

**Draft Direction of a dispute under Regulation 6(6) of the Interconnection Regulations 1997**

**23 September 2002**

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**Draft Direction**

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**DRAFT DIRECTION UNDER THE PROVISIONS OF REGULATION 6(6) OF THE TELECOMMUNICATIONS (INTERCONNECTION) REGULATIONS 1997 OF A DISPUTE BETWEEN CABLE AND WIRELESS COMMUNICATIONS PLC ("C&W") AND BRITISH TELECOMMUNICATIONS PLC ("BT") OVER THE TRANSIT OF CALLS BY C&W TO CERTAIN NTS NUMBER RANGES ON THE BT NETWORK**

**WHEREAS:**

A. The Secretary of State granted to British Telecommunications on 22 June 1984 a licence (the "BT licence") under section 7 of the Telecommunications Act 1984 ("the Act") for the running of telecommunications systems specified in that Licence;

B. By virtue of section 109 of paragraph 20 of Schedule 5 of the Act the BT licence has effect as if granted to British Telecommunications plc ("BT");

C. The Secretary of State has granted to Cable & Wireless Communications plc (C&W) on 5 December 1991 a licence under Section 7 of the Act for the running of a telecommunications system as specified in the licence;

D. On 1 January 1998 the Interconnection Directive came into force and was implemented in the UK through the Telecommunications (Interconnection) Regulations 1997 (the "Regulations") and conditions in the licences of operators;

E. Regulation 6(6) of the Regulations provides that where there is a dispute concerning interconnection between organisations, the Director General of Telecommunications ("the Director") shall, at the request of either party, take steps to resolve the dispute within six months of the date of the request. The Determination which the Director makes to resolve the dispute must represent a fair balance between the legitimate interests of the parties, and must be notified to the parties in accordance with Regulation 8(3). The parties are entitled to a full statement of the reasons on which the Determination is based;

F. C&W entered into an Interconnect Agreement with BT on 1 May 1998;

G. C&W provided the Director with information on this matter dating back to 28 June 1999. Between 28 June 1999 and 11 May 2002 C&W requested that BT pay C&W for the Number Translation Services ('NTS') transit service that C&W had provided for calls to NTS number ranges (excluding 0844 NTS calls or 0871 NTS calls) which C&W had transited for termination on the BT network ('NTS transit traffic');

H. BT did not pay C&W for this NTS transit service, stating that C&W's proposal was not commercially acceptable to BT. BT subsequently stated that it has never requested that C&W provide this service, nor has it entered into contractual arrangements requesting that C&W provide this service. BT and C&W were therefore in dispute;

I. On 11 May 2002, in accordance with the provisions of Regulation 6(6) of the Regulations, C&W referred this dispute to the Director for determination;

J. The Director has a duty to encourage and secure adequate interconnection in the interests of all users in a way which provides maximum economic efficiency and gives maximum benefit to end-users;

K. The Director has considered, inter alia, the information provided by the parties and the matters set out in Regulation 6(8) of the Regulations. The principal points are summarised in the Explanatory Memorandum which accompanies, and is published with, this Direction;

L. A draft of this Direction and the Explanatory Memorandum was issued to interested parties on [ ]. Comments were invited by [ ];

**NOW, THEREFORE:**

**PURSUANT TO REGULATION 6(6) OF THE INTERCONNECTION REGULATIONS, AND HAVING CONSIDERED THE VIEWS OF THE PARTIES AND THOSE MATTERS SET OUT IN REGULATION 6(8) OF THOSE REGULATIONS, THE DIRECTOR MAKES THE FOLLOWING DIRECTION TO RESOLVE THE DISPUTE BETWEEN C&W AND BT:**

1. BT should not be required to settle all outstanding invoices for C&W NTS transit traffic;
2. BT should not be required to amend the Carrier Price List ('CPL') to ensure that the charging structure for NTS transit traffic is identical for both BT to Operator traffic and Operator to BT traffic; and
3. BT should not be required to introduce separate schedules into the Standard Interconnect Agreement ('SIA') to cover NTS transit for both BT to Operator traffic and Operator to BT traffic.
4. The terms defined in this Direction shall have the meaning so defined or described. All other words or expressions used in this Direction shall have the same meaning as in the Interconnection Directive, the Regulations, the Act or the Licence as appropriate.
5. This direction shall take effect on the date it is published.

