual matrix and context of the Agreement. The Agreement does not purport to impose any limitations on the prices that MNOs may charge for services to their retail customers. Nor does it confer a right on BT to use its NCCNs to impose a retail price control. Instead, Clause 12 of the Agreement expressly authorized BT to impose charges only for a “*BT service of facility*”. It provides no mandate for BT to seek to limit the prices that MNOs may charge a third party customer in a different market.
24. This interpretation of the Agreement derives support from Clause 18, which states that “*Each Party shall use numbers in accordance with the National Telephone Numbering Plan and shall comply with the numbering provisions in Annex A*”. It is implicit from Clause 19.1.7 (which states that either party may seek to amend the agreement if it *ceases* to be reasonable) that the parties have agreed that Clause 18 is reasonable. There is no doubt that the MNOs have complied with the National Telephone Numbering Plan as regards 08x numbers, and thus with Clause 18. BT seeks to require them to go *further*, insisting that they should also be subject to price limitations for the benefit of consumers.
25. The existence of the express but limited obligation in Clause 18 makes it clear that the Agreement cannot have been intended to encompass such a limitation, since the parties have agreed that compliance with the National Telephone Numbering Plan, but no more, is all that is required as regards retail customers. There is therefore no basis for reading into the Agreement any limitation on the MNOs freedom of action in the retail market, whether by the means of Clause 12 or otherwise.”
259. As we have already noted, the point in paragraph 21 – that a valid agreement between parties can be overridden by the dispute resolution process – is correct, and was considered in Section J above.
260. Apart from this, O2’s point is in essence a repetition of the submission that BT’s NCCNs were a form of indirect charge control. For the reasons given in paragraphs 234 to 238 above, we do not consider that submission to be correct. O2’s submission that BT’s express discretion to fix prices pursuant to paragraph 12 should read subject to a limitation, preventing BT from imposing tariffs that may have an effect on how mobile network operators may themselves price, is – for the reasons we have given – in essence a form of direct price control. We noted earlier (in paragraphs 117 to 125 above) that the decision of a multi-service firm as to price for its services (i.e. how far above incremental cost and how far below stand-alone cost) is a difficult one. The mobile network operators have decided how they wish to price in the case of 080, 0845 and 0870 calls; we

fail to see why BT should not have a similar discretion as regards the tariffs for terminating such calls, where such a discretion is provided for in the Standard Interconnect Agreement.

261. It is not correct to say that paragraph 12 is qualified by paragraph 18. All that paragraph 18 does is oblige BT's contractual counterparties to abide by the provisions of the National Telephone Numbering Plan, which itself (for reasons which we have explored: see paragraphs 61 above) contains no price controls. Mobile network operators are, therefore, free to price as they will; but it does not follow from that that such freedom should inhibit BT in its freedom to price.

(v) **The Standard Interconnect Agreement is imposed on BT's contractual counterparties**

262. This point was briefly stated by Miss Smith (Transcript Day 11, page 82):

“The [Standard Interconnect Agreement] is a relic of BT's historical position as an incumbent monopoly provider. All other communications providers had to enter into an agreement with BT in order to obtain access to, and interconnection with, BT's network. BT still remains the hub through which all access and interconnection is effected, either as the transit provider or as, in this case, the termination provider. Even at the present day, BT has significant market power in a number of markets, even if there is no current finding of SMP in NTS termination. Of course, the Standard Interconnect Agreement covers all of those markets. There is no separate SIA for NTS termination.”

263. It is quite right to say that the Standard Interconnect Agreement applies to BT's services generally, and that paragraph 12 similarly applies to charges generally. The agreement is not confined to the provision of termination of calls to non-geographic numbers, but applies to some services where BT has real market power. But this is precisely why OFCOM has the power to impose SMP conditions – and why, in some instances, that power has been exercised against BT. The important point is that there is no finding of significant market power in the case of BT's termination of non-geographic calls; the fact that BT may have market power elsewhere is wholly irrelevant, and cannot effect the proper construction of paragraph 12.

(vi) **OFCOM's consideration of paragraph 12**

264. OFCOM did not consider, in either of its Determinations, BT's rights under paragraph 12 of the Standard Interconnect Agreement. It did not place weight on BT's rights under that Agreement. Before us, OFCOM contended that, whilst contractual rights might – in certain cases – be entitled to weight, in the case of paragraph 12, BT's "right" was of such a nature that it should be accorded no special weight.
265. It follows that OFCOM failed to take into account, in either of its Determinations, what we have found to be a relevant factor. The consequences of this are considered in Section M below.

V. **BT'S MOTIVATION IN INTRODUCING NCCN 956, NCCN 985 AND NCCN 986**

266. The documentation evidencing BT's consideration and analysis prior to the introduction of NCCN 956, NCCN 985 and NCCN 986 was sparse: essentially, this consideration was set out in two "proposal" documents to BT's Wholesale Executive Board, one relating to 080 calls, and the other to 0845/0870 calls. Since such documentation was requested by OFCOM from BT pursuant to OFCOM's powers under section 191 of the 2003 Act, we accept it as a complete picture comprising all relevant documents, apart from documents that are legally privileged. (Before us, it was uncontroversial that such material was not appropriate for disclosure under section 191. Section 191 says nothing about privilege, and we express no concluded view, but given that clear words are needed to override privilege, it seems unlikely that section 191 does so: Thanki, *The Law of Privilege*, 1st ed (2006), paragraphs 4.73ff.)
267. These documents nowhere identified the sort of reductions in 080, 0845 or 0870 prices to callers that BT contended before us (and before OFCOM during the course of the Dispute Resolution Process) would occur on the introduction of the NCCNs. Rather, such calculations as were contained in the documents appear to have been based on an assumption that the mobile network operators affected by the NCCNs would continue to price at the same level, with the result

additional revenues would flow from the mobile network operators to BT, by reason of the ladder pricing contained in the NCCNs.

268. Before us, it was contended that these documents demonstrated that – when introducing the NCCNs – BT did not anticipate any kind of price reduction, but rather anticipated additional revenue to BT. This, it was suggested, was inconsistent with the case that BT was now seeking to advance.
269. These documents were put to Mr Fitzakerly and Mr Kilburn in cross-examination. Mr Fitzakerly was asked this (specifically, in regard to the documents relating to NCCN 956) by Mr Ward (Transcript Day 3 (Hearing in Private), pages 4-5):

“Q (Mr Ward) ...The suggestion I am making very simply is that the case we are now facing is truly *ex post facto* and entirely inconsistent with what BT was saying at the time?

A (Mr Fitzakerly) Well, I don't think it is inconsistent, the story has moved on an awful long way but I do not think it is inconsistent with our view that we would have preferred MNOs not to be pricing at the rate that they were.”

In re-examination, Mr Fitzakerly said this (Transcript Day 3 (Hearing in Private), page 5):

“Q (Mr Read) ...it was put to you that there was no expectation that the price would fall and I would be quite clear about the chronology of this: at the time that this board paper was going ahead to the Wholesale Board level, what was your understanding of BT's expectation as to what would actually happen?

A (Mr Fitzakerly) We weren't clear, I think, from my recollection of it at that time we were not clear how the MNOs would react, we thought there was a possibility that they would cut their prices since they would not want to give money to BT, so they thought they might as well just cut their prices or they might keep them where they were, we didn't know, we were clear that there were a range of possibilities so that they could react in a number of different ways.”

270. Mr Kilburn was asked about the documents relating to NCCN 985 and NCCN 986 by Miss Smith. During the course of cross-examination (Transcript Day 4, page 23) he stressed that “the information used in this paper is forecast

information. There are so many unknowns...There's certainly no guarantee of those figures ever being realized as a result of this tariff schedule”.

271. We consider that it is very difficult to base any kind of firm conclusion on the basis of the documentation alone, which (as we have said) is sparse. It is true – as was put to the BT witnesses – that the documentation appears to have assumed that additional revenue would come BT's way. But the analysis did not factor in possible changes in the retail pricing behaviour of the affected mobile network operators. Whether this was because BT did not consider this aspect at all, and regarded ladder pricing purely as a source of additional revenue to it, or whether it appreciated that ladder pricing might well induce changes in mobile network operator behaviour, which might have an effect on 080, 0845 and 0870 prices, and so on BT's projected revenues, but which could not be calculated, is difficult to tell from the face of documents. But it seems unlikely that an organisation that conceived of ladder pricing would have been wholly unaware of the possibility of those affected by such pricing moving to a different rung.
272. We accept the evidence of the BT witnesses that matters were simply too uncertain at this time for BT to formulate any kind of detailed projection as to what the mobile network operators would do if the NCCNs were issued, and that the proposal documents were simply suggesting that revenue to BT might increase by “up to” a certain amount if mobile network operator prices remained unchanged. We do not consider that these documents constitute evidence suggesting that BT believed that this was the inevitable or even the probable outcome of imposing the NCCNs.
273. Having set out our conclusions on the evidence, we turn to the question of its relevance. OFCOM did not consider this in the 080 Determination or in the 0845/0870 Determination, and before us submitted that what BT thought at the time of the introduction of the NCCNs was essentially irrelevant (Transcript Day 3, page 2):
- “The case that is put to the Tribunal has to be assessed on its own merits, and it is absolutely not the case that this is an investigation of motivation at the time. If there is an *ex post facto* justification, we fully accept and address the Final Determinations on the basis that it must be looked at on its merits. But it is right that looking on its merits at abstract theoretical predictions for the future, one straw that one can grasp at is BT's actual contemporaneous expectation of what it would do.”

274. We agree with OFCOM. The question for OFCOM – and now for us – is whether the NCCNs satisfy whatever is the correct legal test for their introduction. We consider that that test must be an objective one, and that BT’s subjective motivation (whatever it may have been) in introducing the NCCNs is essentially irrelevant. BT may have been seeking “revenue share” with the mobile network operators in respect of the 080, 0845 and 0870 call revenues, or it may have been seeking to cause the prices for these calls to fall. Or, in an altogether more broadbrush way, BT may have been seeking to introduce measures which – one way or the other – would correct or somehow adjust what BT regarded as a market failure in the context of 080, 0845 and 0870 retail prices.
275. It was common ground that the detailed analysis into the likely effects of the NCCNs (in particular, the work carried out by Professor Dobbs) was carried out after this documentation was produced. It was suggested that the fact that BT had reached the opposite conclusion to Professor Dobbs was significant in undermining the analysis of Professor Dobbs. As we have noted in paragraphs 271 and 272 above, we do not consider that this is what the documents in fact mean. But even if that were wrong, the lack of detailed analysis in these documents could in no way undermine Professor Dobbs’ work or provide significant evidence as to the likely effect of the introduction of the NCCNs. Matters might have been different if the documentation in support of the introduction of an NCCN contained particularly compelling economic analysis. But that was certainly not the case here. The analysis was next to non-existent.

VI. REGULATORY OBLIGATIONS AND DUTIES

276. We have described the regulatory framework within which mobile network operators set their retail prices for non-geographic calls and within which BT sets its termination charges for such calls in Section E above, and we have noted that neither the mobile network operators nor BT are constrained in their pricing by any form of regulatory obligation imposed upon them. Indeed, this was one of the reasons why we rejected EE’s and O2’s contention that OFCOM’s

approval of ladder pricing was unlawful because it was a form of indirect price control (see paragraphs 234 to 238 above).

277. We would only say this in addition: we regard the presence or absence of a power to regulate by condition, and the fact that that power has, or has not, been exercised, as highly material. (Of course, the Dispute Resolution Process is itself a form of regulation, and in resolving disputes, OFCOM is acting as a regulator and not simply as an arbitrator.) But, essentially, the point is this. Where a power to regulate by rule or condition does not exist, or does exist, but has not been exercised, then it must be asked why this question should be revisited through the Dispute Resolution Process. The power to regulate by rule or condition is curtailed for a reason, and it is our view that this is something that OFCOM needs to take into account in the Dispute Resolution Process. A “regulatory absence”, of this sort is an important indicator, for the purposes of the Dispute Resolution Process, suggesting that a price set by a communications provider should not be interfered with. This is a matter that we consider further in Section M below.
278. Although OFCOM was clearly, and unsurprisingly, aware of the regulatory framework within which it, BT and the mobile network operators operated, and although it was clearly aware of how these powers had – and had not – been exercised, it does not appear to us that OFCOM adequately considered the significance of the fact that (both in the case of BT as regards termination charges for 080/0845/0870 numbers and in the case of the mobile network operators as regards price control over retail charges in respect of these numbers) no price control had in fact been imposed.
279. It follows from what we have said that OFCOM failed to take into account, or failed sufficiently to take into account, in either of its Determinations, what we have found to be a relevant factor. The consequences of this are considered in Section M below.

VII. A WELFARE ASSESSMENT

(i) Introduction

1. The meaning of “welfare assessment”

280. By “welfare assessment”, we refer to an assessment of the economic effects of the introduction of the NCCNs, and whether these economic effects will be beneficial or otherwise. Such an assessment is inherently complex. We consider that such an assessment involves four main stages of analysis:

- (1) *A determination as to whose economic interests need to be taken into account.* Clearly, before any kind of welfare assessment can be carried out, it is necessary to define with sufficient precision whose interests are to be taken into account. In the Determinations, OFCOM considered the interests of callers and call recipients, and no-one else. BT contended for a far wider range of persons’ interests to be taken into account.
- (2) *An identification as to what the relevant effects are.* Having ascertained whose economic interests are relevant for the purposes of a welfare assessment, it is then necessary to consider how those interests might be affected by the introduction of the NCCNs. In this case, OFCOM identified three relevant effects – the Direct Effect, the Indirect Effect and the Mobile Tariff Package Effect.
- (3) *Assessing the relevant effects.* Having ascertained which economic effects are relevant, it is necessary to assess precisely what those effects are.
- (4) *Weighing the effects.* To the extent that there are several relevant effects, but pointing in different directions, it is necessary to determine how these effects are to be weighed one against the other.

The process, in short, is a complex one, and much of the evidence before us went to this part of OFCOM’s assessment.

281. Stages (1), (2) and (4) involve not only economic analysis, but also questions of law and policy. Insofar as questions of policy arise, we consider that the approach we described in paragraph 230 above pertains. Indeed, there is a very close nexus between OFCOM’s policy preference (considered in paragraphs 203 to 217 above) and the welfare analysis that is appropriate in the light of that

policy preference. One, inevitably, is affected by the other. Thus, had OFCOM decided that, as a matter of policy, a cost orientated or cost reflective approach was appropriate, the analysis that we consider below would have been, in many respects, an inappropriate and irrelevant one. However, OFCOM considered that the approach should be displaced by the different approach that we have articulated in paragraphs 163 to 169 above. This approach, of course, has rendered relevant the analysis we consider below.

2. *A summary of OFCOM's approach to welfare assessment*

282. Before considering the four stages in detail, it is appropriate to summarise the parties' various positions. OFCOM considered that the persons whose economic interests were relevant for the purposes of the welfare assessment were first, callers, and, secondly, the recipients of calls. (There was a subsidiary question as to whether OFCOM only considered relevant the interests of callers and call recipients who were natural persons, or whether these classes extended to legal persons.) As between the parties, OFCOM identified three "effects". First, the Direct Effect, which concerned the effect the NCCNs had on the retail price paid by the caller of the 080, 0845 or 0870 number (as the case might be). Thus, if the Direct Effect was upward relative to the *status quo* (i.e. the retail prices for 080, 0845 and/or 0870 numbers increased as a result of the NCCNs), then this would be a disbenefit to callers. Obviously, if retail prices remained the same, the Direct Effect would be neutral. If retail prices fell, then this would be a benefit to callers.

283. OFCOM recognised that there was a distinction between the retail prices of 080, 0845 and/or 0870 numbers falling to below the first step of the pricing ladder, and retail prices falling to a level on the ladder. In each case, the price for calls that is paid by callers falls: the difference is that in the former case – where prices fall to below the first step on the ladder – BT receives no additional revenues for terminating the calls, whereas in the latter case, BT is paid additional amounts because the ladder pricing becomes engaged. OFCOM distinguished between these two scenarios, calling one the "full reduction" scenario, and the other the "partial reduction" scenario.

284. In the case of the partial reduction scenario, clearly there is a benefit to BT, because additional revenues are received by BT. OFCOM discounted such benefit, and only counted it if:

- (1) The additional revenues found their way to the call recipient/service provider; and
- (2) Those additional revenues were used to improve the service to callers.

In such circumstances, there was an effect that OFCOM took into account, which it referred to as the Indirect Effect. OFCOM's approach is described as follows in the 0845/0870 Determination:

“9.27 Charges applicable under NCCNs 985 and 986 may have positive Indirect benefits for consumers, in that the additional revenues generated by BT will be available to improve BT's hosting services or passed through over time to 0845/0870 service providers to improve their service to callers. We consider that there may be sufficient competitive pressure on BT to ensure that some benefits are passed on over time to [service providers]. There is likely to be a delay before such competitive pressure may be realised which [terminating CPs] make changes to their billing systems and processes, and while contracts with [service providers] are re-negotiated.

9.28 However, for consumers of 0845/0870 calls to benefit from the Indirect effect, it is also necessary that [service providers] improve the availability or quality of the services that they offer. It is not clear that this will necessarily occur because many [service providers] are likely to have chosen these number ranges in large part due to the call price they expect OCPs to offer, not because of revenue share. Our conclusion in respect of the Indirect effect is, therefore, that whilst there may be sufficient competitive pressure on BT to ensure that some benefits are passed on over time to SPs, it is not clear that callers to 0845/0870 numbers will necessarily benefit.”

285. It was accepted by all that the Direct Effect would provoke a response in terms of mobile network operators' general pricing, in the form of the Mobile Tariff Package Effect. Since OFCOM concluded (and, as will be seen, we agree) that the Direct Effect would cause a downwards movement on the prices paid by callers for 080, 0845 and 0870 calls, the Mobile Tariff Package Effect would in practice cause an upward movement in mobile tariffs generally. Thus, for instance, in response to the Direct Effect full reduction scenario, the mobile network operators might receive less revenue from callers, and might seek to recover that shortfall by raising the prices for other services offered by them. Similarly, in the case of the Direct Effect partial reduction scenario, mobile network operators again might receive less revenue from callers, and

additionally would have to pay more to BT to terminate calls. Again, they might seek to recover that shortfall by adjusting upwards their prices in respect of other services offered by them.

286. The Mobile Tariff Package Effect is obviously a disbenefit to callers generally, although the extent of the effect was a matter of controversy. It must be noted that, whilst the Mobile Tariff Package Effect might offset the Direct Effect, it only does so when considering callers globally. In other words, the effect on individual callers would vary according to their habits. Callers who did not use 080, 0845 or 0870 numbers would pay more, whereas frequent users of 080, 0845 or 0870 numbers would find this increase offset by the tariff reductions in these numbers. The vast majority of calls made are geographic calls: in paragraph 324 of Myers 2, Mr Myers noted that “there were 118 billion mobile voice call minutes in 2009, which is more than 90 times larger than the 1.3 billion minutes of mobile-originated calls to BT’s 0845/0870 numbers”, and the Flow of Funds Report suggests that calls to 080 numbers are not out of line with these figures. A large decrease in the price of 080/0845/0870 calls would only result in a small increase in the price of geographic calls to offset this. Of course, quite what prices the Mobile Tariff Package Effect might affect turns on the pricing choices of mobile network operators.

287. OFCOM took the view that the benefit of reductions in 080, 0845 and 0870 prices exceeded the disadvantage of corresponding increases elsewhere in mobile package prices. OFCOM thus attached greater weight to the Direct Effect than to the Mobile Tariff Package Effect. OFCOM regarded the “re-balancing” of tariffs between 080, 0845 and 0870 callers on the one hand, and other callers on the other, as a desirable one.

3. *BT’s and the mobile network operators’ objections*

288. Both BT and the mobile network operators had objections to OFCOM’s approach. BT contended that the Indirect Effect had been too narrowly circumscribed, and that an increase in revenue to – for example – BT was a relevant benefit to be taken into account in the welfare analysis. This question is

really a question of whose economic interests need to be taken into account, and is accordingly considered as part of Stage (1) of the welfare assessment.