**Chris Kenny**

**Director of Compliance**

**A person authorised under paragraph 8 of Schedule 1 of the Telecommunications Act 1984**

**[Date]**

## Chapter 1

### Summary

1.1 The Director General of Telecommunications (the 'Director') has issued a draft direction in accordance with the provisions of Regulation 6(6) of the Telecommunications (Interconnection) Regulations 1997 (the 'Regulations') for the resolution of a dispute between Cable and Wireless PLC ('C&W') and British Telecommunications PLC ('BT').

1.2 C&W referred this dispute to the Director on 8 May 2002. Arguments submitted on this issue by C&W and BT are set out in Chapter 4. The Director has considered the submissions made by C&W and BT, and has issued this draft direction in respect of the dispute. Comments are requested and will be taken into account in making a final direction.

1.3 C&W requested that BT be required to:

- 1.3.1 Settle all outstanding invoices for C&W Number Translation Services (NTS) transit traffic;
- 1.3.2 Amend the Carrier Price List ('CPL') to ensure that the charging structure for NTS transit is identical for both BT to Operator traffic and Operator to BT traffic; and
- 1.3.3 Introduce separate schedules to the Standard Interconnect Agreement ('SIA') to cover NTS transit for both BT to Operator traffic and Operator to BT traffic, for clarity moving forward.

1.4 The details of the Director's consideration of the submissions made by C&W and BT, together with the reasons why the Director is minded to make this draft direction, are set out in Chapter 5.

1.5 In summary, the Director is minded to direct that BT should not be required to settle all outstanding invoices for C&W NTS transit traffic. The Director proposes to make this decision as no evidence has been provided to demonstrate that a binding agreement exists between the parties that requires BT to pay C&W for this service. As a result, the Director does not propose to determine that BT should amend the CPL to ensure that the charging structure for NTS transit is identical for both BT to Operator traffic and Operator to BT traffic, or introduce separate schedules to the SIA to cover NTS transit for both BT to Operator traffic and Operator to BT traffic.

1.6 Having considered the facts specific to this dispute and the matters set out in Regulation 6(8) of the Regulations, this draft Direction, in the opinion of the Director, represents a fair balance between the interests of the parties in this case, having regard to the Director's wider duties to promote the development of the telecommunications industry in the UK and to encourage and secure adequate interconnection in the interests of all users in a way that provides maximum economic efficiency and gives the maximum benefit to end users.

## Chapter 2

### Background

#### Description of Number Translation Services (NTS)

2.1 NTS refers to the process associated with the routing of a non-geographic number to a network termination point, eg the translation of a number from its non-geographic format into a geographic number to enable it to be routed to a specific location.

2.2 NTS services are bought by their customers in order to use non-geographic telephone numbers, ie numbers which are used to identify a type of service rather than a geographical location. Services provided through the use of non-geographic numbers include sales, marketing, customer support, and information services.

2.3 There are a number of different types of services which use NTS, for example:

- Freephone: services typically using the 080x/0500 number range. They enable the called party (the NTS customers) to be called free of charge from anywhere in the UK. The NTS customer pays the full cost of the call.
- Local rate: Services typically using the 0845 number range. NTS customers can be called from anywhere in the UK at a price up to the local call rate. The caller pays the local rate and the NTS customer pays the balance.
- National rate: Typically using the 0870 number range. Customers can be called from anywhere in the UK at up to the national rate. The caller pays a price up to the full national rate and the NTS customer pays nothing. In some cases, the NTS customer receives some revenue from the supplier of NTS.
- Premium rate service (PRS): Use the 09xx number range. Callers pay for the cost of the call, together with a variable charge for the content of the call. NTS customers earn revenue from the calls.
- Others which limit the cost of calls to a set amount, eg ten pence per minute.