289. The mobile network operators contended that it was wrong to attach unequal weight to the Direct Effect and the Mobile Tariff Package Effect. This issue is considered as part of Stage (4) of the welfare assessment.

(ii) **Stage (1): whose economic interests need to be taken into account?**

1. *OFCOM's approach*

290. OFCOM contended that the persons whose economic interests were relevant for purposes of welfare analysis were callers and call recipients. In paragraph 4.21 of the 0845/0870 Determination, OFCOM stated:

“...there are two types of consumer relevant to this Dispute: the caller at the originating end of the call (the customer of the [originating CP]) and the call recipient at the terminating end (the [number translation services service provider], which is the customer of the [terminating CP]). Both types of consumer are relevant to meet our statutory duties, and hence we need to consider the impact of the NCCNs 985 and 986 in relation to both...”

291. Precisely the same approach was taken in the 080 Determination (see paragraph 4.6).

2. *A distinction between consumers as natural persons and consumers as legal persons*

292. BT contended that OFCOM had, in the Determinations, drawn a distinction between natural persons on the one hand (or “human” consumers) and legal persons on the other (which class would comprise both human consumers and legal persons like corporations).

293. We do not consider that such a distinction was drawn in the Determinations, which refer to “consumers” without making the distinction between natural and legal persons.

294. Paragraph 16.3 of OFCOM’s Opening Skeleton Argument did, however, introduce the possibility of confusion, and did enable BT to assert (in paragraph

47 of BT's Closing Submissions) that "Ofcom certainly appeared to assert that it was entitled *"to prefer the interests of (human) consumers over those of service providers"*". It is important to have regard to the whole of OFCOM's paragraph 16.3, which states:

"...This appeal, if determined on certain bases, may have an impact on whether "ladder" pricing is, at least in principle, acceptable on other number ranges, or even in fixed-to-mobile calls. There would certainly be substantial public interest implications if some of the parties' more extreme submissions were accepted. Examples include EE's submission that Ofcom is not permitted to determine wholesale pricing disputes on the basis of whether the parties' positions would have desirable outcomes for retail pricing, and BT's arguments that Ofcom is not entitled to prefer the interests of (human) consumers over those of service providers such as banks..."

295. What is very clear from this is that OFCOM was certainly not saying that a distinction was being drawn between human and non-human callers in the Determinations. The distinction between "(human) consumers" on the one hand, and "service providers" on the other is an unhelpful one, and it leaves in limbo that class of caller that is a legal and not a natural person. But we do not consider that this unhelpful distinction is one which was drawn in the Determinations.
296. For the avoidance of doubt, we should say that any distinction being drawn between "human" and "non-human" consumers would have to be carefully justified. Section 3(1)(a) of the 2003 Act refers to furthering "the interests of consumers in relevant markets", and draws no further distinction. It may be that such a distinction could be defended in an appropriate case; but we doubt very much whether this is that case. However, given the conclusion that we have reached, this is a point that we do not need to explore any further.

3. *BT's suggested approach: "total welfare"*

297. As we have noted, BT contended that the interests of an altogether wider group of people should be taken into account as part of the welfare analysis. BT contended that the relevant economic interests were far wider than those that had been considered by OFCOM. Thus, in paragraphs 125-126 of its Notice of

Appeal in the 0845/0870 Determination, it was contended (speaking of the partial reduction scenario) that:

“125. The point which Ofcom has ignored is that if profits are transferred to BT because MNOs keep their prices the same and incur additional termination charges, the profit lost by the MNOs will inevitably go somewhere else. As Professor Dobbs explains, this will be:

“either through negotiated benefits to SPs and SP service provision or to other stakeholders; for example, through increased investment in new services benefiting BT customers, increased dividends to shareholders, lower prices to BT’s customers, changes in tax revenues to the Government and so on”

126. Professor Dobbs goes on to demonstrate that the offset is likely to be 100%. Further, without any compelling evidence to the contrary, this should be treated simply as a revenue transfer and as welfare neutral, so that the MTPE and the effects on the other side of the equation are in fact *“mutually cancelling”*. Ofcom was wrong to regard the overall impact of waterbed and MTPE effects as likely to be welfare adverse, and to ignore benefits to other stakeholders in BT. Ofcom’s cost benefit analysis is therefore incomplete. Professor Dobbs states:

“As far as I can see, these latter benefits are completely disregarded by Ofcom. Whilst it is common for regulators to tend to focus on particular affected parties when measuring welfare changes, this does not make it right; ignoring other affected parties does not fit well with normal cost benefit analysis principles.”

298. The same point was made by Professor Dobbs (in paragraphs 45-47 of Dobbs 6) and in paragraphs 48 and 106-109 of BT’s Closing Submissions. In cross-examination, Professor Dobbs made clear that “I don’t particularly advocate total welfare without any qualifications” (Transcript Day 7, page 70); more importantly, he made clear that the question as to whose interests should be factored into a welfare analysis was a value judgment:

“What I am doing is saying that in the final analysis one can almost make value judgments about the weighting that one wishes to put on monies going to different individuals, and indeed weightings on the different sources of money. It’s possible to do that, but in my opinion, if money goes into an individual’s pocket it is quite hard to make a distinction as to the source...”

299. We agree with Professor Dobbs’ statement that, in the final analysis, one is here concerned with value judgments, and that in this case, such value judgments are informed by two things:

- (1) *OFCOM’s statutory duties*. Section 3(1) of the 2003 Act requires OFCOM “to further the interests of citizens in relation to communications

matters” (section 3(1)(a)) and “to further the interests of consumers in relevant markets” (section 3(1)(b)). Article 8 of Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (“the Framework Directive”, a part of the EU’s Common Regulatory Framework) refers in Article 8 to “users”. None of these terms is in any way supportive of a “total welfare analysis”. Rather, they make clear that OFCOM, as the national regulatory authority in the UK, is actually meant to have regard to the interests of very specific classes of person. Whatever the terms “citizen”, “consumer” or “user” may mean, we do not consider that they extend so far as to embrace BT in its capacity as the terminator of 080, 0845 or 0870 calls. In our view, the more natural designation of BT is as a communications provider.

- (2) *OFCOM’s policy preference.* Clearly, OFCOM’s policy preference will be informed by its statutory duties, including section 3(1) of the 2003 Act. In this case, OFCOM’s policy preference was that 080 calls ought to be free to the caller, and if they are not free, that they are as close to free as possible; and that 0845 and 0870 calls should be charged at or as close as possible to each originating operator’s local (in the case of 0845 calls) or national (in the case of 0870 numbers) rates. We consider that BT’s “total welfare” approach is not consistent with this policy preference. It involves taking into account interests which derogate from the interests of those whose interests deserve most weight, that is to say those callers and call recipients, the users of the system. Take the partial reduction scenario: the price of calls to 080, 0845 and 0870 numbers will fall by virtue of the Direct Effect. But the Mobile Tariff Package Effect will tend to cause prices to other callers to rise, partly because of the loss of revenue to mobile network operators, but also because of the increase in BT’s termination charges, creating additional revenue to BT. We fail to see why this additional revenue to BT should be regarded as a benefit in these circumstances.

300. For the reasons we have given in paragraphs 228 to 230 above, we consider that this Tribunal should only overrule a decision of OFCOM regarding policy preference if it is wrong. Even if BT’s approach had been a viable alternative

analysis (which we do not consider it to be), we would have accorded OFCOM's approach on this point a "margin of appreciation". In this case, however, we have no doubt that it is BT's total welfare approach that is wrong, and that OFCOM's caller/call recipient approach is correct.

(iii) Stage (2): the relevant economic effects

301. As we have noted, OFCOM considered three factors to be relevant when conducting its welfare assessment – the Direct Effect, the Indirect Effect and the Mobile Tariff Package Effect. Although both BT and the mobile network operators had issues with OFCOM's approach in its welfare assessment, no-one took issue with these aspects of OFCOM's approach as a matter of general principle. There was, however, a great deal of debate and dispute as to the precise nature and extent of these effects. It is to this that we now turn.

(iv) Stage (3): assessing the economic effects

302. We should stress, at the outset, that in assessing the nature and extent of the Direct Effect, the Indirect Effect and the Mobile Package Tariff Effect there was a distinct lack of reliable empirical evidence. For the most part, the expert economists who gave evidence before us had to rely on theory, and could not buttress their theory with supporting data. There was some evidence from various communications providers as to what they would have done, had the NCCNs actually been introduced. The problem with this evidence is that it, too, was highly speculative in nature.

1. *The Direct Effect*

303. The Direct Effect describes the extent to which the retail price paid by the callers of (as the case may be) 080, 0845 or 0870 numbers will go up, down or stay the same as a result of the imposition of the NCCN applicable to that particular call type.

304. BT's contention was that – in the case of each NCCN – that NCCN would induce a reduction in the retail price paid by callers for that type of call. That

reduction might, as we have described, be either “total” or “partial”. These terms were generally used by all the parties before us, and we will use them here. But they are actually not very helpful terms. A total reduction suggests that the caller is paying nothing at all, but that is not what the term means. What it means is that the price paid by the caller is below the lowest rung of the ladder, so that the additional charge imposed by BT does not bite. Partial reduction refers to the case where, although there is a reduction in the retail price paid for a particular call type, that reduction in price is not sufficient to bring the price paid by the caller to below the lowest rung on the ladder, and instead causes a higher termination charge from BT to arise. In short, the price falls to one of the rungs of the ladder, or one of the steps of the charging scheme.

305. BT’s contentions were based upon a model developed by Professor Dobbs, which was explained and defended by him in his various reports and in his oral evidence to the Tribunal. Before considering Professor Dobbs’ model, two points need to be made:

(1) First, as Mr Read quite rightly stressed to us (Transcript Day 1, page 59), “no modelling can ever be more than an abstraction of what is actually happening, and therefore it is necessarily going to involve some simplifications”.

(2) Secondly, Professor Dobbs’ modelling was described almost exclusively in mathematical terms. No-one challenging the model took issue with the mathematics – indeed, the model received more praise than criticism in this regard. Dr Walker referred to Professor Dobbs’ modelling as follows (Transcript Day 9, page 18):

“The modelling is not flawed in any technical sense. The modelling is, I would not say “beautiful and elegant” because that would make me very nerdy. The modelling is, in general, absolutely fine.”

Rather, it was certain assumptions, that Professor Dobbs had been obliged to make, due to the lack of empirical evidence, which were the subject of close examination. This fact means that, for the purposes of this Judgment, it is possible (at least to a large extent) to avoid the algebra

(which was essentially uncontentious) and to focus on the assumptions underpinning the algebra (which were very far from uncontentious).

306. Professor Dobbs' model began with an assumption which, although perhaps trite, it is necessary to articulate. The assumption is that mobile network operators (and, indeed, other communications providers) are profit maximisers. Thus, in paragraph 17 of Dobbs 3, Professor Dobbs articulated one of the assumptions of his model as being that "MNOs aim to maximise profits, both before and after the change in wholesale price structure". We consider that this assumption is a well-founded one, and it was not seriously challenged by the other parties.
307. From this assumption flows the test for each NCCN: if the NCCN were to be imposed, would the profit maximising price for the particular call number to which the NCCN applies be lower than the present price, as a result of the NCCN's imposition? In other words, does the NCCN incentivise a reduction in retail price?
308. It is obvious that there is a link between the price charged to callers for calling 080, 0845 or 0870 numbers and the price charged to originating CPs for terminating such calls. As Professor Dobbs noted on page 1 of Dobbs 2, where a wholesaler increases his wholesale price, that increase will create an incentive on the retailer to increase his retail price as a consequence. On the other hand, were the wholesale price to increase with the retail price, this would create an incentive on a retailer not to increase his retail price, and perhaps to lower it. Suppose, for example, a pricing structure whereby any change in the price to callers resulted in a change twice as big in the price to terminate the call (e.g. for 1 ppm increase in the price for a call, the termination price would increase by 2 ppm; and for a 1 ppm decrease in the price for a call, the termination price would decrease by 2 ppm). The incentives are obvious. As Professor Dobbs noted at page 5 of Dobbs 2:

"...suppose BT were to choose to move to a positive constant wholesale price (for example, a move from zero to 5ppm). The consequence of this is that all MNOs would be motivated to increase price, typically by an amount somewhere in the range 0-5ppm. This is because a monopolist typically shares a cost increase with its customers. An increase in a constant wholesale price means an increase of this amount in the MNOs overall marginal cost, so a part of this will be passed on to customers via the retail price. By contrast, if the wholesale price schedule is

increasing (rather than constant), this dis-incentivises the MNOs increase in price. This is because any increase in price now increases the wholesale price that the MNO has to pay on all the quantity of calls purchased and sold. If the gradient of the wholesale tariff is sufficiently large, this effect neutralises the incentive to increase retail price, and may even incentivise a reduction in retail price.”

309. Put in such a general way, the point is obvious. The crucial question is whether a termination price structure designed to create an incentive not to increase prices to callers or even to create an incentive to reduce prices to callers is sufficient to achieve that end. It is not enough simply to consider the termination price structure: a number of other factors are relevant and must be taken into account in determining the answer to this question.
310. These factors are considered in paragraphs 303 to 367 below. Before we consider these, however, there is one complication arising out of the present NCCNs that should be dealt with first. The tariffs contained in the NCCNs are not continuous, but stepped. Thus, by way of example, in the case of NCCN 956 (applying to 080 numbers), a 2 ppm increase is payable if the retail charge is 8.5 ppm or greater until 12.5 ppm is reached, when the increase becomes 4.5 ppm. Because the termination price does not increase within a step, there is an incentive for an MNO to increase prices up to the foot of the next step.
311. The reason this approach was taken was to enable mobile network operators to avoid providing to BT a specific statement as to their average retail price, which might be commercially sensitive. However, the approach taken by the NCCNs does mean that within each step the incentive structure created by the NCCNs does not operate. Thus, the question is whether the increases in termination prices will cause MNOs to reduce their price to callers so as to cause them to move to a particular (lower) step (see page 10 of Dobbs 2). Professor Dobbs put the point very clearly in paragraph 13 of Dobbs 3:

“...there is also a step to the right which features a higher wholesale price, and a step to the left, which features a lower unit wholesale price. It follows that the MNO is unlikely to wish to raise price beyond the point that would trigger the next higher price step, and has an incentive to reduce the retail price in order to get to a lower step and pay a lower wholesale price. The question then is – which of these is the bigger incentive?”

312. As Professor Dobbs noted (in paragraph 19 of Dobbs 3), the question is whether the mobile network operators will have a financial incentive to “walk down the

steps”. This depends in part of the pricing structure contained in the NCCN and on the other factors considered below. Again, to quote from paragraph 14 of Dobbs 3:

“...whether the MNO chose to increase its retail price or decrease it depends on the details of the step function – the vertical height of the steps and the horizontal distance to the next step...if there are enough steps, and the steps are appropriately chosen, it could be the case that MNOs all face an incentive to reduce prices...”

313. In order to determine whether an NCCN will have this effect it is necessary to assess how the profits to a mobile network operator on its 080, 0845 or 0870 calls will be affected by the (hypothetical) imposition of the NCCN. Profit is a firm’s total revenue (*TR*) less total variable (*VC*) and fixed costs (*FC*). Defining *p* as the price of the product (here the price of the call, measured in ppm) and *q* as the quantity of the product (number of minutes) that is sold at price *p*, *TR* obviously comprises *p x q*. Substituting *TR* for *p x q*, a firm’s profit can be assessed by use of the following formula:

$$\text{Profit} = (p \times q) - VC - FC.$$

314. The price charged for a call *p* and the number of calls made *q* are not, however, independent of each other. They are linked, and this link can be expressed in a “demand curve”, which is a graphical representation of the relationship between price *p* and quantity sold *q*.
315. A simplifying assumption with respect to the demand curve that was employed by Professor Dobbs, which was not challenged (and, indeed, appeared to be supported by such empirical evidence as there was), was articulated on page 4 of Dobbs 2:

“It is assumed that MNOs at the retail level face a downward sloping demand for the services but there are no significant spill-over effects on other MNOs. That is, if retail price is increased, it is assumed that users make less use of the service but users are not motivated to switch to other MNOs solely because of differential prices for 0800 numbers – they primarily stop using the service or substitute to fixed line access to these services...”

316. This is an important assumption. Professor Dobbs is postulating the usual downward-sloping demand curve for 080, 0845 and 0870 calls: in other words, where price *p* rises, the demand for calls (expressed as quantity *q*) falls. What is assumed not to occur is for a customer of a mobile network operator to decide –

because of an increase in the price of 080, 0845 or 080 calls – to change supplier and move from one mobile network operator to another. This is an assumption that we return to in paragraphs 337 and 338.

317. The responsiveness of quantities to prices on the demand curve is usually represented by the elasticity of demand. This elasticity measures the ratio between the proportional change in quantity q demanded and the proportional change in price p . Elasticity, being the product of ratios, is independent of the units in which the variables are measured. The formula is:

$$\text{Elasticity } e = \frac{\% \text{ change in quantity } q}{\% \text{ change in price } p}$$

318. This price elasticity of demand is often measured as the percentage change in quantity q following a 1% increase in price p . To quote from Niels, Jenkins & Kavanagh, *Economics for Competition Lawyers*, 1st ed (2011) pages 34-35:

“A more commonly used measure is the price elasticity of demand. This represents the percentage change in quantity following a 1% increase in price. An elasticity of -2 means that a 1% change in price leads to a 2% fall in demand. Price elasticity can also be described as the percentage change in quantity divided by the percentage change in price. So, if a 10% price increase results in a 20% fall in demand, the elasticity is again -2. If a 10% price increase results in only a 3% fall in demand, the elasticity is -0.3. More accurately, this measure should be called the own-price elasticity of demand, as it relates the demand for a product to changes in its own price...Note that the own-price elasticity of demand is usually negative, since price and demand move in opposite directions (in Chapter 1 we said that ‘Veblen goods’ are the exception to this norm – they are more in demand as they become more expensive.)”

319. Elasticity of demand can be illustrated by the following example. Suppose at 40 ppm, a mobile network operator sells 1,000 minutes of 080 calls; but that at 10 ppm, the quantity sold is 10,000 minutes. The percentage change in quantity q is +900% for a percentage change in price of -75%. The price elasticity of demand is thus -12 (i.e. 900 divided by 75), a highly elastic figure.
320. A profit maximising firm will choose that price p (which will inform the quantity sold q) such that the excess of revenue over costs is as great as possible (i.e. profit is as large as possible). On a unit-by-unit basis, if any unit of production adds more to revenue than it does to cost, then producing and selling that unit will increase profits. A unit of production raises profits if the marginal revenue (MR) obtained from selling it exceeds the marginal cost (MC) of

producing it. Thus, the condition that needs to hold for a profit maximising level of output is that it generates a situation where $MC = MR$.

321. MR indicates by how much total revenue changes as one extra unit is sold or price p is changed. How MR changes with price or output is determined by the elasticity of demand. If demand is perfectly inelastic (i.e. the demand elasticity is zero), the mobile network operator could sell the same number of calls, irrespective of price. For example, suppose, no matter what the price, a mobile network operator can sell 1,000 minutes of 080 calls. It obviously makes sense to sell at the highest possible price (e.g. 1,000 minutes at 100 ppm brings in £1,000, whereas 1,000 minutes at 10 ppm brings in only £100).
322. However, in general one would not expect the demand elasticity to be zero, and if it is not, the profit maximising outcome may well be different. In paragraph 319 above, we referred to an example where there was an elasticity of -12 (where demand is very elastic). In this case, if the mobile network operator can sell 1,000 minutes of 080 calls at 40 ppm, this will generate revenue of £400; whereas by pricing at 10 ppm, the quantity sold will be 10,000 minutes, generating revenue of £1,000. Thus, leaving (as we do), costs on one side, the mobile network operator will, in this case, clearly prefer the lower price to the higher.
323. On the cost side of the equation, the evidence before us entailed further assumptions. Thus, it was assumed that FC would be unaffected by the introduction of the NCCN. As a constant, it can then safely be discounted. We do not consider it further, and fixed costs did not feature in the economic analysis before us.
324. Professor Dobbs also assumed MC to be similar across mobile network operators and invariant with output (page 6 of Dobbs 2; paragraphs 15, 17 and 31 of Dobbs 3). This latter point means that marginal cost equals average cost ($MC = AC$), and as such $p - MC$ will indicate marginal or unit profit. Thus, supposing a mobile network operator sells 080 calls at a retail price of 20 ppm, a marginal cost of 5 ppm would leave a marginal profit of 15, whereas a marginal cost of 1 would leave the MNO with a marginal profit of 19.⁵

⁵ It is to be stressed that the profit here is simply the profit per unit, i.e. per minute sold.

325. The marginal cost of an additional minute's call was the subject of some controversy before us. The evidence before us was as follows:

(1) In Dobbs 3, Professor Dobbs noted:

“28. I should mention a point that was relevant to both my initial work and my subsequent modelling for this report. The central element that determines whether MNOs have an incentive to increase or decrease price is the marginal cost of an 080 call. This rather turns on whether there is excess capacity (in which case short run marginal cost is essentially zero) or whether, because of network demand growth, the relevant cost is a long run marginal cost figure. Given the concern is with increases in retail prices (and hence reductions in calls), one might argue a case for a marginal cost of zero. However, if there is enough demand growth in general, one might make a case for a higher long run figure.

29. A discussion with network engineers suggests that the assessment of marginal cost is often complex, being complicated by large elements of common costs and/or fixed costs. I am advised that virtually no cost is specific to 080 calls and many costs are not primarily call volume driven. I am advised that a figure of between 0 ppm and 2 ppm is probably realistic for true marginal cost. It was suggested that MNOs would likely claim a higher figure, but a figure of less than 5 ppm would be regarded as an absolute maximum giving the maximum plausible benefit of the doubt on ambiguous fixed and/or common costs.

30. However, to ensure the correctness of the modelling, I considered the position if the marginal cost was as high as 5 ppm. This seemed to me a very conservative assumption since Ofcom itself in its preliminary determination (later confirmed in the Determination) considered that “*the efficient costs of originating 080 calls is unlikely to exceed 5ppm*” (and these costs would not be entirely marginal costs). Even if marginal cost is set as high as 5 ppm, there are still incentives to move down the wholesale ladder, although the higher the marginal cost, the weaker the incentive becomes...”

(2) Thus, Professor Dobbs' figure of 5 ppm was a *maximum* and highly conservative figure. As paragraph 29 of Dobbs 3 made clear, Professor Dobbs' view was that the marginal cost of a call (and, of course, in terms of originating a call, there can be no difference between an 080 call and any other type of call) lay between 0 ppm and 2 ppm.

(3) Mr Pratt regarded 1.9 ppm as “quite a conservative estimate for the marginal costs” (Transcript Day 6, page 35), and did not balk at the possibility of marginal costs being as low as 0.5 ppm (Transcript Day 6, page 35).

(4) Dr Walker's evidence was similar (Transcript Day 9, page 19):

- “Q (Mr Read)** The point is though that certainly now we know that the 1 to 5 ppm marginal cost figures are actually likely to be the wrong range, do we not?
- A (Dr Walker)** Yes, there is good evidence that marginal costs are towards the lower end of that range, absolutely.
- Q (Mr Read)** Under 1 ppm?
- A (Dr Walker)** No, I am afraid I would disagree with that, but that is a different dispute.”

326. In the present case, as we have noted, it is assumed that the mobile network operators act as profit maximisers, on the basis of the simplifying assumptions we have described. To do so, they choose a price p that results in a quantity sold q such that $MC = MR$.

327. We can now turn to the effect of BT's NCCNs. The NCCNs introduce an additional variable cost to be borne by the mobile network operators. The effect of this is best demonstrated by a simple example. Suppose that where prices to callers exceed 20 ppm, the cost of terminating those calls goes up by 80 ppm. We shall assume that, apart from this termination charge, MC is 5 ppm. Thus, up to a call price of 20 ppm, MC is 5 ppm; thereafter, it is 85 ppm. We are interested in how that extra cost will affect the call price charged by the mobile network operator. Assuming perfectly inelastic demand, the table below indicates how output and profit will vary according to the price charged. It is clear that the profit-maximising mobile network operator will not sell at just above 20 ppm. At this price, a loss is made, whereas a profit can be made at all the other prices shown on the table. In this example – assuming perfectly inelastic demand – the profit-maximising price of calls is either 100 ppm or 20 ppm.

Call price p (ppm)	100	20.1	20	10
Quantity q sold (minutes)	1,000	1,000	1,000	1,000
MC (before the change in termination cost in ppm)	5	5	5	5
Profit (per minute sold⁶, in £) i.e. $q(p - MC)$	950	151	150	50
MC (after the change in termination cost in ppm)	85	85	5	5
Profit (per minute sold, in £) i.e. $q(p - MC)$	150	-649	150	50

328. Whilst it may safely be said that demand for 080, 0845 and 0870 calls is neither perfectly inelastic nor perfectly elastic, the problem is that there is little empirical evidence as to what the demand elasticity for 080, 0845 or 0870 calls actually is. It is not possible to say, with any degree of confidence, what the demand curve for 080, 0845 or 0870 calls looks like, nor what the price elasticity of demand is for different prices. Thus, changes in the amount sold q cannot precisely be related to changes in price p . Going back to the example in paragraph 319, whereas it may safely be said that quantity q will increase as price p falls (and *vice versa*), the amount of that increase is not known. In the example above, it may safely be said that assuming perfectly inelastic demand, the mobile network operator will be neutral as between 100 ppm and 20ppm, but if that assumption is set aside, then the mobile network operator will be better off selling at 20ppm (even if demand is relatively inelastic) because where 1,000 minutes are sold at 100 ppm, more than 1,000 minutes will be sold at 20 ppm. If that is so, then the change in termination costs will have encouraged lower prices.

329. In short, there is little material from which one is able to assess how a change in price p will affect quantity q . Such evidence as there is, is considered in paragraphs 331 to 335 below. For the purposes of his model, Professor Dobbs dealt with the problem in the following way:

- (1) Professor Dobbs assumed that “[e]ach MNO faces a demand schedule which is constant elasticity in the region of its current price and finally chosen price (but individual MNOs generally will face different demand

⁶ Ignoring fixed costs, which would obviously have to be taken into account.

elasticities)”: paragraph 31 of Dobbs 3. As EE noted in paragraph 22.1 of its written closing submissions, “[t]he issue regarding the “shape of the demand curve” arises from the fact that that choice was essentially arbitrary: there is no reason to believe the demand function actually faced by the MNOs will be constant elasticity or indeed that the real demand function will bear any relation to any standard form demand function”. In short, the shape of the demand curve is unknown. See also paragraph 46 of Walker 1.

- (2) Taking Professor Dobbs’ assumption, quantity q is a function of price p and elasticity e . However, although elasticity e is assumed to be constant (see paragraph 329(1)), that assumption does not tell us what elasticity e actually is. In order to derive an elasticity, Professor Dobbs had resort to an equation known as the Lerner index. Again, to quote from *Economic for Competition Lawyers* (page 131):

“There is a well-known relationship in economic theory, known as the Lerner condition, which captures the link between the demand conditions facing a company and the extent to which it prices above marginal costs...The less elastic the demand a company...faces, the higher it will price above its marginal costs. Specifically, the condition states that at the profit-maximising price, the price-cost margin (Lerner index) is equal to -1 divided by the elasticity. So if the elasticity is -2 (meaning that if the firm raises its price by 10%, it will lose 20% of its demand), we would expect to observe margins of 50% (-1 divided by -2).”

- (3) Essentially, since the Lerner index of a firm can be specified either in terms of elasticity of demand facing the firm, or in terms of its prices and marginal costs, it is possible to rearrange the equations so as to relate the elasticity of demand on the one hand to prices and marginal costs on the other (see paragraphs 44-45 of Walker 1). As Professor Dobbs explained it in paragraph 32(iii) of Dobbs 3:

“Consider an example of an MNO that has a particular profit maximising price and a particular marginal cost in the above ranges. Given a particular choice of price and a particular choice of marginal cost, it is possible to calculate the elasticity of demand that is consistent with these numbers (this is because demand elasticity determines the profit maximising price-cost margin; observing the latter reveals the former.”

- (4) Seeking to derive elasticities in this way inevitably involves making assumptions. One we have already identified: the assumption that elasticity is constant (see paragraph 329(1) above). Another was articulated by Dr Walker in paragraph 47 of Walker 1:

“...MNOs are not setting the price of only one product. They set the price of multiple products simultaneously for the various services they offer and the price that they set for one product is likely to be partially dependent on the price they set for other products. This means that the simple Lerner Index is no longer correct. Without going into the mathematics of the situation, it can be shown that when a firm sets the price of a number of complementary products, then the elasticity of demand derived from the simple Lerner Index will be an over-estimate of the true elasticity of demand. This is intuitive. When products are complements, the firm will “underprice” each one compared to the single product outcome because of the positive effect of a lower price of one product on the demand for other complementary products. This implies that the Lerner Index will be lower than in the single product outcome (because price is lower) and so the implied own-price elasticity will be higher than the actual own-price elasticity. The result is that deriving the elasticity assuming that MNOs set only one price will lead to an over-estimate of the correct elasticity. This highlights the need to consider carefully the pricing problem faced by MNOs.”

- (5) Professor Dobbs did not dispute this. In paragraph 11 of Dobbs 4 he noted:

“Dobbs-3 also infers demand elasticity at current MNO retail prices simply by assuming these a profit maximising prices. The implied elasticity is thus always in the elastic range – however, some MNOs comments suggest that they consider demand to be inelastic at current prices.”

In short, the use of the Lerner index in this case might give a more elastic demand than would accord with the “real world” situation. This was a point noted by Dr Walker in paragraph 48 of Walker 1: “the MNOs have argued that the actual elasticity of 080 calls is much lower than the one derived from the Lerner Index that is used by the BT experts”.

330. There are two points to be made about the elasticity assumptions underlying Professor Dobbs’ model. In the first place, it is clear that an assumption of constant elasticity is almost certainly going to be wrong. In reality, the demand curve for 080, 0845 and 0870 calls is likely to have its idiosyncrasies, and is unlikely to be perfectly straight, perfectly concave or perfectly convex (see, for example, the cross-examination of Mr Pratt at Transcript Day 6, pages 48 to 52).

331. Secondly, the empirical evidence regarding elasticity of demand was, as we have noted, not particularly clear-cut, but certainly did not unequivocally support an assumption that demand was elastic. OFCOM's assessment of elasticity is at paragraphs 5.111 to 5.177 and paragraphs 5.133 to 5.137 of Annex 3 of the 0845/0870 Final Determination. This assessment reflected all the uncertainties in the empirical evidence, but (whilst accepting the sparse nature of the evidence) OFCOM suggested that demand might be inelastic. Essentially, this was based upon the views expressed to OFCOM by the mobile network operators, and such views also featured in the evidence before us. Thus, both Mr Wardle and Mr Stone stated that – if faced with BT's NCCNs – both O2 and Vodafone would likely contemplate increasing their prices for 080, 0845 and 0870 calls (see paragraphs 26 to 26 of 1 Wardle; paragraphs 21 and 34 of Stone 1; and paragraph 20 of Stone 2), which suggests an inelastic demand. The problem with this evidence is that it dealt with the hypothetical scenario of what these mobile network operators would do if faced with the NCCNs. Whilst we have no doubt that Mr Wardle and Mr Stone were doing their best to assist the Tribunal, the hypothetical nature of the question they were seeking to answer leads us to attach very little weight to their evidence.
332. Conversely, Mr Harding and Mr Aspinall both suggested that demand for 080, 0845 and 0870 calls was elastic (see paragraph 20 of Harding 1 and paragraph 16 of Aspinall 1). Although this evidence was based on past consumer behaviour, it too was so sparse as to make it unsafe to base significant conclusions on this evidence.
333. Mr Pratt considered that demand was inelastic (paragraph 52(a) of Pratt 1 and Transcript Day 6, page 39), but essentially Mr Pratt's evidence was based upon what he (and OFCOM) had been told by other communications providers. The evidence before us touched upon an effort by the Department of Work and Pensions to make calls to them zero rated (which evidence suggested an elastic demand, but which Mr Pratt did not find convincing: Transcript Day 6, pages 31-32) and upon a research document providing the views of callers with regard to the prices for non-geographic calls (Transcript Day 2, page 40). We found neither particularly helpful in reaching an understanding of the elasticity of

demand for 080, 0845 and 0870 calls and the shape of the demand curve for such calls.

334. The position was very well summed up in an exchange between Mr Read and Mr Pratt (Transcript Day 6, page 48):

“Q (Mr Read) ...The long and the short of it is that when you come to actually look at all this material you, I think, would agree that there is a dearth rather than an over-abundance of material in terms of the issues about elasticity. You are nodding, so that is “yes” for the tape?

A (Mr Pratt) I think I said earlier that there was a dearth of good evidence on demand elasticity. We had the example from one of the MNOs in the Final Determination we discussed earlier. My view is that OFCOM found on balance inelastic demand was more likely than not, given what the MNOs had told us, but did not rule out the possibility that demand could be elastic, hence when we look at the range of scenarios it is relevant to consider the possibility of elastic demand and inelastic demand.”

335. Further, Professor Dobbs noted (Transcript Day 8, pages 12-13):

“One gets a price change, and one gets a volume response. The short run response is usually very limited because customers don’t even know about the price change. Gradually, over time, they perhaps learn more about that fact and therefore as time passes you expect the volume response to be rather larger. This is the idea that short run elasticities are typically more inelastic, long run elasticities inevitably tend to be more toward elastic. I am not claiming in this particular case that demands are inelastic, I am just saying there is a general tendency. So when I am faced with a small piece of information like this, and I am asked to make a comment about it...one needs to think about it, reflect on the time horizons over which the responses are assessed. Obviously, as you take a longer time horizon other things change, so it becomes more difficult to disentangle different kinds of effects. I think the key point I would like to emphasise is that one can be over-impressed by quick little pieces of data which perhaps need to be treated with caution.”

336. Professor Dobbs’ point regarding long and short term elasticities is a good one, and a further complicating factor in the assessment. The fact that long term elasticity might be difficult to disentangle from, for example, brand improvement (whereby call prices for 080, 0845 and 0870 calls reflecting OFCOM’s policy preference actually causes demand for such calls to rise independent of a change in price p) was also a point well-made.

337. At the end of the day, a problem with Professor Dobb’s model was that a key parameter – e , from which q was derived – was assumed, and could not be

derived from empirical evidence. Professor Dobbs responded to the suggestion that demand might be inelastic and not elastic by a further refinement to the model, described in Dobbs 4. Essentially, the thesis advanced by Professor Dobbs was that there must be a reason that mobile network operators are charging what they are charging for 080, 0845 and 0870 calls, and no more. In short, given the assumption that mobile network operators are rational profit maximisers, the prices charged by mobile network operators must be constrained by something which would affect their profitability. In other words, something is preventing mobile network operators from charging more. So either mobile network operators are not increasing their prices because demand is elastic at these prices; or they are not increasing them for other reasons. These other reasons might be because of the Mobile Tariff Package Effect or “waterbed” effect considered in greater detail in paragraphs 350 to 364 below or because an increase would cause customers to move from one mobile network operator to another. As to these:

- (1) *The Mobile Tariff Package Effect or “waterbed effect”*. Essentially, as is described below, the “waterbed” describes a case where, if the price of a particular product is *lowered*, prices for related products *increase* to compensate.
- (2) *Change of supplier*. This point involves departing from the assumption described in paragraph 316 above. In other words, a change in price of 080, 0845 or 0870 calls not only affects the quantity of calls made, but may cause the caller to change his communications provider altogether.

338. These potential consequences are described in Dobbs 4:

- “15. It seems an open question whether 08- demands are indeed elastic or inelastic; no robust empirical evidence has been presented on this point. However, clearly if MNO demands are inelastic at current prices, and if MNOs are profit maximising at these current prices, then account must be made of the spillover effects. Accordingly, section 3 below examines this scenario. It assumes the spillover effect can be described using a spillover profit function denoted $S(p)$ which is increasing in p . As the 08- retail price p is varied, this may affect the level of demand for the MNO’s other services; whilst this might be in part substitution and in part complementary, the primary effect is likely to be complementary. This is because a higher price for 08- services will tend to induce some customers to shift allegiance to other MNOs, so reducing the demand for all the MNO’s services.

16. Conceptually, as the 08- price is changed, this might also lead to the MNO re-optimising prices in the tariff bundle of its other services (the so called *Mobile tariff package effect – MTP*). This can be viewed as a ‘feedback’ effect. The same is true of hypothesised strategic reactions by other MNOs consequent on a unilateral change in a given MNO’s 08- price – these can also be thought of as potentially leading to feedback effects on the profitability of the MNO’s business. Conceptually, the overall profitability consequence arising from a unilateral variation in 08- retail price can be partitioned into a direct effect and indirect one. Overall, the indirect effect (including impacts on the MNO’s other service demands, its prices and reactions by other MNOs) can be summarised as a profit consequence that can be shown to be strictly increasing with 08- price at the current MNO retail price. In the model presented in section 3 below, both the ‘spillover term’ and the demand for the 08- calls is modelled as functions of 08- price alone. This means that unilateral variation in 08 average price can affect other demands, may induce further price and structural changes in the rest of the MNO’s tariffing and may induce price reactions by competitors (which may then also feedback to the rest of the *MTP*), but the feedback of these induced effects back onto the demand for the MNO’s own 08 services is assumed to be negligible.
17. The existence of significant spillover effects is in any case rather speculative – again no robust evidence has been presented for it – and it does seem reasonable, in the absence of any evidence to the contrary, to assume that feedback effects from induced strategic reactions are likely to have negligible quantitative impact on 08-demands. Indeed, several MNOs have admitted as much, in that they regard 08 numbers as not part of the headline rates which are subject to more intense competitive pressure. It is also worth pointing out that, in so far as there is a feedback effect, this will tend to reduce the spillover effect on the individual MNO.”
339. As EE noted in paragraph 28 of its written closing submissions, “Professor Dobbs’ logic in introducing the spillover term is that, if demand is inelastic at current prices, MNOs could profitably raise prices, so, on the assumption that MNOs seek to be profit maximising, there must be some other effect which constrains MNOs’ retail pricing of 08x calls. To that extent Professor Dobbs’ logic appears sound. However, Professor Dobbs also considers that this effect can be modelled as a function of 08x price and then proceeds to model it in a particular manner”.
340. We agree that there is logic to Professor Dobbs’ position. The problem, however, with modelling it, is just the same as with the model expounded in Dobbs 3: the model is based upon assumptions, which may or may not hold good in the “real world”, and cannot be proved or disproved because of the absence of empirical evidence. For example, there was, quite simply, no substantial evidence before us of what – assuming demand to be inelastic –

might be constraining mobile network operators from pushing their prices still higher.

341. In the 0845/0870 Determination, OFCOM concluded that “it is more likely that NCCNs 985 and 986 will lead to price decreases for 0845/0870 calls rather than price increases...However, we are still uncertain about the magnitude of the Direct effect...” (paragraph 1.24 of the 0845/0870 Determination). This represented a development of OFCOM’s position, both as stated in the provisional conclusion in OFCOM’s draft determination, and as stated in the 080 Determination. In the 080 Determination, OFCOM concluded (in paragraph 1.24(ii)) that “we do not consider that NCCN 956...would necessarily result in lower retail prices for 080 calls”.
342. OFCOM’s change of view was clearly informed by the additional material that OFCOM received between the 080 Determination and the 0845/0870 Determination. We consider the conclusion reached by OFCOM in the 0845/0870 Determination to be correct, and the conclusion in the 080 Determination (for perfectly understandable reasons, namely the additional material considered by OFCOM since the 080 Determination was published) to be incorrect.
343. The question is whether OFCOM was correct to find that the magnitude or extent of any reduction was impossible to ascertain. We are satisfied that OFCOM was entirely right to conclude that whilst there was a positive Direct Effect (in the sense that the retail prices for 080, 0845 and 0870 calls were more likely than not to fall), but that this Direct Effect could not further be quantified. Although Professor Dobbs’ assumptions regarding marginal cost *MC* may have been overly conservative, (the lower *MC*, the more likely it is that the model will predict a fall in prices), the fundamental difficulty in assessing the magnitude of the Direct Effect lies in the uncertainty in demand elasticity. We do not consider that there was any way in which OFCOM could have constructed a reliable demand curve for 080, 0845 and 0870 calls so as to enable it to project how far 080, 0845 and 0870 prices would fall. Accordingly OFCOM had no choice but to consider what would happen assuming a range of demand curves, with no way of determining which of these curves most closely approximated to reality. Inevitably, of course, this meant that OFCOM could

only reach a conclusion as to the direction of the Direct Effect, and not as to its magnitude.