#### Description of Transit

2.4 Interconnection is the physical and logical linking of telecommunications networks used by the same or a different operator in order to allow the users of one operator to communicate with users of the same or another operator, or to access services provided by another operator.

2.5 In certain cases operators might interconnect directly with one another, in order to enable users on an originating operator's network to access users on a terminating operator's network.

2.6 However, where operators do not directly interconnect with one another an originating operator will need to purchase a transit service in order to pass traffic between networks.

### **Charging arrangements for the transit of geographic traffic**

2.7 For geographic (i.e. non NTS) traffic, a transit operator carries calls from one operator to another and collects the terminating charge on behalf of the terminating operator from the originating operator.

### **Charging arrangements for the transit of 'traditional' NTS traffic**

2.8 When a terminating operator reaches agreement with a transit operator for the provision of transit services for calls to certain NTS products (eg calls to 0845/0870 number ranges), the payment to the transit operator is payable by the terminating operator. Traffic to these NTS products is known as 'traditional' NTS traffic, and is the traffic that is relevant to this dispute. All references to NTS traffic in this dispute are references to 'traditional' NTS traffic.

2.9 C&W has referred a dispute relating to the contractual arrangements for traditional NTS traffic. These arrangements can be found in BT's Standard Interconnect Agreement ('SIA').

2.10 The following contractual provisions form background to this dispute;

Paragraph 5.2 of Section 1 of the SIA states that;

*"For the avoidance of doubt and notwithstanding the interconnection of the BT System and the Operator System neither Party shall hand over to the other Party, nor have an obligation to convey Calls of any category, unless the other Party has agreed to convey Calls of that category and there is express provision to convey Calls of that category in a Schedule"*

Paragraph 12.1 of Section 1 of the SIA states that;

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

Paragraph 13.1 of Section 1 of the SIA states that

*"For an Operator service or facility BT shall pay to the Operator the charges specified from time to time in the Carrier Price List"*.

Annex D of the SIA defines the Carrier Price List ('CPL') as;

*"the price list having that name which contains charges for Standard Services consistent with the full list of Standard Services maintained by BT pursuant to Condition 69 of the BT Licence, charges for services provided by the Operator and some other charges and information"*.

2.11 The contractual arrangements between BT and operators for traditional NTS traffic are set out in greater detail in paragraphs 5.2 – 5.5.

### **Charging arrangements for the transit of 'new' NTS traffic**

2.12 For calls to certain other NTS products (eg calls to the 0844/0871 number ranges) the transit operator pays the terminating operator the charge that it has agreed with them. It then seeks this sum plus its transit charge from the originating operator.

2.13 This position was set out in "Oftel's Statement on the Relationship between Interconnection Charges and Retail Prices for Number Translation Services" (the 'NTS Statement'), published in December 1999. This traffic is known as 'new NTS traffic', and does not form the basis of this dispute. This document will not set out the contractual arrangements regarding 'new NTS traffic'.

## **Chapter 3**

### **History of the dispute**

3.1 C&W provided the Director with information pertaining to this dispute dating back to 1999. This information indicates that there was correspondence between BT and C&W representatives regarding the transit of certain NTS number ranges, in particular Premium Rate Services ('PRS').

3.2 In August 2001 C&W issued an invoice to BT which requested payment for the NTS transit service provided by C&W. Subsequent to this invoice being issued the parties met to discuss this issue and BT's rejection of C&W invoices for this service.