344. In short, we consider OFCOM's conclusion in the 0845/0870 Determination to be correct, not merely in its finding that prices for 080, 0845 and 0870 calls would fall, but also in its limiting conclusion that the magnitude of this effect could not be ascertained. This conclusion, we stress, was not driven by convenience or expediency or by the time limits imposed upon OFCOM by the Dispute Resolution Process, but simply by the limits of the data available.
345. Our conclusion is both supported and well-illustrated by the following. Mr Myers sought to demonstrate the inter-relationship between the Direct Effect, the Indirect Effect and the Mobile Tariff Package Effect (which – as we shall see – are closely inter-linked) in a diagram (see Figure 8 at page 82 of Myers 2). This was, he stressed, “illustrative”. Dr Maldoom sought to use this diagram to derive an actual quantification of the various effects illustrated in Mr Myers' diagram (see paragraphs 36 to 38 of Maldoom 7). He was cross-examined about this (Transcript Day 6, pages 73 to 76):

- “Q (Mr Herberg)** So, am I right in thinking what you did was, you took out a ruler and you measured the height that you have indicated at C and at B to find the proportion of the Indirect Effect to the Mobile Tariff Package Effect?
- A (Dr Maldoom)** Roughly, yes. Yes.
- Q (Mr Herberg)** Only roughly, not exactly?
- A (Dr Maldoom)** Well, I mean these are rough proportions.
- Q (Mr Herberg)** Yes, I see, the proportions are rough?
- A (Dr Maldoom)** Yes. The proportions are rough.
- Q (Mr Herberg)** With a ruler it is going to be not exact, is it? And again, your ruler did service to measure A and B and then to work out the waterbed effect around that?
- A (Dr Maldoom)** Yes, all I have measured is A, B and C.
- Q (Mr Herberg)** And you – obviously, I will not take too much time on this, you have been in court and you have heard Mr Myers' explanation, have you not, that this was effectively a not to-scale diagram...
- A (Dr Maldoom)** Yes, I mean this has arisen as a result of dialogue. I mean, it really goes back to my original point about the difficulties of deducing any kind of quantitative information from the Determination itself...
- Q (Mr Herberg)** Indeed.

A (Dr Maldoom) I mean, I don't think there is any debate about that. So the figure came to life as a result of that. But, I mean, I would emphasise that this is essentially all I have to go on in terms of judging the relative magnitudes of the difference effects.

...

Q (Mr Herberg) Did it not strike you that what you were doing was a bit odd? I mean, it would be pretty surprising, would it not, if OFCOM, having resolutely declined in its Final Determinations, to quantify the sizes or relative sizes of the various effects, having said despite BT's criticisms that there was too much radical uncertainty to do more than come to a view on directional and weighted factors – in spite of all that, if Mr Myers had, without saying he was doing this, smuggled into his graph a hidden quantitative analysis waiting to be decoded by you?

A (Dr Maldoom) Well, okay, I wouldn't suggest that he would do that. However, if I were drawing this diagram, as indeed Mr Myers must have been doing, I would not be able to draw this diagram without making some implicit assumptions. So, I have to take a view, for example, about how much larger the direct effect is going to be that the MTPE when I draw this diagram."

346. The suggestion that the actual magnitudes of the Direct Effect, the Indirect Effect and the Mobile Tariff Package Effect could be derived from an illustrative figure is plainly an absurd one. The exchange illustrates the paucity of data that all were labouring under, and underlines the correctness of OFCOM's conclusion.

2. The Indirect Effect

347. The Indirect Effect only arises in the case of a partial, rather than a total, reduction in retail prices for 080, 0845 and 0870 numbers. It measures the flow of additional revenues to call recipients/service providers. There will only be such additional revenues if there is additional revenue to BT i.e. if prices for calls fall somewhere on the ladder. If there is a total reduction (i.e. if prices fall to below the first step on the ladder), then there will be no additional revenues. Accordingly, the Indirect Effect is at least as uncertain as the Direct Effect, because it is contingent on the Direct Effect.

348. In fact, it is more uncertain, because even if there are additional revenues, these may be retained by BT, and not passed on. OFCOM (rightly, in our conclusion: see paragraph 299 above) discounted as part of the welfare analysis additional revenues flowing to BT, and regarded it as uncertain how much revenue would flow through to the call recipients/service providers themselves.

349. In short, the Indirect Effect assumes:

- (1) That termination charges rise i.e. that there is an increase in revenue to the terminating CP (which is not part of OFCOM's policy preference)
- (2) That the benefit of that increase will be passed on, by the terminating CP, to the call recipient. This is speculative, and in any event very much a "second order objective" on the part of OFCOM: OFCOM's primary objective was to achieve the maximum possible reduction in 080, 0845 and 0870 call prices, in which case there would be no Indirect Effect at all (see the cross-examination of Mr Myers, Transcript Day 5, page 47).

3. *The Mobile Tariff Package Effect*

350. The Mobile Tariff Package Effect is an effect that can off-set the Direct Effect. Essentially, as a result of losing revenue and/or suffering increased costs pursuant to the Direct Effect, mobile network operators would seek to claw back that loss by charging more for other services. As we have noted, this is colloquially known as the waterbed effect. Force a reduction in price or increase in cost in respect of one aspect of service, and that loss may be clawed back through increased prices elsewhere. (Hence "waterbed": push down in one place, the level rises somewhere else.)

351. Whilst the Mobile Tariff Package Effect might offset the Direct Effect, it would only do so when considering callers globally. In other words, the effect on individual callers would vary according to their habits. Callers who did not use 080/0845/0870 numbers would pay more for other calls and perhaps more in total, whereas frequent users of 080/0845/0870 numbers would find this increase offset by the tariff reductions in these numbers (albeit that, given that the vast majority of calls would be geographic calls, a large decrease in the price of 080/0845/0870 calls would only result in a small increase in the price of geographic calls to offset this). This was referred to before us as "tariff re-

balancing”. It is for this reason that OFCOM took the view that the benefit of 080/0845/0870 reductions exceeded the disadvantage of corresponding increases elsewhere in mobile package prices.

352. There was substantial agreement before us that a waterbed effect could not exceed 100% of the loss to mobile network operators, for the reason articulated by Professor Stoneman (Transcript Day 7, pages 37-38):

“Clearly, the waterbed cannot be 100% or greater than 100%, because it would mean the tariff re-balancing producing an outcome that was better for the MNOs than before the NCCNs were introduced, and if that was feasible, the assumption of profit maximization means that the MNOs would have done it previously anyway. So, we then have this situation that we are going to have some outcome that is less than 100%, and the question is by how much less than 100%.”

353. Apart from agreement that the waterbed effect could not equal or exceed 100%, there were divergent views as to what its likely magnitude would be. Dr Maldoom suggested that the waterbed effect would only be partial (paragraph 29 of Maldoom 7), and likely to be less than 50% (paragraph 30 of Maldoom 7). Indeed, before us, Dr Maldoom suggested a waterbed effect in the range of 10% to 34% (Transcript Day 7, page 28). In paragraph 43 of Maldoom 7 (which was expanded upon in Section 4.3 of Maldoom 7), Dr Maldoom stated that “a waterbed of 80% or more is inconceivable; indeed, any waterbed effect stronger than 50% would be implausible and anything significantly stronger than one-third at odds with the [Competition Commission’s] views in 2009”. This reference to the Competition Commission’s views was a reference to the Competition Commission’s 16 January 2009 Determination on mobile termination rates entitled *Mobile phone wholesale voice termination charges Determination*. However, in cross-examination, Dr Maldoom was obliged to concede that this was based upon a mis-reading of the Competition Commission’s Determination, and that the Competition Commission had in fact found the waterbed effect to be “strong” (see Dr Maldoom’s evidence at Transcript Day 7, pages 32 to 37). In essence, as Miss Smith put it, and as Dr Maldoom accepted in cross-examination, “what you have done, as we see it, is you have effectively taken the figure that you have just bandied about of 90%, which the Competition Commission applied at the second stage of the analysis, the leakage issue, and you have applied that 90% figure to the first stage of the

analysis, the waterbed issue, and you have used it to support the very strong statements you make in your witness statement...” (Transcript Day 7, page 33).

354. With that, the evidence supporting Dr Maldoom’s propositions regarding the strength or otherwise of the waterbed effect was very weak (Transcript Day 7, pages 36-37):

“Q (The Chairman) Dr Maldoom, just to follow through on that, going back to paragraph 43 of [Maldoom 7], you say, basing yourself I think on the CC report, that a waterbed of 80% or more is inconceivable. Counsel is very helpfully taking you through the paragraphs she says are relevant to the Competition Commission’s approach. Do you still stand by the statement that a waterbed effect of 80% or more is inconceivable?

A (Mr Maldoom) I do, yes. This is not just based on the CC evidence. I discuss also a degree of consensus that this waterbed is not complete, and really the 80% or more inconceivable statement is a reflection of that. The CC, I think, is relevant in terms of this question about a third or more. I think this is a much more debatable question, to be honest.

Q (The Chairman) Dr Maldoom, where do you discuss the other material in your report?

A (Dr Maldoom) Okay, I have got – let me just find it – this is dealt with more fully by Professor Dobbs – it is Section 4.3. To be fair, I discuss the CC here, and I essentially only take a lower bound from the CC Determination, not anything more. Specifically, really, because these kinds of concerns that we have just been discussing, but then the other evidence I particularly included was the Genakos & Valetti and I believe I have reference Veronese & Pesendorfer – I am not sure if I have; maybe I haven’t on that.

Q (The Chairman) We will read Section 4.3 when we rise, but the question I will leave hanging about for you to think over those five minutes is if your 80% figure does not come from the CC report, where does it come from?

A (Dr Maldoom) I think I sort of addressed that with Professor Stoneman’s question in the sense that that was meant to be a representation of a degree of consensus about the incompleteness of the waterbed, so I would take 80% to mean strong, yet incomplete, and that is all that 80% was meant to be doing.

Q (Miss Smith) The figure of 80% is the figure that you obtained from Mr Myers’ Figure 8 by taking out your ruler and measuring -

A (Dr Maldoom) Well, that is also the case.

Q (Miss Smith) The only indication we have is Mr Myers' Figure, which indicates a waterbed effect of 80% or more, and then you go on in [paragraph] 43 to say that that 80%, which I have taken from Mr Myers' Figure 8, is inconceivable. That is the 80% figure?

A (Dr Maldoom) It is also there, it is there as a number which is sufficiently different from a 100[%] that I can differentiate as being incomplete which again also has the convenience of also being a number which is implied by the figure. There is no particular magic to these numbers. I will just be absolutely clear here."

355. We have already commented upon the danger of seeking to draw concrete figures out of Mr Myers' illustrative Figure 8 (see paragraphs 345 above). In these circumstances, it is clear that there was little material to support Dr Maldoom's assertions regarding the strength (or otherwise) of the waterbed, and we reject his evidence in this regard.

356. In a paper written by Professors Valletti and Genakos, entitled *Testing the "Waterbed" Effect in Mobile Telephony* (one of the papers referenced in Section 4.3 of Maldoom 7), based upon an examination of mobile operator's prices and profit margins across more than 20 countries over six years, and focusing on termination rates rather than (as here) origination rates, the conclusion was reached that the waterbed effect was substantial, albeit not complete. The conclusion was also expressed that the waterbed effect was stronger the more intense competition is in markets (like the UK) with high levels of market penetration and high termination rates.

357. Professor Valletti was not prepared to commit himself as to how much higher the waterbed might be in the context of mobile origination rather than mobile termination (Transcript Day 8, page 94):

“Q (Mr Read) Here, obviously, we are looking at call origination, the other end of the market, if I can put it like that. Although there may be good reasons why you say the data can carry through, no-one has actually conducted a study on effectively a waterbed in call origination?

A (Professor Valletti) The analogies are there, of course. What would matter to me at least would be to understand – mobile termination seems to be an example where the magnitude of revenues you make from termination should be bigger. So I would expect a mobile waterbed effect to be higher

in the mobile termination rate vis-à-vis this current case. I do not know what portion of the total these after market calls, but that would be crucial information that I would need to assess the empirical evidence on this aspect of the waterbed being 100% complete or incomplete.”

358. Professor Valletti noted that there had never been a study concentrating specifically on the UK market (Transcript Day 8, page 94). He also observed (Transcript Day 8, page 98) that “I was not instructed by OFCOM to look into the empirical evidence because I wasn’t given any...”.

359. Finally, Professor Valletti commented upon the other study mentioned by Dr Maldoom in Section 4.3 of Maldoom 7, namely the study of Professors Veronese and Pesendorfer (Transcript Day 8, page 93):

“...I don’t want to sound too arrogant, but the only published study is our study, my study with Christos Genakos. I did speak to Martin and Barbara about theirs and they said: “No, we will never submit this to an academic journal, because we think our dataset is too dirty”. There is a difference, I should say, between published and unpublished.”

360. Dr Walker expressed the view that the waterbed effect was substantial, and likely to be close to 100% (paragraph 55 of Walker 3). However, this view was an extrapolation to the UK of the views expressed by Professors Valletti and Genakos, which, as Dr Walker himself acknowledged, was not without its difficulties (Transcript Day 9, pages 9-10):

“Q (Mr Read) In paragraph 55 of [Walker 3]...you say: “My view is that it [the waterbed] is likely to be close to or at 100%”, and then you refer to the Genakos & Valletti study. Now, Genakos & Valletti, the one thing it does not demonstrate is that the waterbed is 100%?

A (Dr Walker) What Genakos & Valletti do is they provide a figure for the waterbed effect in terms of changes in termination rates and changes in retail voice revenues, and if you apply that to the UK, you do find a 100% waterbed effect.

Q (Mr Read) Sorry, if you apply it to the UK?

A (Dr Walker) Yes.

Q (Mr Read) But your only proposition for applying it to the UK and you get 100% is the fact that the UK is very competitive, is it not?

A (Dr Walker) No, my proposition, that is just a simple proposition to

do with the relative levels of termination revenues and voice revenues in the UK.

Q (Mr Read)

So you are saying that from Genakos & Valletti you can work out what the waterbed is specifically in the UK mobile termination rate market?

A (Dr Walker)

Yes, this is not a difficult calculation. What Valletti & Genakos tell us in their preferred result is a 10% reduction in termination revenues will lead to a 5% increase in retail voice revenues. If you look at that in terms of the relative proportions of termination revenues and retail voice revenues in the UK that would give you a 100% waterbed effect. That would show that a 10% reduction in termination revenue is actually slightly less than a 5% increase in retail voice revenues. That is all I am doing.

Q (Professor Stoneman)

If I can just attempt – it is purely a matter of clarification. When Professor Valletti was sitting there yesterday, we asked him about this, and he gave us the result it was 10% prices and 5% prices because he did not have any quantity data. It was not on revenue at all, and when we asked him why he could not calculate the waterbed effect he said: “It’s because I don’t have any quantity data”. If he had quantity data he could have done it on revenues and done the calculation you have. So he was not willing to draw any conclusion with respect to the waterbed effect, all he was willing to say was: “We had a 10% change in the termination rate, and a 5% change in the origination price. It was to do with price, he told us yesterday?”

A (Dr Walker)

No, I agree, and I am then applying it to quantities in terms of revenues that we do know about in the UK, but I accept that he didn’t do that.

Q (Professor Stoneman)

I am sorry, but to me you have somehow implied an elasticity of demand in there somewhere. You are assuming the quantities stayed the same, I think, in order to get that calculation now?

A (Dr Walker)

I would accept that, yes. What I am doing is I am looking at the revenue effect of the 10% reduction in termination rates from where they currently are and comparing that to a 5% in retail revenues from where they currently are and, you are absolutely right, yes, that does imply a zero elasticity.”

361. Given this absence of data, and the fact that Dr Walker’s extrapolation was one that Professor Valletti did not venture, we are not prepared to go as far as Dr Walker.

362. Professor Dobbs did not hold himself out as being particularly expert in the extent of the waterbed, and essentially accepted what Professor Valletti had said – that the waterbed was likely to be less than 100%, but that it was likely also to be strong (Transcript Day 8, page 23).
363. Dr Valetti – as the author of the only detailed study of the water, albeit not as regards this market – was clearly best placed to comment on the likely size of the Mobile Tariff Package Effect, and the fact that he felt himself unable to do so (because of a lack of empirical evidence) we find telling. As an expert, he was very properly identifying for us the limits of expert knowledge in this area.
364. Reaching any kind of conclusion as to the extent of the Mobile Tariff Package Effect is thus extremely difficult. Basing ourselves mainly on the evidence of Professor Valletti, we find that the waterbed effect in the present case would be significant, but otherwise impossible to quantify. We should say that by significant we do not mean to suggest that the Mobile Tariff Package Effect would exceed 50%. It may do, it may not – we simply do not know.

4. *Other factors*

365. In addition to these three main factors, there are some other factors that require mention. BT placed a considerable stress on brand pollution, by which it meant that numbers that had relatively clear descriptions in the National Telephone Numbering Plan did not live up to those descriptions when called from a mobile telephone. Mr Read referred to this as a “market failure”, and suggested that – were the NCCNs to achieve their aim – this market failure would be mitigated. To an extent, this is true, but even if the retail prices for 080, 0845 and 0870 calls fell to below the lowest rung on the NCCN ladders, that does not mean that calls prices would match the description in the National Telephone Numbering Plan. Thus, for instance, 080 calls from mobile telephones would not be free to the caller, but would likely cost just below 8.5 ppm, even on the basis of the total reduction scenario.
366. Nevertheless, OFCOM accepted that this was a welfare benefit in line with its policy preference, and we are not disposed to disagree.

367. BT also suggested that mitigating this market failure might result in greater use being made of 080, 0845 and 0870 numbers by callers, with the result that call recipients/service providers might be more inclined to use such numbers, to the benefit not just of callers on mobile networks, but also callers on fixed networks. As a matter of logic, we consider that there is much in what Mr Read says; the problem is that these benefits are unquantifiable. OFCOM took them into account by way of the additional weight that it accorded to the Direct Effect, and we agree that – given the uncertainties – this was an appropriate course.

(v) **Stage (4): weighing up countervailing economic effects**

1. *Overview*

368. OFCOM considered three factors: the Direct Effect; the Indirect Effect; and the Mobile Tariff Package Effect.

369. Before us, it was contended that the Direct Effect would have one of two consequences:

- (1) Assuming a partial reduction, there would be an increase in the mobile network operator's costs (in the form of a higher termination charge) as well as a decrease in the mobile network operator's revenue (in the form of lower prices for 080/0845/0870 calls to callers). This is logical, although it must be noted that it is predicated on an assumption that demand elasticity is such that a reduction in price does not greatly increase call volumes. Highly elastic demand might very well mean that although a mobile network operator's marginal costs would increase (i.e. the cost per call), and its marginal revenue would decrease (i.e. the revenue per call), these per call losses would be offset by increases in the volume of such calls. Because of the uncertainties relating to the size of the demand elasticity, it is of course not possible to say what the outcome would be.
- (2) Assuming a total reduction there will be no change in the mobile network operator's costs (because the ladder will not "bite") but a decrease in the mobile network operator's revenue (in the form of lower prices for

080/0845/0870 calls to consumers). Again, this is logical, but is subject to the same qualification as to call volumes that we made in the preceding sub-paragraph.

370. The Mobile Tariff Package Effect is an effect that off-sets (either in whole or in part) the Direct Effect, and we have found that effect to be significant, but impossible to quantify any further. However, whilst the Mobile Tariff Package Effect might offset the Direct Effect (at least in part), it would only do so when considering callers globally. In other words, the effect on individual callers would vary according to their habits. Callers who did not use 080, 0845, or 0870 numbers would pay more, whereas frequent users of 080, 0845, and 0870 numbers would find this increase offset by the tariff reductions in these numbers (albeit that, given that the vast majority of calls would be geographic calls, a large decrease in the price of 080/0845/0870 calls would only result in a small increase in the price of geographic calls to offset this).
371. Because of its policy preference, OFCOM gave the Direct Effect greater weight than the Mobile Tariff Package Effect.
372. The Indirect Effect measures the flow of additional revenues to call recipients/service providers, which is in itself uncertain, since some of these revenues may be retained by terminating CPs, which OFCOM found to be welfare neutral. Absent this uncertainty, OFCOM considered that the benefit to call recipients in the form of additional revenue ranked as importantly as the benefit to callers in terms of price reduction. In other words, £1 additional revenue to a call recipient was as important, as valuable, as £1 price reduction to callers. However, because of this uncertainty, OFCOM gave less weight to the Indirect Effect.
373. Two questions of weight thus come into question. First, should the Direct Effect be given greater weight than the Mobile Tariff Package Effect? Secondly, should the Indirect Effect be weighted less heavily than the Direct Effect? As we noted in paragraphs 228 to 230 above, these are both questions where there are likely to be several “right” answers, and where we consider that an appeal should only succeed where OFCOM is wrong, and not where it has simply selected one of several right answers.

2. Should the Direct Effect be given greater weight than the Mobile Tariff Package Effect?

374. Since we have found that OFCOM's policy preference was one that it was perfectly entitled to adopt (see paragraphs 218 to 240 above), and since the preference of the Direct Effect over the Mobile Tariff Package Effect is a consequence of this policy preference, we consider that OFCOM was justified in taking this approach.

3. Should the Indirect Effect be weighted less heavily than the Direct Effect?

375. We consider that it is most important to bear in mind the purpose of 080, 0845 and 0870 calls. Whilst we agree that, in an appropriate case, call recipients are equally to be taken into account as callers, it is important to bear in mind the purpose of 080, 0845 and 0870 calls (as we have found it to be in Section G(III) above):

- (1) It is absolutely clear that the purpose of 080 calls is not to raise revenue for the call recipient. It is to provide a service to the caller, a free call.
- (2) This is less clear in the case of 0845/0870 calls, where there was some evidence of revenue share in the case of 0845 calls. However, the amount of that sharing was small, and we consider that the primary purpose of 0845/0870 numbers was to have a number that was at a fixed non-geographic rate, and to avoid geographic designation (e.g. the Hereford plumber who wants to present like a national plumber; or the national business that wants a national, and not location specific, number). Call recipients are prepared to pay for such a facility. Whilst we fully accept that some numbers in the National Telephone Numbering Plan are intended to, and do, raise revenue, we do not consider that to be particularly true of these numbers.

376. For there to be a significant revenue flow from caller/originating CP to the call recipient (still less, the terminating CP) in our view subverts the purpose of these calls, and the regulatory policy that OFCOM was espousing.

377. Before us, OFCOM suggested that whilst the primary objective was to achieve a reduction in 080, 0845 and 0870 call prices, if there was a revenue flow to call recipients/service providers which would enable them to provide a better service, this was – if not the primary objective – at least a secondary benefit that should be taken into account. We disagree with this. Whilst it might be going too far to say this was a wholly irrelevant factor, we consider it to be so minor in importance that it should not have been taken into account by OFCOM, given the level of investigation it entailed.

4. *Weighting Direct Effect against Mobile Tariff Package Effect*

378. Even confining the welfare analysis to the Direct Effect and the Mobile Tariff Package Effect, the position is one of considerable uncertainty. It may help if we take a simplifying example:

- (1) *Total reduction scenario.* Suppose ladder pricing (as per the NCCNs) is introduced by BT, and the effect is for prices for 080/0845/0870 calls to fall below the first rung of the ladder – with a benefit to the callers of these numbers of £100. Suppose, also, a 100% Mobile Tariff Package Effect. In effect, one class of caller (080/0845/0870 callers) receives a benefit of £100, whilst another class (those subject to the waterbed) receive an equivalent disbenefit. There is no Indirect Effect (even if relevant), because no additional revenue flows to BT. According to OFCOM’s approach, this outcome is beneficial to the persons whose economic interests need to be taken into account. It is all the more so if (as we have found) the waterbed effect is less than 100% and only “significant”. To the extent that the waterbed effect is less than 100%, callers are better off, for this loss of revenue will be borne by the mobile network operator.
- (2) *Partial reduction scenario.* Suppose the effect of the ladder pricing is to effect a partial reduction. Prices of 080/0870/0845 calls fall, but to somewhere on the ladder (with, say, an overall benefit to callers of £50). The costs of mobile network operators will increase, because of the ladder, say by £25. This additional cost will go to BT, and thence (possibly) to the call recipient. As we have noted, we consider this

Indirect Effect to be a factor that should not be taken into account in the case of these particular non-geographic numbers. The mobile network operators will, of course, seek to pass on (i) their lost revenue and (ii) their increased costs to callers by raising other prices. Assuming a waterbed effect of 100%, callers will face increases in prices of £75 – more than the benefit received in reductions in 080/0845/0870 tariffs. Again, however, the assumption of a waterbed of 100% is one that we do not consider to be likely.

379. Fundamentally, the welfare analysis is inconclusive, due to a lack of empirical evidence. Even with the assistance of the simplifying assumptions that we have described, a reliable assessment of elasticity of demand is not possible. Whilst it is possible to conclude that prices for 080, 0845 and 0870 calls will, on balance, fall, it cannot be said how far they will fall, nor what volumes of calls there will be at any given price. Equally, the extent of the Mobile Tariff Package Effect is essentially unknown.

5. *A multi-lateral analysis*

380. The foregoing analysis is essentially a bi-lateral one. It looks at the NCCNs that BT seeks to introduce, and seeks to assess what effect those NCCNs will have on the pricing of 080, 0845 and 0870 calls by mobile network operators.

381. The analysis disregards the fact that, as we have found (see paragraphs 149 to 150 above), BT's share of the number hosting market is not 100%, but of the order of 25%. In the words of Professor Stoneman (Transcript Day 4 (Private Hearing), page 1), "nearly all of the economic modelling is based upon the assumption that BT is the only supplier of termination calls to any of the mobile operators, and therefore the change in the mobile operators' prices link in directly to BT prices. It may well be the case...that BT in fact only have 25% of the market, which means that 75% of the market is supplied by others".

382. In short, the modelling makes an assumption that is clearly not correct in the market as it stands. Professor Dobbs accepted that this was the case, but contended that the direction of the incentive on mobile network operators of BT's NCCNs would be similar, albeit that that incentive might be diluted by

reason of BT's limited market share (Transcript Day 8, page 5). Clearly, this is right, if other terminating CPs do nothing: assuming a mobile network operator's calls are terminated in line with the market shares of BT and the other terminating CPs, the effect of BT's NCCNs will be to cause the price of terminating 25% of those calls to change. That will create a downward incentive, simply not as great a downward incentive as if BT had a market share of 100%.

383. The position is further complicated by two other factors:

- (1) First of all, there will be an interaction between BT and the other terminating CPs. These communications providers will not act in a vacuum, but will take account of each other's conduct in order to improve their respective positions. In other words, each terminating CP will seek to maximize its profits by offering what it perceives to be the most advantageous (for it) form of pricing for the termination of 080, 0845 and 0870 calls.
- (2) Secondly, where a mobile network operator is faced with (say) different tariffs for the termination of 080, 0845 and 0870 calls from different terminating CPs, it is most unlikely that the mobile network operator will seek to price differentially. In other words, a caller calling an 0845 number terminated by BT will not be charged a different price to a caller calling an 0845 number terminated by C&W. This was made very clear in the evidence of Mr Stone (Transcript Day 4 (Private Hearing), page 1):

“Q (Professor Stoneman)

...So if you changed your prices in response to the BT NCCN, that price change would also feed through to the 08 calls that are actually provided by other suppliers? That is the important point?

A (Mr Stone)

Yes, I would not introduce complexity by differentiating between the two. It is important to us to try and keep it as simple as possible from the consumer's perspective.”

Thus, a mobile network operator, when considering the pricing of 080, 0845 and 0870 calls will want to keep those prices uniform – irrespective of who is terminating those calls. Clearly, this will have a dramatic effect on how a mobile network operator approaches its pricing decisions. If

faced only by an increase in the cost of terminating BT-terminated calls, a mobile network operator might (by way of example) decide to keep 080, 0845 and 0870 prices the same, and to seek to recover its additional costs elsewhere.

384. In conclusion, the situation modelled by BT, and assessed by OFCOM in the 0845/0870 Determination, is very much more complex than simply the effect of a termination price change by BT on calls originated by mobile network operators. We noted in paragraph 198(7) above that OFCOM considered effects on competition separately from its welfare assessment, and for that reason we have done likewise in this Judgment. However, there is a very close relationship in this case between the welfare assessment and an assessment of competitive effects, for the reasons given in the preceding paragraph. We return to this complexity in Section M below.

VIII. THE EFFECT ON COMPETITION

385. This is a factor that was considered by OFCOM in both the 080 Determination and in the 0845/0870 Determination.

(i) The 080 Determination

386. In the 080 Determination, OFCOM was concerned that other terminators of 080 calls would be unable to introduce charges of the sort that BT was seeking to introduce in the form of NCCN 956 because of the limitations in BT's transit billing system (see paragraphs 124(iii) and 5.222 to 5.224).

387. In the event, OFCOM's (justified) concerns regarding the replicability of tariffs by other terminating CPs was overtaken by events. By the time of the 0845/0870 Determination, it was clear that terminating CPs could – if they wished – impose forms of ladder pricing themselves. The unchallenged evidence of Mr Harding (paragraphs 29 to 47 of Harding 1) was that C&W – BT's main competitor in the market for the termination of non-geographic calls – had initially had objections to BT's ladder pricing, not because of BT's objectives, but because of the “practical implications of the way BT chose to implement NCCN 956 and their impact on our business” (paragraph 30 of

Harding 1). However, as discussion between BT and C&W progressed, C&W came to believe that “we had solutions to most of the problems that ladder pricing would cause” (paragraph 39 of Harding 1), and in April 2010, C&W decided to implement its own ladder pricing charges (paragraph 40 of Harding 1).

(ii) **The 0845/0870 Determination**

388. In these circumstances, the replicability of ladder pricing tariffs by other terminating CPs ceased to be an issue in the 0845/0870 Determination. However, in the 0845/0870 Determination, OFCOM articulated a different concern. Paragraph 1.25 provided:

“1.25 Our final conclusion is the same as our provisional conclusion in the Draft Determination. The risk of competitive distortions between TCPs is relatively low and there may be no significant distortion to competition in MNOs’ wholesale sales to MVNOs. However, there are possible concerns about the potential distortion of OCP’s choice of transit provider, and about competition between MNOs and MVNOs in retail services (relating to disincentives to pricing innovations and potential for the range of retail packages to be reduced, although the nature of these effects depends on the method to derive the MNOs’ average retail price).”

389. This paragraph is somewhat generally worded. Before us, the concern about distortion was expressed as to be a concern that mobile network operators might seek to disguise the fact that they were originating 080, 0845 and 0870 calls by routing them through others, who would pay lower termination charges. Mr Kilburn – to whom this point was put in cross-examination – was dismissive of it. He did not consider that it would be a problem, and he certainly considered that if there were a change in how a mobile network operator was routing its calls, BT would notice, and deal with it (Transcript Day 4, page 45). We consider this to be the sort of practical problem that falls to be dealt with in negotiations between communications providers and, if necessary, contractually. We do not regard it as so serious a competitive risk as to prevent BT from imposing its NCCNs on mobile network operators, all other things being equal.

390. We do not understand the generally expressed concerns in paragraph 1.25 of the 0845/0870 Determination regarding competition between mobile network operators and mobile virtual network operators in the provision of retail services

to calls. The whole point, as we understand it, of OFCOM's policy objective is to incentivise reductions in 080, 0845 and 0870 calls, and we have found (see paragraphs 239 to 240 above) that the incentive contained in the NCCN operates on a non-discriminatory basis. No doubt mobile network operators and mobile virtual network operators would react differently to the NCCNs were they to be imposed: but that seems to us to be the essence of competition, not a restriction of it.

(iii) The importance of competition

391. Clearly, as a matter of consistency, OFCOM would (all other things being equal) apply to any other terminating CP the three Principles that had applied to BT's NCCNs (Transcript Day 6, page 9):

“Q (The Chairman) Mr Myers, it is a hypothetical question, but I would be grateful if you could try and answer it. As you said a moment ago, this, of course, is a dispute between BT and various MNOs. Supposing the dispute had been between MNOs and a different TCP, would your approach and your answer, or OFCOM's answer, to these determinations have been the same? And, if not the same, how would it have been different?

A (Mr Myers) Perhaps I can just merely give a provisional answer to that, because it's not a point I have completely focused on. I can't immediately identify any feature of OFCOM's analysis which would be particularly different, I think. I think the analysis would be largely the same.”

392. This answer is unsurprising, but nevertheless important. The ability to price differently, and to introduce innovative pricing structures, is a key aspect of competition between suppliers. If too restrictive a test is imposed on the introduction of innovative pricing structures, then competition will not be enhanced, but restricted. We noted in paragraphs 380 to 384 above that determining the effect of BT's NCCNs was much more complicated than simply looking at the bilateral economic relationship between BT and the mobile network operators whose calls BT terminated: the role of BT's competitors – the other terminating CPs – needs to be borne in mind. If the ability of terminating

CPs to vary their pricing structures is constrained, then the dynamic of competition between terminating CPs is inhibited.

393. Professor Dobbs' evidence on this point was instructive (Transcript Day 8, pages 95-96):

“...One of the things with innovations in pricing is that in the first instance when they're first introduced, they're not necessarily going to hit the nail on the head. I think to some degree one could say this may well be the case here. What one can say is that in the market place, decision-makers tend to improve their decisions, particularly when you have got something new as this. This ladder pricing is quite innovative in my opinion, it's the first time I've ever seen it...”

394. One of the reasons decision-makers improve their decisions is because of the reactions of others in the market.

395. It is clear that, in promulgating a stringent test that must be satisfied before BT can introduce its NCCNs, which will be applied to other terminating CPs should they seek to introduce similar measures, OFCOM is significantly restricting communication providers' commercial freedom to price which – absent the Dispute Resolution Process – is not constrained by regulation. It might be said that a test that simply seeks to assess whether a price change provides benefits to consumers (Principle 2(i)) and does not materially distort competition (Principle 2(ii)) is not especially stringent. But that is to overlook the lack of empirical evidence as to what BT's pricing would do in this market, and the sheer difficulty (in the absence of such evidence) of demonstrating through modelling that the NCCNs would be beneficial to consumers.

396. The crucial question is what is a regulator to do in the context of such uncertainty? Essentially, the regulator has two choices:

- (1) To prevent change unless it can be demonstrated that the change is beneficial – in which case it may well be said that the dead hand of regulation is constraining behaviour which may actually be beneficial to consumers. We stress that our conclusion regarding Principle 2(i) was that the welfare assessment was inconclusive, not that consumers would be harmed.
- (2) Alternatively, to allow change despite the uncertainty, even though there is a risk that the change may result in a disbenefit to consumers,

recognising that an undue fetter on commercial freedom is itself a disbenefit to consumers.

397. In the Determinations, OFCOM clearly opted for the first choice. But it did so without articulating or considering the alternative. We consider that this is a matter that OFCOM should have considered during the course of its Determinations.

IX. THE ABILITY OF MOBILE NETWORK OPERATORS TO RECOVER THEIR EFFICIENT COSTS

398. The ability of mobile network operators to recover their efficient costs forms the substance of OFCOM's Principle 1 and – in the case of the 0845/0870 Determination – this principle was found to be satisfied. OFCOM did not seek to contend that the contrary finding in the 080 Determination could be defended (see paragraph 171(1) above).

399. Before us, no-one contended that BT's NCCNs would render it impossible for the mobile network operators to recover their efficient costs.

400. Accordingly, we will deal very briefly with this point. We consider the return to mobile network operators to be a relevant factor, and consider OFCOM's Principle 1 to be rightly grounded: mobile network operators should not be denied the opportunity of recovering their efficient costs of originating calls to 080/0845/0870 numbers. This is because, under the telecommunications system as it presently operates in the UK, an originating CP cannot make any choice as to which communications provider terminates any particular call (including calls to 080, 0845, and 0870 numbers). Since, therefore, the terminating CP has an effective monopoly, an ability to allow the originating CP to recover his costs is a basic requirement that needs to be complied with.

X. PRACTICALITIES

401. We accept that the imposition of BT's NCCNs would involve some effort on the part of both BT and the mobile network operators in order to make the new billing structure work.

402. Some difficulties, however, we consider have been over-stated. A particular difficulty that was identified (notably by Mr Ornel) was that it would be very hard to calculate the average price for 080, 0845 and 0870 calls that were terminated by BT (as opposed to the average price for all 080, 0845 and 0870 calls sold by a given mobile network operator).

403. Mr Ornel's point was that although mobile network operators, when pricing their calls, did not distinguish between which call was terminated by which terminating CP, such a distinction would nevertheless have to be drawn when seeking to calculate an average retail price in accordance with the requirements of the NCCNs (Transcript Day 4, page 53):

“...if we take an example – I'm not too familiar with who are BT customers and who are Cable & Wireless customers to use numbers, but this is the thought process in my mind. Maybe BT is dominant in NHS numbers and Jobcentre numbers and they have that market sewn up, so to speak, and maybe Cable & Wireless have TV shows which 0845 numbers and 080 numbers are on. So it is the type of numbers, if the market they are present in is different when you go to the next layer down, the customer behaviour, the consumer behaviour, would be different. If the consumer behaviour is different they will be on different tariffs. Within T-Mobile, some of our customers have calls within the bundle, some of them without, outside of the bundle, some of them have special options, etc. So that could lead to a different average price. So even if the headline price was, say, 40p a call, it is the characteristics of the consumers making the calls are different, then the average retail price could be different say between a call to a BT hosted number and a call to a Cable & Wireless hosted number.”

404. We are skeptical as to whether the average price for (say) 080 calls to BT-hosted numbers would be so different from the average price for 080 calls to C&W hosted numbers, but we heard no specific evidence on this point beyond the general assertions of the mobile network operators.

405. More to the point, we are very doubtful as to whether the reference to “average retail price” in the NCCNs is a reference solely to “the average retail price for calls to BT-hosted numbers”. That seems to us a somewhat unlikely construction, and was not the construction put forward by BT (Transcript Day 10, page 100).

406. The wording used in the NCCNs does not refer to average retail price at all, but simply states that “if the retail charge payable by the originating Operator's retail customers” is a certain amount, then the charge for terminating the call will be a specified amount. No attempt is made to confine the “retail charge

payable” to calls to BT terminated numbers, and we hold that the “retail charge payable” refers to calls to all 080, 0845 or 0870 numbers, irrespective of the identity of the terminating CP.

407. That said, it is clear that the calculation of the “retail charge payable” is not a straightforward one: does it, for instance, mean that for each individual 080, 0845 or 0870 call, the termination charge for that call depends on the rate paid by the caller? Or does it, as the parties before us assumed, require the calculation of an average retail charge? If so, then such a calculation will have to take into account the fact that in some cases, 080, 0845 and 0870 calls will form part of a bundle, and in other cases they will not.
408. We consider that these difficulties are precisely the sort of difficulties that the parties should be able to resolve between themselves, once the principles for the imposition of new pricing structures are clear. In this regard, we adopt with approval paragraph 1.25 of OFCOM’s 080 Determination:

“We conclude that Principle 3 could be satisfied in each case. We consider that the Parties could reach a practical solution to these issues should it be agreed that a payment to BT was fair and reasonable. We further consider that it should be relatively straightforward to implement a payment from BT to the 2G/3G MNOs, should it be agreed that an origination payment was fair and reasonable. We conclude that these issues of practicality could and should be resolved between the Parties without further involvement from Ofcom.”