3.3 In January 2002 C&W initiated a period of further correspondence between the parties, and offered BT a lower price in respect of invoices for NTS traffic which C&W had raised prior to 30 September 2001. In February 2002 BT rejected C&W's offer, stating that "The Interconnect Agreement does not provide for the service for which C&W endeavour to charge BT, accordingly your invoices are not valid and BT cannot accept a liability to pay".

3.4 Correspondence continued on this matter until the dispute was referred to the Director for determination on 8 May 2002.

## Chapter 4

### Arguments made by the parties

#### *Overview of C&W's arguments*

4.1 In referring this dispute to the Director for determination, C&W stated that a number of originating operators hand BT-terminated NTS traffic to C&W to transit to BT. C&W further stated that it had for some time been engaged in discussions with BT about payment for the delivery of these transit calls.

4.2 C&W stated that when BT delivers NTS traffic to C&W which does not originate on BT's network, C&W is liable to pay BT a transit fee. This charge is applied by reference to footnote 7, as set out in Part 1.02 of the CPL ('footnote 7'). However, C&W stated that BT is refusing to pay C&W a transit fee when it delivers transited NTS traffic to BT.

4.3 C&W further stated that BT has argued there is no contractual arrangement in place to cover charges for C&W transit traffic. However, C&W argued that C&W to BT transit traffic is any case covered by the existing schedule covering all C&W to BT NTS traffic, just as the schedule covering BT to C&W NTS traffic includes the delivery of transit traffic.

4.4 C&W further argued that the main contractual problem is BT's refusal to amend the CPL to include C&W NTS transit charges and have an identical pricing structure in place governing operator to BT NTS transit traffic as that which governs BT to operator transit traffic. C&W stated that the inequity of this is an example of the problem caused by BT controlling the CPL containing prices for both BT to operator services and operator to BT services.

4.5 C&W stated that for consistency with BT's charging structure, C&W NTS transit charges should be included in a footnote similar to footnote 7. However, C&W argued that greater long-term clarity would be provided if BT introduced new contractual schedules covering BT-operator NTS transit traffic and operator-BT NTS transit traffic.

4.6 Finally, C&W argued that BT's refusal to pay C&W for NTS transit services undermines its position in the transit market where BT is its main competitor. C&W requested a direction from the Director requiring BT to

- 4.6.1 settle all outstanding invoices for C&W NTS transit traffic;
- 4.6.2 amend the CPL to ensure that the charging structure for NTS transit is identical for both BT to Operator traffic and Operator to BT traffic;
- 4.6.3 introduce separate schedules to the SIA to cover NTS transit for both BT to Operator traffic and Operator to BT traffic, for clarity moving forward.

4.7 C&W stated that such a resolution would be consistent with the factors the DG must have regard to in reaching a decision as set out at regulation 6(8).

4.8 Subsequent to referring this issue for determination, C&W provided the Director with copies of correspondence to BT in which C&W endeavoured to seek remuneration for its transit service. C&W's arguments in this regard, as taken from this correspondence, will now be set out.

***C&W's arguments regarding the existing contractual position between the parties***

4.9 C&W submitted the following arguments in order to support its position that there is already an agreement in place between BT and C&W for C&W to deliver transited NTS traffic to BT and for BT to terminate the traffic:

- Schedules 110 (BT freephone), 111 (BT Local Call Fixed Access ('LCFA') ), 112 (BT PRS) and 116 (BT National Call Fixed Access ('NCFA') ) of the SIA cover NTS traffic handed over by C&W to BT for termination;
- Schedules 311 (Operator freephone), 312 (Operator LCFA), 313 (Operator PRS) and 315 (Operator NCFA) of the SIA cover calls handed over from the BT system to C&W for termination. BT interprets schedules 311, 312, 313 and 315 to cover all traffic handed over from the BT system to C&W NTS ranges - ie BT transit traffic originating on other networks as well as BT originated traffic;
- By the same interpretation schedules 110, 111, 112 and 116 of the SIA must cover C&W transit traffic as well as C&W originated traffic. That is, there is an agreement in place for BT to terminate C&W transit traffic.