XI. THE FORTHCOMING REVIEW OF NON-GEOGRAPHIC NUMBERS

409. OFCOM’s Simplifying Non-Geographic Numbers Consultation Document was published on 16 December 2010. OFCOM’s considerations on this topic continue, but at some point in the reasonably near future there is likely to be a new regime in respect of non-geographic numbers.

410. In its Written Response to the Tribunal’s Questions of 15 April 2011, Vodafone made the following submissions:

“111. The SNGN review is relevant to the Tribunal’s decision in three respects.

112. Firstly, it provides a reason in itself to doubt whether the economic effects relied upon by BT will ever materialise. Ofcom currently intends to publish its final decisions in that Review in September 2011. It is plain from the content of the consultation paper and its submissions to the Tribunal that it currently has no plans to sanction wholesale charges based on ladder pricing. Instead it proposed to delink 0845 and 0870 from geographic numbers and to impose an entirely new regulatory regime.

113. Whilst no doubt Ofcom retains an open mind, there is accordingly every prospect that the regulatory landscape is about to change fundamentally.
114. Secondly, the fact that Ofcom was undertaking a comprehensive policy review seeking to identify comprehensive solutions to the problems it considered to exist in respect of NGNs was itself another reason for Ofcom to be risk averse about BT's approach.
115. At the very highest, BT's proposal offered an indirect and partial means to tackle Ofcom's concerns, but brought with it at least a risk of harm to consumer welfare. Ofcom was fully entitled to take into account its view that:
- "There are likely to be other policy options available in the NGCS Review, including some that could be more effective and less disruptive in achieving lower 0845/0870 prices."
116. Whilst Vodafone contests much of Ofcom's preliminary analysis as set out in the NGCS Consultation, that is not a matter for this appeal.
117. Thirdly, as Ofcom identified, BT's proposals would impose very considerable compliance costs upon the MNOs in advance of wide-ranging changes to the regulatory regime. As Ofcom described it:
- "it is relevant that the NGCS Review, which includes policy options beyond the scope of this dispute, may implement a set of changes to industry arrangements for 0845/0870 calls. We are therefore concerned about the potential for a major and potentially disruptive set of changes in industry arrangements to implement NCCNs 985 and 986, which subsequently be rolled back or substantially affected following the conclusion of the NGCS Review next year."
118. Ofcom now plans to publish its conclusions in September.
119. Vodafone submits that this context was plainly material to Ofcom's analysis."

411. We disagree with these submissions. The Dispute Resolution Process laid down in the 2003 Act requires OFCOM to resolve disputes between the parties within – generally speaking – a four month period. On appeal to this Tribunal, whilst there is no statutory time frame for the determination of appeals, it is clearly desirable for such appeals to be resolved as expeditiously as is possible.

412. We consider that it would be wrong for OFCOM, having determined a dispute, or for this Tribunal, having determined an appeal, to allow that outcome to be influenced by a separate and future review, even if that review is occurring in the near future.

XII. THE NATURE OF THE DISPUTE RESOLUTION PROCESS

413. As we have noted, the Dispute Resolution Process is intended to be concluded within, generally speaking, a four month period. This provides, we consider,

something of an indicator as to the nature, extent and depth of the sort of review that OFCOM can carry out. We consider that any approach to assessing NCCNs such as those introduced by BT must reflect the statutory obligations as to timing that have been imposed on OFCOM, and so must be easily capable of completion within a four-month period.

414. We appreciate that the manner in which the evidence expanded in this case – which we described in paragraph 32 above – is not usual. Nevertheless, the extent and detail of the economic analysis before us (and, to an extent, before OFCOM during the 0845/0870 Dispute Resolution Process) was not consistent with a four month process. Even then, the outcome of the analysis was not clear-cut but (as both we and OFCOM have found) essentially inconclusive.
415. Given the way the Disputes developed, this was not a matter that OFCOM could have considered during the course of the Disputes. However, it is a matter that we bear in mind: for the future, any test for assessing for assessing the “fairness and reasonableness” of charges must be capable of being concluded within four months.

XIII. CONCLUSIONS

416. In this Section, we have considered eleven potentially relevant factors. Two of these we have concluded are irrelevant, namely:
- (1) BT’s motivation in introducing NCCN 956, NCCN 985 and NCCN 986: see paragraphs 266 to 275 above.
 - (2) The forthcoming review of non-geographic numbers: see paragraphs 409 to 412 above.
417. A number we have found to be relevant, but have also found that these were properly taken into account by OFCOM. Specifically, these include:
- (1) OFCOM’s consideration of its general statutory obligations under the 2003 Act: see paragraphs 199 to 202 above.
 - (2) OFCOM’s policy preference: see paragraphs 203 to 240 above.
 - (3) OFCOM’s welfare assessment: see paragraphs 280 to 384 above.

- (4) The ability of mobile network operators to recover their efficient costs: see paragraphs 398 to 400 above.
 - (5) Questions of practicality: see paragraphs 401 to 408 above.
418. A number we have found to be relevant, but we have also found that these were not properly taken into account by OFCOM. Specifically, these include:
- (1) BT's rights under the Standard Interconnect Agreement: see paragraphs 241 to 265 above.
 - (2) The regulatory obligations and duties on the parties to the dispute: see paragraphs 276 to 279 above.
 - (3) The effect on competition: see paragraphs 385 to 397 above.
419. Finally, we also considered the nature of the Dispute Resolution Process to be a relevant factor. Clearly, OFCOM must be able to resolve disputes satisfactorily within the statutory time-frame that is imposed on it. In this case, the vast amount of evidence that we have had to consider is inimical to satisfactory dispute resolution pursuant to the Dispute Resolution Process. We have briefly described how evidence proliferated in this case: this was certainly not a matter that can be ascribed to OFCOM, given the Tribunal's ruling on admissibility of evidence described in paragraph 11 above. However, it is a factor that we have borne in mind: for the future, the test applied by OFCOM clearly must be one that is capable of resolving a dispute within a four month time-frame.

M. WEIGHING THE RELEVANT FACTORS

I. INTRODUCTION

420. We have held, in Section J above, that OFCOM's powers under the Dispute Resolution Process are broad, and extend not merely to the resolution of disputes in the traditional sense (i.e. declaring the rights and obligations of the parties to the dispute) but to the imposition of solutions on the parties to the dispute which do not derive from the parties' rights and obligations. In short, the Dispute Resolution Process contains a legislative element, whereby OFCOM makes rights, and does not merely determine them.

421. It goes without question that the Dispute Resolution Process is a regulatory tool, to be used by OFCOM to further and fulfil its regulatory duties. The question that arises is precisely how OFCOM should exercise such powers as it has and how best it can fulfil its regulatory duties using the Dispute Resolution Process.

II. THE TRIBUNAL'S DECISION IN T-MOBILE

422. Before us, it was contended that OFCOM's approach when seeking to resolve disputes relating to prices was laid down in the decision of this Tribunal in *T-Mobile (UK) Ltd v Office of Communications* [2008] CAT 12, in a judgment on "core issues". The dispute in this case arose out of price controls imposed by OFCOM in respect of mobile call termination charges for 2G and 3G calls. The price controls were based on the sort of costs that might be incurred by a reasonably efficient network operator.

423. The dispute arose when some mobile network operators began offering a so-called "blended" rate, which incorporated an additional charge in respect of calls that were being terminated on a 3G network (see paragraph 42). The introduction of this sort of "blended" rate meant that the overall price to other operators exceeded the price control cap imposed for 2G termination. Importantly, these changes were sought to be introduced pursuant to paragraph 13 of the Standard Interconnect Agreement, which is described in paragraph 40 of the Judgment, and which is set out in paragraph 54 above.

424. Although BT accepted some rate changes notified to it pursuant to paragraph 13, as time passed, it rejected others, and so disputes between BT and five mobile network operators were referred to OFCOM for determination (paragraph 45). (There were also a number of disputes between H3G and other mobile network operators concerning notices of variation, which the Tribunal treated as having the same effect as notices under paragraph 13 of the Standard Interconnect Agreement: paragraph 47.)

425. The disputes were determined by OFCOM, and appealed to the Tribunal. The specifics of OFCOM's approach to the resolution of the disputes is described in paragraphs 57 to 74 of the Judgment: these specifics are not relevant for present purposes.

426. OFCOM's approach was the subject of criticism by the Tribunal, in paragraphs 84 to 101 of the Judgment. Because this criticism (and the more general guidance from the Tribunal to be found later on in the Judgment in paragraphs 175 to 189) have, quite properly, been assimilated by OFCOM and applied in later disputes, it is necessary to consider these passages with some care.
427. Beginning, first, with the Tribunal's analysis in paragraphs 87 to 101 of the Judgment. The Tribunal found that:

"87. ...OFCOM failed to have sufficient regard to its statutory obligations under sections 3 and 4 of the 2003 Act. The initial error is expressed early on in OFCOM's Defence...where it states that in exercising its discretion as to the manner in which it resolves disputes:

"OFCOM is guided by the basic principle that undertakings should be free to negotiate and set the terms and conditions (including prices) on which they transact. This freedom is subject to two regulatory constraints: (a) *ex ante* regulatory obligations imposed in accordance with the CRF; and (b) *ex post* competition law under Arts 81 and 82 EC and the [Competition Act 1998]. In considering a dispute OFCOM identifies the relevant regulatory framework and, in particular, any existing *ex ante* obligations applicable to the parties. The methodology applied by OFCOM seeks to ensure that the parties' freedom to determine their price is curtailed only insofar as necessary and proportionate to fulfil the objectives of such obligations. OFCOM will, however, also consider whether there are any overriding policy objectives which should be taken into account". (emphasis added)

88. In other words OFCOM approached the dispute by asking itself whether, looking at the existing regulatory constraints imposed on the parties, there was any reason why BT (or [H3G]) should **not** pay the charges proposed by the MNOs. Any other considerations arising from OFCOM's statutory duties were therefore relegated to the consideration of whether there were "overriding policy objectives" which should be taken into account. This approach represented, in the Tribunal's judgment, a fundamental error as to the task facing OFCOM in determining these disputes. OFCOM failed to recognize that dispute resolution is itself a third potential regulatory restraint that operates in addition to other *ex ante* obligations and *ex post* competition law."

428. In paragraph 101, the Tribunal concluded by describing the test that OFCOM should apply:

"...That test can be expressed as requiring OFCOM to determine what are reasonable terms and conditions as between the parties. The word "reasonable" in this context means two things. First it requires a fair balance to be struck between the interests of the parties to the connectivity agreement. It therefore requires the same kind of adjudication that any arbitrator appointed by the parties to determine a dispute about the reasonable rate would carry out. But secondly, because OFCOM is a regulator bound by its statutory duties and the Community requirements it also means

reasonable for the purposes of ensuring that those objectives and requirements are achieved. OFCOM did not approach resolving these disputes on this basis and it therefore committed an error of law.”

429. In paragraphs 102 to 106 of its Judgment, the Tribunal considered the relationship between OFCOM’s dispute resolution powers and the power to impose SMP conditions. The Tribunal accepted (in paragraph 103) that, in resolving the disputes, OFCOM was not bound to set a price reflecting the costs of providing the service. However, the Tribunal also considered that “OFCOM erred in drawing too rigid a boundary between the exercise of its dispute resolution powers and its SMP-related powers”. The Tribunal went on to say:

- “104. OFCOM was wrong to disregard entirely the relationship between prices and costs in this case. There is an underlying assumption in the Disputes Determinations that there is no middle ground between eschewing analysis of the relationship of price to cost completely on the one hand and a full investigation of costs of the kind carried out as part of the SMP market review on the other. The Tribunal does not accept that there is such a strict dichotomy. It should be possible to carry out some investigation of costs to form a broad idea of what that relationship is. Such an assessment may or may not give rise to a cost based price. It may simply result in OFCOM concluding that the price proposed is a reasonable one even though that price was not arrived at on a cost basis. The costs are not only relevant when setting a “strictly cost based price” but are likely to be a factor to a greater or lesser extent in most cases where the dispute between the parties concerns price.
105. The Tribunal recognises that there is a risk that although all the appellants accepted that the dispute resolution procedure is meant to provide a quick answer to the dispute, the parties to a dispute may be tempted to swamp OFCOM with the same level of economic and accountancy information that they generally provide in market reviews. This could prevent OFCOM from complying with the time limit set for the exercise of this function. There are a number of answers to such a concern. The first is that the parties to the dispute may well also have an interest in ensuring that the dispute can be resolved rapidly and should tailor the information they provide and the level of detail to which they expect OFCOM to descend accordingly. The second is that OFCOM is entitled to prepare in anticipation of disputes in relation to sectors of the market where it sees, from its overall monitoring role, that disputes may arise...Thirdly,...OFCOM is entitled to, and should, use such information as it has at its disposal from the exercise of its other regulatory functions. So OFCOM should not start each dispute resolution exercise from scratch...
106. Such an approach would not amount to using dispute resolution powers as an alternative means for addressing SMP. Rather it should be considered as an appropriate way by which OFCOM ensures that the objectives set out in sections 3 and 4 of the 2003 Act are fulfilled.”

430. In paragraphs 107 to 114, the Tribunal emphasised the need for a regulator like OFCOM to be consistent, and thereafter it considered in detail the proper approach to resolving the disputes (which is of no particular relevance to the present disputes). Then, in paragraphs 179 to 189, the Tribunal considered, in more general terms, how OFCOM should have approached the task of resolving these disputes:

“175. The relief sought by some of the appellants asks for clear directions or guidance to be given to OFCOM as to how to approach the task of resolving these disputes in the event that one or more of the grounds of appeal succeed. We are told that there are a number of disputes currently before OFCOM in which it is considering the exercise of its dispute resolution powers. This, as well as the large sums of money involved, explains why the parties have been so assiduous in pursuing these appeals even though the price set by the Determinations has largely been overtaken...OFOM also made clear at the hearing that, in the event that the appeals were upheld, the Tribunal should give as much guidance as possible as to how to exercise this function.

176. We recognize that it is not helpful simply to require OFCOM to take account of its statutory objectives. Those objectives are expressed in broad terms setting out a series of “goods” that the regulator should promote. OFCOM has to find a way of moving from those “goods” to a price expressed in pence per minute and must provide adequate reasoning explaining how it has arrived at the figure. The Tribunal has therefore considered both what general guidance can be given to OFCOM as to how it should resolve disputes referred to it under section 185 of the 2003 Act and also how the current disputes should be disposed of. The Tribunal must bear in mind that it is intended to provide an effective appeal mechanism from OFCOM’s decisions and that this is best achieved if the appeal process arrives at a final resolution of these disputes rather than simply remitting the matter back to OFCOM to undertake further investigation and consultation.”

431. In its guidance to OFCOM, the Tribunal identified the importance of considering why the dispute had arisen. The Tribunal observed:

“177. In many cases, including the present ones, the dispute will arise in the context of an existing commercial agreement where one of the parties is trying to vary the terms. OFCOM has made it clear in the guidance it issued in July 2004 on dispute resolution that it “will not accept a dispute without evidence of the failure of meaningful commercial negotiations”. It requires the parties to provide documentary evidence of commercial negotiations on all issues covered by the scope of the dispute and a statement by an officer of the company, preferably the CEO, that the company has used its best endeavours to resolve the dispute through commercial negotiation. This stance reflects the wording of Recital (32) of the Framework Directive which provides that “an aggrieved party that has negotiated in good faith to reach agreement should be able to call on the national regulatory authority to resolve the dispute”. The onus lies on the party proposing the variation to provide to the other party and to OFCOM the justification for the change in terms upon which the parties have hitherto been prepared to do business. This would be

the position in any situation where one party to a binding contract proposes a variation of that contract.

178. The fact that the dispute is referred to OFCOM must mean either that the other contracting party does not accept the justification put forward by the party proposing the variation or that it asserts that there are counter influences cancelling out that justification or perhaps both. OFCOM's first task is therefore to examine the reasons put forward for the proposed change in terms and decide whether they are justified. In considering this question OFCOM must have regard to what is fair as between the parties and what is reasonable from the point of view of the regulatory objectives set out in the Common Regulatory Framework directives and in the 2003 Act.
179. If it is clear that the reasons put forward do not support the change proposed, then the dispute may be resolved simply by upholding the rejection of the proposal by the recipient of the OCCN and ordering the parties to continue doing business on the terms and conditions that have so far applied. Similarly, if it is clear that the objections raised by the recipient of the OCCN are without foundation, then OFCOM can resolve the dispute by upholding the proposed change and make the appropriate orders.
180. Given OFCOM's role as regulator, even if it decides that the arguments put forward by one side of the dispute are misconceived, OFCOM must still check whether the position that would be arrived at by fully accepting one side or the other side's arguments will accord with the regulatory objectives. That is not to say that OFCOM must, as a matter of course, consider afresh the totality of the terms and conditions each time a dispute is referred, regardless of how wide or how narrow the actual area of dispute is between the parties. However, it is always appropriate for OFCOM to ask itself whether there are grounds which would justify it exercising other powers under the 2003 Act to intervene in respect of those aspects of the contract which are not in dispute between the parties. This is part of OFCOM's overall regulatory remit, keeping in mind its powers under section 105 of the 2003 Act (pursuant to Article 5(4) of the Access Directive) to intervene on its own initiative in matters relating to access and interconnection. If OFCOM concludes that there would be no grounds for such intervention, then OFCOM would be entitled not to stray beyond the matters put at issue by the parties. If the answer is affirmative then OFCOM would be entitled to investigate the contract terms more widely. It would not be right for OFCOM to ignore that possibility on the grounds that those are matters which can be dealt with in the course of a future market review into the imposition of SMP conditions or by the application of domestic or European competition law."

432. The Tribunal then went on to consider three more specific points:

- (1) First, that even if the submissions made by the parties do not focus on costs issues, the Tribunal would expect OFCOM at least to consider whether an analysis, however broad brush, of the relationship of prices to costs is necessary. OFCOM should also have regard to the consistency of price and cost trends in all cases, regardless of the stance adopted by the parties (see paragraph 184 of the Judgment).

- (2) Secondly, that benchmarking was a useful tool, and that OFCOM should consider the value of comparisons put forward by the parties and what they said about the reasonableness of the charges or other terms and conditions being proposed (see paragraph 186 of the Judgment).
- (3) Thirdly, that the Tribunal would expect to see some discussion of which of the general duties set out in section 3 and which of the Community requirements set out in section 4 of the 2003 Act (read together with Article 8 of the Framework Directive) are particularly engaged by the issues raised in the dispute and how the proposed resolution of the dispute accords with those objectives. It is not sufficient simply to refer to the relevant provisions of the legislation in general terms when many are of little relevance to issues raised by the dispute (see paragraph 187 of the Judgment).

III. **ANALYSIS**

433. As we noted in paragraph 3 above, in both the 080 Determination and the 0845/0870 Determination, OFCOM described the “dispute” between the parties as to whether the termination charge that BT was proposing by (variously) NCCN 956, NCCN 985 and NCCN 986 was “fair and reasonable”. It is easy, now, to see where this phrase comes from: a reading of paragraphs 101 and 178 of the Tribunal’s judgment in *T-Mobile* is sufficient.
434. There can be no objection to a test so framed, provided always that it has the flexibility to cater for unexpected factors and does not unduly fetter OFCOM’s discretion. Precisely the points we made earlier in relation to policy preferences (paragraphs 206 to 209 above) apply here. Equally, the Tribunal must be careful not to create an unduly restrictive approach to dispute resolution that also might fetter OFCOM unduly.
435. Accordingly, in describing how OFCOM should weigh the relevant factors that we have identified in Section L above, we have very much in mind the point made by Mummery LJ in *Floe Telecom Ltd v Office of Communications* [2009] EWCA Civ 47:

- “20. It is the unnecessary nature of the Tribunal's legal rulings in its judgment that is most troubling. The court itself drew the attention of the parties at the hearing to *R (Burke) v. GMC* [2006] QB 27. There are sound reasons why courts and tribunals at all levels generally confine themselves to deciding what is necessary for the adjudication of the actual disputes between the parties. Deciding no more than is necessary may be described as an unimaginative, unadventurous, inactive, conservative or restrictive approach to the judicial function, but the lessons of practical experience are that unnecessary opinions and findings of courts are fraught with danger.
21. Specialist tribunals seem to be more prone than ordinary courts to yield to the temptation of generous general advice and guidance. The wish to be helpful to users is understandable. It may even be commendable. But bodies established to adjudicate on disputes are not in the business of giving advisory opinions to litigants or potential litigants. They should take care not to be, or to feel, pressured by the parties or by interveners or by critics to do things which they are not intended, qualified or equipped to do. In general, more harm than good is likely to be done by deciding more than is necessary for the adjudication of the actual dispute.
22. One of the dangers of unnecessary rulings is that, with only the assistance of the parties and without the benefit of wider consultation on relevant aspects of the public interest, the court's opinions, though meant to be helpful, may turn out to be damaging in practice and wrong in law. The court may be unaware of all the available arguments or ignorant of the practical implications of what it says. Those who rely on its advisory opinions when applying the law in practice may be misled or confused. A judgment aimed at giving authoritative advice and guidance may be misused by selective citation in different and unforeseen disputes and circumstances.”

There is, as the Court of Appeal rightly stressed, a danger in going beyond the precise matters in dispute, and we stress that in this Judgment we are resolving an appeal from the Disputes, and not laying down a general approach.

436. Before us, a number of the parties pressed upon us the importance of a “cost-reflective” approach in disputes such as this, and the decision in *T-Mobile* was cited in support of such an approach. As we have noted (paragraph 215 above), in the case of these Disputes, OFCOM did not take a “cost-reflective” approach, but rather adopted an approach that was informed by other policy preferences. We have found that OFCOM’s approach was (in this case) an entirely justified one (paragraphs 218 to 240 above), and we do not consider that there is, in taking such an approach, anything inconsistent with the decision in *T-Mobile*. To the contrary, if the Tribunal in *T-Mobile* were laying down a single – cost-

reflective – approach for OFCOM to adopt in all future cases (which it was not), then this would have amounted to an improper fetter on OFCOM.

437. It is important to distinguish between those aspects of the decision in *T-Mobile* that articulate general propositions of law, and those aspects that seek to describe the manner in which the particular appeals before the Tribunal should be resolved. We consider that the *T-Mobile* decision quite rightly held that:

- (1) In the Dispute Resolution Process, OFCOM does not simply act as an arbitrator, but as a regulator, and that it must, for that reason, take due regard of the statutory duties imposed on it by sections 3 and 4 of the 2003 Act. Of course, precisely how those statutory duties are taken into account by OFCOM is, in the first instance, a matter for OFCOM; and we have described in Section K above the manner in which OFCOM's decisions in this regard should be reviewed.
- (2) The Dispute Resolution Process contains powers in OFCOM not merely to resolve disputes in the traditional sense, but also powers to impose solutions on the parties to the dispute which are not necessarily in accordance with the strict legal rights and obligations of those parties. We accept that the Tribunal in *T-Mobile* did not put the point quite in these terms (which are the terms we have used in paragraph 185 above). But such an understanding of OFCOM's powers clearly informed the Tribunal's views that the Dispute Resolution Process represented a third regulatory restraint, operating in parallel with OFCOM's powers to impose SMP conditions and not legally subordinate to this aspect of OFCOM's regulatory powers.

438. Equally, it is important to observe one, very important, distinction between the decision in *T-Mobile*, and the facts of the present case. In *T-Mobile*, a variation was sought to be agreed pursuant to paragraph 13 of the Standard Interconnect Agreement (and equivalent in the H3G agreement), whereas in the present case, BT seeks to impose a change pursuant to paragraph 12 of the Standard Interconnect Agreement. As we have noted in paragraph 56 above, we consider that there is a significant difference between these two provisions, in that paragraph 12 gives a right to vary to BT, whereas paragraph 13 gives a right to

propose a variation to either BT or its contractual counterparty which will take effect if agreed, but (if not agreed) is subject to determination by OFCOM. Whilst in the latter case it makes sense to speak of a “burden of proof” – whereby the proponent of a variation must justify it, otherwise the *status quo* remains – this makes no sense in paragraph 12 cases, which the Tribunal in *T-Mobile* was not considering. Accordingly, we reject the contention that there is in some way an onus on BT to justify its NCCNs.

IV. THE APPROACH IN THE PRESENT CASE

(i) The three principles

439. We consider that the three cumulative principles, described in paragraphs 163 to 167 above, that OFCOM adopted to resolve these Disputes represent a good analytical framework. We have found that Principle 1 (that mobile network operators should not be denied the opportunity to recover their efficient costs) is satisfied (see paragraphs 398 to 400 above). We have also found that Principle 3 (reasonably practical to implement) is satisfied (see paragraphs 401 to 408 above).
440. That leaves Principle 2. In relation to this principle, we make two general observations:
- (1) First, as we noted in paragraphs 174(1) and 380-384 above, the inter-relationship between Principle 2(i) (benefits to consumers) and Principle 2(ii) (avoiding material distortion of competition) is a difficult one. It is unclear from the Determinations whether these two “sub-principles” are themselves cumulative, so that if either one is failed, a price change cannot take effect, or whether OFCOM saw the relationship between these two “sub-principles” differently.
 - (2) Secondly, whilst Principle 2 explicitly considers benefits to consumers and effects on competition, it omits to consider a third relevant factor, namely the contractual rights of BT.
441. We shall consider Principle 2(ii) first; then briefly consider the importance of BT’s contractual rights under paragraph 12 of the Standard Interconnect Agreement; and then consider Principle 2(i).

(ii) Principle 2 (ii)

442. Principle 2(ii) is concerned with the distortion of competition. We have found that the introduction of the NCCNs would not have the effect of distorting competition (see paragraphs 385 to 397 above). What is more, we consider that the imposition of a stringent test for the introduction of price changes by BT itself has the effect of distorting competition, by placing a restraint on pricing freedom not only on BT, but on any other terminating CP which might wish to introduce similar pricing structures to those contained in the NCCNs. We are mindful that price control is an intrusive form of control which, elsewhere in the 2003 Act, can only be introduced by SMP condition. None of the parties to the dispute were subject to regulatory control as regards the prices for 080, 0845 or 0870 calls nor as regards the prices for terminating such calls: see paragraphs 392 to 395 above.
443. We consider that these are powerful indicators in favour of allowing BT to introduce the new prices.

(iii) BT's contractual rights

444. As we have found, BT had a contractual right to impose the NCCNs on the mobile network operators (see paragraphs 56(1) above). Ordinarily, persons such as communications providers are entitled to expect their legal position to be dictated by their private law rights and obligations (including, in particular, any contracts entered into by them), although of course these rights and obligations can be modified by such regulatory regime as they may be subject to. Thus, for instance, many SMP conditions comprise a public law “overlay” qualifying or altering the strict legal rights of the parties. Where this occurs, private law rights give way to regulation. Thus, whilst we certainly do not suggest that private law rights can dictate the outcome of the Dispute Resolution Process (as we have held, the Dispute Resolution Process can override such rights), private law rights are relevant factors to take into account. BT's rights under paragraph 12 of the Standard Interconnect Agreement point in the direction of allowing BT to introduce the new prices.

(iv) Principle 2(i)

445. Principle 2(i) contains OFCOM's welfare assessment, which is itself informed by OFCOM's regulatory preferences regarding the prices of 080, 0845 and 0870 calls. We have found OFCOM's regulatory preference to have been a lawful one, in line with its statutory duties (see paragraphs 218 to 240 above). Moreover, the effects that OFCOM considered for the purposes of assessing whether the NCCNs fulfilled this regulatory preference was one that we broadly endorsed, save that we considered the Indirect Effect was an effect that should not have troubled OFCOM (see paragraphs 375 to 377 above).
446. As regards this welfare assessment, we have found that it could not be said that the NCCNs did provide benefits to consumers. Our view was that the outcome was inconclusive (see paragraphs 378 to 379 above), albeit that we also considered that OFCOM had failed fully to take into account the implications of BT's limited market share in the call-hosting market (see paragraphs 380 to 384 above), which would have the effect of diluting the impact of BT's price change.
447. If, therefore, the test to be applied is whether the NCCNs can be shown to provide benefits to consumers, then that test is not met. However, we do not consider this to be the correct test in the circumstances of the present case, because it places undue importance on OFCOM's policy preference, at the expense of the two other relevant factors that we have identified as forming a part of Principle 2 (namely Principle 2(ii) and BT's private law rights).
448. We consider that whilst OFCOM's welfare analysis could override these other factors, it should only do so where it can clearly and distinctly be demonstrated that the introduction of the NCCNs would act as a material disbenefit to consumers. In short, given the presence of the two other factors that we have identified, it is not enough for the welfare analysis to be simply inconclusive. The welfare analysis must demonstrate, and demonstrate clearly, that the interests of consumers will be disadvantaged.
449. We consider that such an approach gives due weight to OFCOM's policy preference, but without allowing that policy preference to swamp the other

legitimate interests that are in play. The alternative approach – requiring the benefit of the NCCNs to be demonstrated – involves an undue pre-disposition in favour of the *status quo*, to the detriment of other legitimate interests. Such an approach also avoids excessive focus on economic analysis where such analysis is intrinsically equivocal.

450. Accordingly, we unanimously hold that NCCN 956, NCCN 985 and NCCN 986 are fair and reasonable and that BT had the right to introduce them. It follows that BT’s appeal against the 080 Determination and the 0845/0870 Determination succeeds. It equally follows that EE’s appeal against the 0845/0870 Determination fails.

N. REMISSION TO OFCOM AND DIRECTIONS FOR GIVING EFFECT TO THIS JUDGMENT

451. We unanimously find that BT has, and at all material times has had, the right to impose the NCCNs on its contractual counterparties pursuant to paragraph 12 of the Standard Interconnect Agreement. Accordingly, pursuant to section 195(3) of the 2003 Act, we direct OFCOM to allow NCCN 956, NCCN 985 and NCCN 986 to stand.

452. BT contended that if (as we have found) it had the right to impose the NCCNs, then it had this right from 3 June 2009 (in the case of NCCN 956) and 2 October 2009 (in the case of NCCNs 985 and 986). Accordingly, BT contends that the effective operation of the NCCNs should be back-dated.

453. We agree that the consequence of our Judgment is that BT had the right to impose the NCCNs from the date it sought to do so. The question is the extent to which we should direct OFCOM to exercise its power under section 190(2)(d) of the 2003 Act to:

“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 of the dispute to the other, to give a direction, enforceable by the party to whom the sums are to be paid, requiring the payment of sums by way of adjustment of an underpayment or overpayment.”

454. We find that there has been a failure by the mobile network operators party to the Determinations (i.e. EE, O2, H3G and Vodafone, the “MNOs”) to pay BT in accordance with the NCCNs that were imposed by BT under the Standard Interconnect Agreement. Accordingly, we unanimously direct that OFCOM requires that the MNOs pay to BT in accordance with section 190(2)(d) of the 2003 Act such amounts as are due under the NCCNs, these amounts to be calculated in accordance with paragraph 455 below.
455. We direct, pursuant to section 195(4) that the amount of any such payment be assessed by OFCOM on the basis of information provided to OFCOM by BT and the MNOs as follows:
- (1) For the period (the “First Period”) from the date on which the NCCNs imposed by BT came into force (being 1 July 2009, in the case of NCCN 956, and 1 November 2009, in the case of NCCNs 985 and 986) until the date of OFCOM’s Determinations that the NCCNs were not fair and reasonable (being 5 February 2010 in the case of the 080 Determination and 10 August 2010 in the case of the 0845/0870 Determination) the MNOs shall pay to BT the additional termination rates due under the NCCNs, calculated by reference to the prices charged to callers by the MNOs during this period. As to this:
 - (i) As we have made clear, we do not consider that any of the NCCNs require a distinction to be drawn between 080, 0845 or 0870 calls terminated by BT and 080, 0845 or 0870 calls terminated by other terminating CPs. The calculation should be done by reference to all 080, 0845 and 0870 calls originated by the MNOs.
 - (ii) *Prima facie*, we consider that these prices should be ascertained by reference to the 080, 0845 and 0870 prices published by the MNOs in accordance with General Condition 10 (which we have set out in paragraph 101 above). However, where the MNOs can demonstrate (the burden being on them) that the prices for certain 080, 0845 and 0870 calls were set at bespoke or individual prices and tariffs, then such prices and tariffs shall be used.

- (iii) We have found that the vast majority of 080, 0845 and 0870 calls will not fall within call bundles (see paragraphs 111 to 114 above). However, to the extent that such calls do fall within bundles, it will be necessary to calculate a proper price for such a call by reference to the terms and conditions of that bundle. We emphasise that the fact that a call forms part of a bundle does not mean that it has no price; if that price is too difficult to calculate, then the price of the call should be calculated by reference to the per call tariff published in accordance with General Condition 10.
- (2) For the period (“the Second Period”) from the date of OFCOM’s Determinations that the NCCNs were not fair and reasonable (being 5 February 2010 in the case of the 080 Determination and 10 August 2010 in the case of the 0845/0870 Determination) until the date of this Judgment (1 August 2011) the MNOs shall pay to BT the termination rates payable under the NCCNs calculated by reference to such prices as are published as being available to callers by the MNOs in accordance with General Condition 10 on 30 August 2011, being a date 28 days from the date of this Judgment, or on such date as is ordered in the final version of the draft order described in paragraph 460 below. As regards the calculation of termination rates by reference to this date, we should say that we regard the points made in paragraph 455(1) as, *mutatis mutandis*, equally valid.

456. We consider this approach to be the appropriate one in the circumstances of this case, for the following reasons:

- (1) As we have found, BT had a right to impose the NCCNs, and it exercised that right. The mobile network operators were, of course, perfectly entitled to challenge this exercise of BT’s rights under paragraph 12 of the Standard Interconnect Agreement, and they did so by way of the Dispute Resolution Process. What the MNOs were not entitled to do, pending the resolution of the Disputes, was to ignore the NCCNs. The MNOs should have complied with the NCCNs, whilst pursuing their challenge to them. This, accordingly, informs our direction as regards the First Period.

- (2) It was fundamental to BT's submissions that the NCCNs would have the effect of correcting – at least in part – a “market failure” in the pricing of 080, 0845 and 0870 calls, which would result in the mobile network operators reducing the prices for these calls. In these circumstances, the mobile network operators contended that were the NCCNs to be imposed with “retrospective” effect, then they would be deprived of the opportunity of adjusting their prices in the light of the NCCNs. Assuming the prices for 080, 0845 and 0870 calls would have fallen in response to the NCCNs, it might be that BT would have received no additional revenue at all. Imposition of the NCCNs “retrospectively” would enable BT to contend that the average retail prices for 080, 0845 and 0870 calls between 2009 and 2011 entitled it to substantial additional payments.
- (3) We do not consider that the effect of this Judgment is to impose the NCCNs on the MNOs with retrospective effect. As we have found, the NCCNs were imposed on 3 June 2009 (in the case of NCCN 956) and 2 October 2009 (in the case of NCCNs 985 and 986) and took effect from those dates. The MNOs should have complied with the NCCNs and, had they done so, it would have been for them to decide whether to maintain (or, indeed, increase) the prices for 080, 0845 and 0870 calls, thereby causing the termination payments due to BT to increase; or to reduce those prices, thereby causing the termination payments due to BT to increase by a lesser amount or not to increase at all (depending on the extent of the fall in the prices to caller). In short, the MNOs are the authors of their own misfortune in failing to abide by the new charges that BT had specified.
- (4) This position changed when the 080 and 0845/0870 Determinations were published by OFCOM. As we have noted, these Determinations had the effect of setting aside the NCCNs and requiring BT to revert to the *status quo ante*. Although we consider that these Determinations were wrong, for the reasons we have given, we do not consider that they can be left out of account. The successful MNOs were entitled to rely on the Determinations, even if BT was appealing those Determinations to this Tribunal. Accordingly, we accept the submission of the mobile network

operators to this extent, namely that during Period 2 it would not be appropriate to require them to pay termination charges to BT calculated by reference to the actual prices charged to callers during this period. Equally, however, given the conclusion we have reached in this Judgment, it would also not be appropriate to allow the MNOs to pay termination rates to BT calculated as if the NCCNs had never been made.

- (5) Had it been possible to calculate the extent to which 080, 0845 and 0870 call prices would have changed as a result of the NCCNs, then we consider that the correct course would have been to calculate termination charges during Period 2 on this basis. However, as we have found (see paragraph 346 above) this is a calculation that cannot be carried out because of the absence of empirical data. Accordingly, we consider that termination rates for Period 2 should be calculated by reference to a date when the MNOs will have had the opportunity to consider the NCCNs, and to adjust their prices in the light of them. Inevitably, such a date must lie in the future, and the date we have determined is 30 August 2011, being a date 28 days from the date of this Judgment, or on such date as is ordered in the final version of the draft order described in paragraph 460 below. These considerations inform our direction as regards the Second Period.

457. We do not consider that interest should be payable on any sums payable pursuant to paragraph 455 above.
458. Accordingly, we remit the Disputes back to OFCOM with the directions (which we make pursuant to section 195(4) of the 2003 Act) contained in paragraphs 451, 454, 455 and 457 above.
459. It will then be for OFCOM to determine the Disputes in accordance with these directions. We have well in mind the comments of Lloyd LJ in *Office of Communications v Floe Telecom Ltd* [2006] EWCA Civ 768, made in the context of other statutory provisions, but equally applicable here:

“34. The CAT was heavily influenced...by its view that it had an overriding function to determine all points taken in the grounds of appeal on their merits, and that therefore allowing the appeal by setting aside a regulator’s decision did not necessarily complete the performance by the CAT of its functions in the particular case. The Tribunal, as a statutory body, has the task of deciding

such appeals as are brought to it in accordance with the provisions of the 1998 Act and the rules, but it does not have a more general statutory function, of supervising regulators. When a decision is set aside and remitted to the relevant regulator, that particular matter is then to be dealt with by that regulator in accordance with its own statutory duties and functions. The regulator will have received a complaint and will have embarked upon an investigation, but will not have concluded that investigation, because the decision by which it purported to do so will have been set aside. Accordingly, as part of its current tasks, it will have the incomplete investigation to consider and process. If it comes to another decision, further rights of appeal may arise...but otherwise the CAT has no role in relation to the regulator's conduct..."

460. We will circulate with this Judgment a draft Order giving effect to these directions, on which we will invite the parties' comments.

Marcus Smith QC

Peter Clayton

Professor Paul Stoneman

Charles Dhanowa
Registrar

Date: 1 August 2011

ANNEX 1

Annex 1 sets out the terms and abbreviations used, and the documents referred to, in the Judgment, together with a cross-reference to that paragraph of the Judgment where that term or document first appears and is defined.