***C&W's arguments regarding existing contractual charging arrangements between the parties***

4.10 Paragraph 4.9 sets out C&W's argument that the existing contractual arrangements between C&W and BT constitute an agreement between BT and C&W for C&W's transit service. C&W also made the following points in order to demonstrate how the existing contractual information does not provide for C&W to be remunerated by BT for the provision of its transit service:

- The charges for the termination services referred to in all the above schedules are set out in the CPL. BT pays C&W amounts for terminating NTS calls as set out in section 1.02. These payments are made regardless of whether traffic is BT originated or transit. However, by virtue of footnote 7 BT subsequently charges C&W for all calls which did not originate on the BT network;
- C&W pays BT amounts for terminating NTS traffic as set out at section 1.06 of the CPL regardless of whether these calls originate on the C&W network or are transited through C&W's network. There is currently no reference to

charges paid by BT in respect of non-C&W originated traffic handed over by C&W.

4.11 However, in spite of the points made by C&W outlining that the contractual information does not provide for C&W to be remunerated by BT for the provision of its transit service, C&W stated that an existing contractual arrangement exists to allow C&W to charge BT, as the terminating operator, a transit charge for NTS calls that C&W transits to BT from originating operators. C&W argued that this arrangement stemmed from historic correspondence between the parties, and provided the Director with copies of this correspondence.

### ***C&W's arguments regarding originating operators' need for C&W transit service***

4.12 C&W made the following points in order to demonstrate why originating operators could not in all cases interconnect directly with BT:

- BT route failure on an Interconnect circuit carrying NTS traffic from an operator to BT to terminate on BT NTS number ranges;
- Call gapping on selected switches/NTS inbound (to BT) routes (for example a mass calling event) meaning that calls could not get through on their normal route;
- Failure by BT to complete Data Management Amendments (DMA) on time in all instances such that a new route could carry existing number ranges, or difficulties associated with opening a new number range on an existing route such that calls would not fail on their first choice route;
- Delays by BT in installing additional capacity on existing or new Interconnect which could mean that an operator might not be able to send NTS traffic to BT to terminate on its number ranges;
- BT might not connect with every originating operator in the UK that has a telecoms licence and could therefore subsequently originate a call to a BT NTS number range;
- Calls to BT NTS number ranges could originate from abroad and be brought into the UK by C&W for onward connection to BT for termination.

4.13 In response to a request from the Director, C&W made the following additional points in support of originating operators' use of their transit service:

- Failure of a tested new provision to carry traffic because the route was not left in service or was code blocked by BT following testing;
- BT introduced virtual switch locations (VSLs) in 1999/2000 to cope with a lack of capacity in the BT network. These VSLs took a long time to implement which meant a period of time where there was a lack of capacity in BT's network and so operators routed calls via C&W;

- An operator might erroneously program its routing table such that the call is routed via C&W instead of directly to BT;
- C&W has offered 'special' rates for termination of other NTS number ranges belonging to other operators but within the same number range. Some operators will therefore route all those types of calls (eg 0845) by number range rather than necessarily who owns the code;
- An operator might have settlement/billing issues with BT that means they have decided to re-route calls to C&W rather than directly to BT;
- A Non-Geographic Number Portability number range that has been ported on to another operator more than once can mean the call comes from C&W and then needs to go on to BT for ultimate termination.

4.14 In addition, C&W also provided the Director with details of originating operators who have transited calls to be terminated on BT's network via C&W's NTS transit service. This list had been compiled by C&W for the purposes of billing BT. C&W requested that this list remain confidential.

## **BT**

4.15 In response to C&W's argument that BT is refusing to pay C&W a transit fee when C&W delivers transited NTS traffic to BT, BT stated that no such transit fee is payable by BT. BT argued that it has never requested that C&W provides this service nor has it entered into a contractual arrangement which requests that C&W provides transited NTS traffic to the BT network.

4.16 BT further argued that if BT were made to remunerate C&W for this service, BT would be forced to accept unnecessary costs, for a service it did not request and for which it had made prior investment within the BT network.

4.17 BT argued that C&W transit service is unnecessary as BT has invested in sufficient Points of Connection within the BT network to ensure that originating operators can route traffic directly to BT's network.

4.18 In response to C&W's request that BT should be required to amend the CPL to ensure that C&W could charge BT for this traffic, BT stated that entries in the CPL are either for services and products contractually provided by BT to operators or for services and products contractually purchased by BT from operators. BT stated that the C&W transit proposal would not meet either of these criteria. BT further stated that should C&W want to provide a transit service to other operators it is free to do so and to publish any charges by whatever mediums are available to it.

4.19 In response to C&W's request that BT should be required to introduce separate schedules to the SIA to cover BT to operator traffic and operator to BT traffic, BT stated that this would result in an over bureaucratic and confusing system that would be totally unworkable.

4.20 In responding to C&W's determination request, BT provided the Director with copies of correspondence to C&W in which BT made the following points in response to arguments made by C&W:

- The fact that C&W has provided a transit service to a third party is of C&W's own volition and presumably is based on a relationship with the traffic originator. This is a matter for C&W;
- BT has previously considered C&W's proposals, but rejected them because they were not commercially acceptable to BT. BT is meeting all its contractual and regulatory obligations in relation to NTS calls;
- The payment of the Transit Network Use ("TWIX") by C&W is covered by the Operator NTS Schedules and the associated price list entry. If a TWIX payment were agreed by BT as being payable to C&W, then that could be covered by the existing BT NTS Schedules and the associated price list entries. However, the possibility of such a method of contractual implementation does not imply that BT and C&W have agreed to such a Service or that such a Service is in contract;
- In considering C&W's request for a determination on this issue, the Director would in particular consider two specific factors that are set out in paragraph 6(8)

of the Telecommunications (Interconnection) Regulations 1997. These factors are the availability of technically and commercially viable alternatives to the interconnection requested, and the nature of the request in relation to the resources available to meet the request;

4.21 In response to further correspondence from the Director, BT set out how it considered the SIA governs Transit Services. BT stated that transit services are dealt with in the following way:

- the originating operator hands over all calls (which the originating operator wishes conveyed by the transit operator to a third party) to BT, as the transit operator, under Schedule 102 (the “Transit Schedule”); then
- BT as transit operator hands over the calls to the terminating operator under the standard termination schedules i.e. such calls are handed over by BT to the terminating operator for termination under the same contract schedule as other calls destined for that terminating operator including calls which have originated on BT’s own system. Therefore, under the originating operator/BT contract the “Transit” schedule applies to all calls which the originating operator wishes to route via BT’s transit service to all terminating operators.
- Under the terminating operator/BT contract the termination schedules (e.g. Sch301 geographic calls, Sch311 Free phone, Sch312 LCFA, Sch313 PRS, Sch314 Personal Numbering, Sch315 NCFA, Sch410 0871 NTS, Sch411 0844 NTS, Sch516 Personal Assistant etc) cover the hand over of all calls for termination by that terminating operator irrespective of where a call originated.

4.22 BT also stated that the change requested by C&W would take considerable work, add complication to the present contract structure (with SIA “transit” schedules on each side of BT as a transit operator) and the present CPL entries, cause significant confusion, and result in a mixed population of old and new contractual arrangements for a considerable period.

4.23 BT also argued that that in the April 2002 General Contract Review Notice submitted by C&W and several other operators to BT, there appears to be a desire for a generic change in the regime to one where the originating operator always pays the TWIX transit charge to the terminating operator. BT further stated that if there is any prospect of such a change happening, it would not be appropriate to embark on a major restructuring of the SIA transit product.