TERM/ABBREVIATION	PARAGRAPH IN THE JUDGMENT WHERE THE TERM FIRST APPEARS AND IS DEFINED
080 Determination	Paragraph 1(1)
080 numbers	Paragraph 1(1)
0845 numbers	Paragraph 1(2)
0845/0870 Determination	Paragraph 1(2)
0870 numbers	Paragraph 1(2)
2003 Act	Paragraph 2
after-market	Paragraph 116(2)
average cost /AC	Paragraph 119
BT	Paragraph 1
BT System	Paragraph 49
C&W	Paragraph 15
call termination charge	Paragraph 37
calling party pays / CPP	Paragraph 38
Carrier Price List	Paragraph 51
Case 1151	Paragraph 1
Case 1168	Paragraph 1
Case 1169	Paragraph 1
Charge Change Notice	Paragraph 54
Charge Change Proposal	Paragraph 54
common costs	Paragraph 120
CP	Paragraph 34
Direct Effect	Paragraph 164(1)
Dispute Resolution Process	Paragraph 2
Disputes	Paragraph 1
EE	Paragraph 1(2)(vi)
end-to-end connectivity	Paragraph 35
First Period	Paragraph 455(1)
fixed costs / FC	Paragraph 117

TERM/ABBREVIATION	PARAGRAPH IN THE JUDGMENT WHERE THE TERM FIRST APPEARS AND IS DEFINED
Fixed Narrowband Services Statement	Paragraph 78
Flow of Funds Report	Paragraph 66
Framework Directive	Paragraph 299(1)
full reduction scenario	Paragraph 283
Geographic Area Code	Paragraph 58(1)
Geographic Number	Paragraph 58(1)
H3G	Paragraph 1(2)(iii)
incremental costs	Paragraph 120
Indirect Effect	Paragraph 164(2)
IVR	Paragraph 22
ladder pricing	Paragraph 73
marginal cost / MC	Paragraph 119
Marginal revenue / MR	Paragraph 320
micro-payments	Paragraph 83
MNOs	Paragraph 454
Mobile Tariff Package Effect	Paragraph 164(3)
National Telephone Numbering Plan	Paragraph 57
NCCN 500 Decision	Paragraph 147
NCCN 911	Paragraph 68(3)
NCCN 956	Paragraph 72
NCCN 985	Paragraph 87
NCCN 986	Paragraph 92
Network Charge Change Notice / NCCN	Paragraph 68(3)(i)
Non-Geographic Number	Paragraph 58(1)
NTS Call Origination Condition	Paragraph 78
NTS Call Termination Market Review	Paragraph 147
number hosting	Paragraph 7(6)
number translation services / NTS	Paragraph 59
O2	Paragraph 1(1)(iv)
OFCOM	Paragraph 1
one-sided / two-sided markets	Paragraph 129
Opal	Paragraph 15

TERM/ABBREVIATION	PARAGRAPH IN THE JUDGMENT WHERE THE TERM FIRST APPEARS AND IS DEFINED
Operator	Paragraph 49
Operator System	Paragraph 49
Orange	Paragraph 1(1)(ii)
Orange/BT interconnection disputes: freephone origination and mobile number portability (OFCOM statement)	Paragraph 68
originating CP	Paragraph 36
partial reduction scenario	Paragraph 283
pence per minute / ppm	Paragraph 37
revenue share	Paragraph 83
Second Period	Paragraph 455(2)
service providers	Paragraph 65
significant market power / SMP	Paragraph 78
Simplifying Non-Geographic Numbers Consultation Document	Paragraph 108
Standard Interconnect Agreement	Paragraph 48
terminating CP	Paragraph 36
T-Mobile	Paragraph 1(1)(i)
transit services	Paragraph 39
transiting CP	Paragraph 42
variable costs /VC	Paragraph 117
Vodafone	Paragraph 1(1)(iii)
waterbed effect	Paragraph 337

ANNEX 2

Annex 2 lists in date order the factual and expert evidence that was adduced before the Tribunal. Shaded rows indicate documents relevant to Cases 1168 and 1169 only. Unshaded rows indicate documents relevant to all three cases (i.e. Cases 1151, 1168 and 1169).

TITLE OF WITNESS STATEMENT/REPORT	PARTY ON WHOSE BEHALF SERVED	DATE	ABBREVIATION
Dr Maldoom's expert report: comments on Ofcom's determination on 0800 numbers	BT	January 2010	Maldoom 1
Prof Dobbs' expert report on BT's charges for 080 calls	BT	27 January 2010	Dobbs 1
Prof Dobbs' expert report regarding the dispute concerning BT's charges for 080 calls	BT	1 February 2010	Dobbs 2
Dr Maldoom's expert report: comments on Ofcom's determination on 0800 numbers, revised version	BT	3 February 2010	Maldoom 2
Prof Dobbs' expert report/witness statement submitted to the Tribunal dealing with 080 calls	BT	2 April 2010	Dobbs 3
Expert report of Professor Maldoom	BT	6 April 2010	Maldoom 3
Andrew B.D. Reid, Chief Network Services Strategist, BT	BT	6 April 2010	Reid 1
First witness statement of Paul Richards	BT	6 April 2010	Richards 1
First witness statement of Darren Joseph Kilburn	BT	6 April 2010	Kilburn 1
First witness statement of Neil Buckley	OFCOM	10 June 2010	Buckley 1
Witness statement of Anthony Richard Fitzakerly	BT	17 June 2010	Fitzakerly 1
Prof Dobbs' expert report regarding the dispute concerning BT's charges for 08 Numbers	BT	22 June 2010	Dobbs 4
Prof Dobbs' expert report on Ofcom Supplementary Consultation to resolve a dispute between BT and each of	BT	14 July 2010	Dobbs 5

Vodafone, H3G, and O2 about BT's termination charges for 0845 and 0870 calls			
Professor Maldoom: Ofcom's supplementary consultation on 0845 and 0870 calls: A note for BT	BT	21 July 2010	Maldoom 4
Witness statement of Geoffrey Richard Platt Myers	OFCOM	30 September 2010	Myers 1
Witness statement of Neil Buckley	OFCOM	1 October 2010	Buckley 2
Witness statement of Robyn Mary Durie	EE	7 October 2010	Durie 1
Prof Dobbs' expert report for the Tribunal on Ofcom's determination to resolve a dispute between BT and each of Vodafone, H3G, O2 and Everything Everywhere about BT's termination charges for 0845/0870 calls	BT	8 October 2010	Dobbs 6
Dr Maldoom's expert report for the Tribunal on Ofcom's determination to resolve a dispute between BT and each of Vodafone, H3G and O2 and Everything Everywhere about BT's termination charges for 0845/0870 calls	BT	8 October 2010	Maldoom 5
Witness statement of Anthony Richard Fitzakerly	BT	8 October 2010	Fitzakerly 2
Witness statement of Stephen Orndel	EE	8 October 2010	Orndel 1
Expert report of Paul Muysert	EE	8 October 2010	Muysert 1
Witness statement of Darren Joseph Kilburn	BT	11 October 2010	Kilburn 2
Witness statement of Robyn Mary Durie	EE	20 October 2010	Durie 2
Witness statement of Stephen Orndel	EE	20 October 2010	Orndel 2
Expert report of Paul Muysert	EE	20 October 2010	Muysert 2
Witness statement of Lawrence	O2	20 October	Wardle 1

Wardle		2010	
Witness statement of Robin James Stone	Vodafone	21 October 2010	Stone 1
Witness statement of Steve James Bowey	Vodafone	21 October 2010	Bowey 1
Expert report of Dr Mike Walker	EE, O2 and Vodafone	21 October 2010	Walker 1
Expert report of Professor Tommaso Valletti	OFCOM	6 January 2011	Valletti 1
Witness statement of Geoffrey Richard Platt Myers	OFCOM	7 January 2011	Myers 2
Witness statement of Neil Michael Pratt	OFCOM	7 January 2011	Pratt 1
Expert Report of Daniel Maldoom	BT	26 January 2011	Maldoom 6
Witness statement of Darren Joseph Kilburn	BT	26 January 2011	Kilburn 3
Witness statement of Lawrence Wardle	O2	26 January 2011	Wardle 2
Witness statement of Robin James Stone	Vodafone	26 January 2011	Stone 2
Supplemental expert report of Dr Mike Walker	EE, O2 and Vodafone	26 January 2011	Walker 2
Witness statement of Nicholas Scott Harding	C&W	26 January 2011	Harding 1
Witness statement of Andrew Aspinall	Opal	26 January 2011	Aspinall 1
Witness statement of Steve James Bowey	Vodafone	27 January 2011	Bowey 2
Witness statement of Stephen Ornel	EE	24 February 2011	Ornel 3
Prof Dobbs' expert report for the Tribunal	BT	25 February 2011	Dobbs 7
Expert Report of Daniel Maldoom	BT	25 February 2011	Maldoom 7
Witness statement of Darren Joseph Kilburn	BT	25 February 2011	Kilburn 4
Witness statement of Anthony Richard Fitzakerly	BT	25 February 2011	Fitzakerly 3
Witness statement of Andrew	BT	25 February	Martin 1

Martin		2011	
Expert report of Paul Muysert	EE	25 February 2011	Muysert 3
Further supplemental expert report of Dr Mike Walker	EE, O2 and Vodafone	25 March 2011	Walker 3
Note agreed by Professor Valletti and Professor Dobbs	OFCOM/BT	April 2011	Valletti/Dobbs Note

ANNEX 3(A)

NCCN 911

NETWORK CHARGE CHANGE NOTICE

NCCN NUMBER: 911

SERVICE: BT Freefone™ 0800 & 0808 Calls

EFFECTIVE DATE: 1st November 2008

Associated Terms and Conditions are in Schedule 110 Annex C of the Network Charge Control Standard Interconnect Agreement dated 1 October 1997.

SUBMITTED TO OFCOM ON: 2nd October 2008

BY: ZACK THOMPSON

**ROLE: Interconnect Pricing
BT Wholesale**

SIGNED: *Zack Thompson*

**PP W2.157E
BT Brentwood WS200
One London Road
Brentwood
Essex CM14 4QP
Tel 01277 323461**

Charge Changes

Effective: 1st November 2008

As shown in Carrier Price List section B1.06.1 – Freefone™ 0800 & 0808 Calls

Existing Charges

Freefone™ 0800 & 0808 Calls

Description	Effective Date	Until	Daytime	Evening	Weekend
All Operators	01/04/2008		-0.6261	-0.2866	-0.2257

Proposed Charges

Freefone™ 0800 & 0808 Calls

Description	Effective Date	Until	Daytime	Evening	Weekend
All Operators	01/04/2008	31/10/2008	-0.6261	-0.2866	-0.2257
Fixed Operators	01/11/2008		-0.6261	-0.2866	-0.2257
Mobile Operators	01/11/2008		0.0000	0.0000	0.0000

ANNEX 3(B)

NCCN 956

NETWORK CHARGE CHANGE NOTICE

NCCN NUMBER: 956

SERVICE: BT Freefone™ 0800 & 0808 Calls

EFFECTIVE DATE: 1st July 2009

Associated Terms and Conditions are in Schedule 110 Annex C of the Network Charge Control Standard Interconnect Agreement dated 1 October 1997.

SUBMITTED TO OFCOM ON: 3rd June 2009

BY: Zack Thompson

**ROLE: Interconnect Pricing
BT Wholesale**

SIGNED: *Zack Thompson*

**PP W2.157E
BT Brentwood WS200
One London Road
Brentwood
Essex CM14 4QP
Tel 01277 323461**

Charge Changes
Effective: 1st July 2009

As shown in Carrier Price List section B1.06.1 – Freefone™ 0800 & 0808 Calls

Existing Charges

Freefone™ 0800 & 0808 Calls

Description	Effective Date	Until	Daytime (ppm)	Evening (ppm)	Weekend (ppm)
All Operators	01/04/2008	31/10/2008	-0.6261	-0.2866	-0.2257
Fixed Operators	01/11/2008	31/03/2009	-0.6261	-0.2866	-0.2257
Fixed Operators	01/04/2009		-0.6481	-0.2967	-0.2336
Mobile Operators	01/11/2008		0.0000	0.0000	0.0000

Proposed Charges

Freefone™ 0800 & 0808 Calls

Description	Effective Date	Until	Daytime (ppm)	Evening (ppm)	Weekend (ppm)	Note
All Operators	01/04/2008	31/10/2008	-0.6261	-0.2866	-0.2257	
Fixed Operators	01/11/2008	31/03/2009	-0.6261	-0.2866	-0.2257	
Fixed Operators	01/04/2009	30/06/2009	-0.6481	-0.2967	-0.2336	
Mobile Operators	01/11/2008	30/06/2009	0.0000	0.0000	0.0000	
All Operators	01/07/2009		-0.6481	-0.2967	-0.2336	1
All Operators	01/07/2009		0.0000	0.0000	0.0000	2
All Operators	01/07/2009		2.0000	2.0000	2.0000	3
All Operators	01/07/2009		4.5000	4.5000	4.5000	4
All Operators	01/07/2009		7.0000	7.0000	7.0000	5
All Operators	01/07/2009		10.0000	10.0000	10.0000	6
All Operators	01/07/2009		13.0000	13.0000	13.0000	7

A negative value denotes a payment from BT to the Operator.

The BT charges to the originating Operator shall be ascertained as follows:

Note 1 – if no retail charge is payable by the originating Operator’s retail customers, the charge set out opposite note 1;

Note 2 – if the retail charge payable by the originating Operator’s retail customers is greater than zero and less than 8.5ppm (inc VAT), the charge set out opposite note 2;

Note 3 – if the retail charge payable by the originating Operator’s retail customers is 8.5ppm or greater, and less than 12.5ppm (inc VAT), the charge will be calculated as set out opposite note 3;

Note 4 – if the retail charge payable by the originating Operator’s retail customers is 12.5ppm or greater, and less than 17.5ppm (inc VAT), the charge will be calculated as set out opposite note 4;

Note 5 – if the retail charge payable by the originating Operator’s retail customers is 17.5ppm or greater, and less than 22.5ppm (inc VAT), the charge will be calculated as set out opposite note 5;

Note 6 – if the retail charge payable by the originating Operator’s retail customers is 22.5ppm or greater, and less than 27.5ppm (inc VAT), the charge will be calculated as set out opposite note 6;

Note 7 – if the retail charge payable by the originating Operator’s retail customers is 27.5ppm (inc VAT) or greater, the charge will be calculated as set out opposite note 7;

in the above table shall apply for all, or for the relevant portions of a Billing Period.

ANNEX 3(C)

NCCN 985

NETWORK CHARGE CHANGE NOTICE

NCCN NUMBER: 985
SERVICE: Lo-Call™ 0845 Calls
EFFECTIVE DATE: 1st November 2009

Associated Terms and Conditions are in Schedule 111 Annex C of the Network Charge Control Standard Interconnect Agreement dated 1 October 1997.

SUBMITTED TO OFCOM ON: 2ND OCTOBER 2009

BY: Zack Thompson
ROLE: Interconnect Pricing
BT Wholesale
SIGNED: *Zack Thompson*

PP W2.157E
BT Brentwood WS200
One London Road
Brentwood
Essex CM14 4QP
Tel 01277 323461

Charge Changes

Effective: 1st November 2009

As shown in Carrier Price List section B1.06.1 – Lo-Call™ 0845 Calls

Existing Charges

Lo-Call™ 0845 Calls

Description	Effective Date	Until	Daytime (ppm)	Evening (ppm)	Weekend (ppm)
All Operators (note a)	01/11/2008	31/07/2009	2.6633	0.7725	0.6308
All Operators (note a)	01/08/2009		2.6654	0.8430	0.6422

a) A set-up fee is applicable.

Proposed Charges

Lo-Call™ 0845 Calls

Description	Effective Date	Until	Daytime (ppm)	Evening (ppm)	Weekend (ppm)	Note
All Operators (note a)	01/11/2008	31/07/2009	2.6633	0.7725	0.6308	
All Operators (note a)	01/08/2009	31/10/2009	2.6654	0.8430	0.6422	
All Operators (note a)	01/11/2009		2.6654	0.8430	0.6422	1
All Operators (note a)	01/11/2009		4.6654	2.8430	2.6422	2
All Operators (note a)	01/11/2009		7.1654	5.3430	5.1422	3
All Operators (note a)	01/11/2009		9.6654	7.8430	7.6422	4
All Operators (note a)	01/11/2009		12.6654	10.8430	10.6422	5
All Operators (note a)	01/11/2009		15.6654	13.8430	13.6422	6

The BT charges to the originating Operator shall be ascertained as follows:

Note 1 – if the retail charge payable by the originating Operator’s retail customers is less than 12.5ppm (inc VAT), the charge will be calculated as set out opposite note 1;

Note 2 – if the retail charge payable by the originating Operator’s retail customers is 12.5ppm or greater, and less than 17.5ppm (inc VAT), the charge will be calculated as set out opposite note 2;

Note 3 – if the retail charge payable by the originating Operator’s retail customers is 17.5ppm or greater, and less than 22.5ppm (inc VAT), the charge will be calculated as set out opposite note 3;

Note 4 – if the retail charge payable by the originating Operator’s retail customers is 22.5ppm or greater, and less than 27.5ppm (inc VAT), the charge will be calculated as set out opposite note 4;

Note 5 – if the retail charge payable by the originating Operator’s retail customers is 27.5ppm or greater, and less than 32.5ppm (inc VAT), the charge will be calculated as set out opposite note 5;

Note 6 – if the retail charge payable by the originating Operator’s retail customers is 32.5ppm (inc VAT) or greater, the charge will be calculated as set out opposite note 6;

in the above table shall apply for all, or for the relevant portions of a Billing Period.

- a) A set-up fee is applicable.

ANNEX 3(D)

NCCN 986

NETWORK CHARGE CHANGE NOTICE

NCCN NUMBER: 986

SERVICE: National Call™ 0870 (other than BT Click™) Calls

EFFECTIVE DATE: 1st November 2009

Associated Terms and Conditions are in Schedule 116 Annex C of the Network Charge Control Standard Interconnect Agreement dated 1 October 1997.

SUBMITTED TO OFCOM ON: 2nd October 2009

BY: Zack Thompson

**ROLE: Interconnect Pricing
BT Wholesale**

SIGNED: *Zack Thompson*

**PP W2.157E
BT Brentwood WS200
One London Road
Brentwood
Essex CM14 4QP
Tel 01277 323461**

Charge Changes

Effective: 1st November 2009

As shown in Carrier Price List section B1.06.1 – National Call™ 0870 (other than BT Click™) Calls

Existing Charges

National Call™ 0870 (other than BT Click™) Calls

Description	Effective Date	Until	Daytime (ppm)	Evening (ppm)	Weekend (ppm)
All Operators	01/11/2008	31/07/2009	6.8927	4.4764	2.0494
All Operators	01/08/2009		0.5600	0.2600	0.2000

Proposed Charges

National Call™ 0870 (other than BT Click™) Calls

Description	Effective Date	Until	Daytime (ppm)	Evening (ppm)	Weekend (ppm)	Note
All Operators	01/11/2008	31/07/2009	6.8927	4.4764	2.0494	
All Operators	01/08/2009	31/10/2009	0.5600	0.2600	0.2000	
All Operators	01/11/2009		0.5600	0.2600	0.2000	1
All Operators	01/11/2009		2.5600	2.2600	2.2000	2
All Operators	01/11/2009		5.0600	4.7600	4.7000	3
All Operators	01/11/2009		7.5600	7.2600	7.2000	4
All Operators	01/11/2009		10.5600	10.2600	10.2000	5
All Operators	01/11/2009		15.5600	15.2600	15.2000	6

The BT charges to the originating Operator shall be ascertained as follows:

Note 1 – if the retail charge payable by the originating Operator's retail customers is less than 12.5ppm (inc VAT), the charge will be calculated as set out opposite note 1;

Note 2 – if the retail charge payable by the originating Operator's retail customers is 12.5ppm or greater, and less than 17.5ppm (inc VAT), the charge will be calculated as set out opposite note 2;

Note 3 – if the retail charge payable by the originating Operator's retail customers is 17.5ppm or greater, and less than 22.5ppm (inc VAT), the charge will be calculated as set out opposite note 3;

Note 4 – if the retail charge payable by the originating Operator's retail customers is 22.5ppm or greater, and less than 27.5ppm (inc VAT), the charge will be calculated as set out opposite note 4;

Note 5 – if the retail charge payable by the originating Operator's retail customers is 27.5ppm or greater, and less than 32.5ppm (inc VAT), the charge will be calculated as set out opposite note 5;

Note 6 – if the retail charge payable by the originating Operator's retail customers is 32.5ppm (inc VAT) or greater, the charge will be calculated as set out opposite note 6;

in the above table shall apply for all, or for the relevant portions of a Billing Period.