## Chapter 5

### The Director's proposed decision and reasons

#### ***C&W's first request, that BT be required to settle existing C&W invoices for C&W NTS Transit Traffic***

5.1 In reaching a proposed decision on C&W's first request, the Director has had to consider whether a formal agreement exists between BT and C&W for BT to pay C&W for its transit service. The Director has considered the SIA and the CPL with respect to the transit of traditional NTS services. The Director has also considered whether any other agreement exists between BT and C&W which requires BT to settle existing C&W invoices for C&W NTS Transit Traffic.

5.2 Schedules 110 (BT Freephone), 111 (BT LCFA), 112 (BT PRS) and 116 (BT NCFA) of the SIA cover NTS traffic handed over by an operator to BT for termination. For the purposes of the dispute at hand, the operator in question is C&W.

5.3 Under Schedules 110, 111, 112 and 116, BT agrees to convey the relevant types of calls received from C&W to the destination of the call on the BT network (termination), or where the destination of the call is on another network, to that other network (transit). In return, C&W agrees to pay BT a charge for such termination or transit calculated in accordance with the rate for such a call specified in the CPL. Part 1.06 of the CPL sets out the rates C&W should pay BT for the services under each of the relevant Schedules.

5.4 Schedules 311, 312, 313 and 315 apply to calls handed over by BT to an operator for termination. Once again, for the purposes of the dispute at hand, the operator is C&W.

5.5 Under these Schedules, C&W agrees to convey the relevant types of calls received from BT to C&W's network (termination), or where the destination of the call is on a third party's network, to that third party's network (transit). In return, BT agrees to pay C&W a charge for such termination or transit calculated in accordance with the rate for such a call specified in the CPL. Part 1.02 of the CPL sets out the rates BT will pay C&W for the services under each of the relevant Schedules. Unlike Part 1.06, Part 1.02 includes Footnote 7. Footnote 7 allows BT to withhold an amount of the payment due to C&W to cover BT's costs when BT is acting as a transit operator, stating that

*"For Operator NTS Calls that did not originate on the BT system, excluding excluding Operator 0844 NTS Calls or Operator 0871 NTS Calls, the pence per minute (ppm) charges set out in the table below (7) will become payable to BT".*

5.6 The relevant Schedules refer to the obligation to convey all calls of a particular type 'handed over from the Operator system'. It appears to the Director that there is nothing in these Schedules to exclude transit traffic. In light of this analysis, the Director considers that it is possible to interpret the SIA in such a way as to place an

obligation on BT to convey NTS transit traffic. However, this does not mean that BT has entered into a formal agreement with regard to C&W's NTS transit service.

5.7 C&W has requested that the Director determine that BT be required to pay for C&W's transit service, by settling C&W existing invoices for this service. The Director's provisional opinion is that the arrangements set out in paragraphs 5.2 - 5.5 are not sufficient to require BT to pay for C&W's transit service. Payment for services provided by either party under the SIA is governed wholly by the CPL. The CPL is silent on the recovery by C&W of any costs incurred in transitting NTS traffic to BT, although express provision, by way of footnote 7, is made for the recovery by BT of such costs. In these circumstances, it is the Director's proposed opinion that BT is not required by the SIA or CPL to pay C&W for such transit services.

5.8 C&W has argued that in correspondence which took place between C&W and BT on this issue from 28 June 1999 to 15 July 1999 "C&W set an expectation to be paid a transit fee (where appropriate) for calls that transit C&W's network for termination on BT's number ranges."

5.9 C&W also stated that as a result of this correspondence "It is equally clear that, subject to agreeing an appropriate transit fee, BT had agreed to this request by C&W". The Director is minded to reject this argument.

5.10 In this correspondence, C&W acknowledged the fact that the SIA does not provide for operator to BT NTS transit charging. However, C&W also stated that this does not provide justification for BT's non-acceptance of C&W invoices.

5.11 At this time C&W requested that BT accept, in principle, the validity of C&W's invoice. In response, BT stated that "Whilst (BT is) happy to say that, once we have agreed pricing, BT will have accepted (C&W's) right to bill, (BT) is not prepared to do this now". While this statement does appear to show some intention on BT's part to reach an agreement with C&W at some point in the future, it does not, in the Director's proposed opinion, constitute an agreement in itself. It does not appear from the correspondence that the Director has seen that this statement of intention was ever taken any further by either BT or C&W. In correspondence submitted by C&W, C&W refers to this issue being discussed at meetings with BT. However, no evidence has been provided to the Director which, in his proposed opinion, indicates that a formal agreement has been reached on this matter.

5.12 Based on the correspondence he has been provided with, the Director is minded to conclude that no additional agreement exists between BT and C&W with respect to the payment by BT to C&W for the transit of NTS traffic. The Director is therefore proposing that BT not be required to settle existing C&W invoices for this service.

***C&W's second request, for a Direction requiring that BT amend the CPL to ensure that the charging structure for NTS transit is identical for both BT to operator traffic and operator to BT traffic;***

***C&W's third request, for a Direction requiring that BT introduce separate schedules to cover NTS transit for both BT to operator traffic and operator to BT traffic, for clarity moving forward.***

5.13 As has been set out, it is the Director's provisional opinion that no agreement has been reached between the parties which requires BT to settle C&W's outstanding invoices for this service.

5.14 However, in order to assess C&W's second and third requests, the Director has considered whether such a state of affairs is reasonable going forward. In doing this, the Director has considered the objectives of the NTS regulatory regime, and the criteria that are set out in Regulation 6(8) of the Regulations.

### **The objectives of Oftel's regulatory regime**

5.15 The Director considers that the objectives of the NTS regulatory regime are of key importance when reaching a decision on the merits of C&W's determination request.

5.16 It is implicit within the spirit of the regulatory framework governing the supply of NTS services that an operator terminating NTS calls has 'ownership' of this traffic. This point was emphasised in the "Determination of a dispute between BT and a number of operators regarding a proposal to charge for NTS links from January 1 2001" (the 'NTS Links determination') that was published in June 2001. One of the issues considered for the purposes of this determination was BT's proposal to transfer responsibility for NTS links carrying NTS traffic (including transited traffic) from BT to the terminating operator.

5.17 The NTS links determination confirmed the principle that it is a matter for the terminating operator to decide how it wants NTS traffic terminating on its network to be routed. Indeed, it is in the terminating operator's best interests to ensure that it optimises its network in such a way as to receive NTS traffic in the most efficient way possible. Both BT and other terminating operators have the option of entering into an explicit agreement with C&W to take C&W's transit service if they choose to do so, and they are best placed to make this decision.

5.18 In addition, the Director considers that these arrangements promote investment and innovation in NTS, by rewarding those who invest in these services whilst ensuring a fair return for originating operators. It is vital that the arrangements that govern the routing of NTS traffic from originating operators to terminating operators are as efficient as possible. Requiring that BT take C&W's transit service would not necessarily represent the most efficient way of routing such traffic, as unnecessary costs may have to be borne.

5.19 In particular, requiring that BT take C&W's transit service could unhelpfully create incentives for originating operators to use transit products in the aim of

extracting more from the terminator (which in this case is BT). For example, originating operators should not have the opportunity to artificially reduce BT's termination payments for NTS by unnecessarily routing calls via C&W. If this were the case, instead of paying the full outpayment directly to BT, it would be paid to C&W who would then deduct their transit charge before paying the residue to BT. In this way BT would be forced to receive less for its calls than it should via direct interconnect routes, which would result in an inefficient use of transit products.

### **The criteria set out in Regulation 6(8) of the Interconnection Regulations**

5.20 However, the position set out in paragraphs 5.15 - 5.19 is subject to there not being significant practical problems associated with direct interconnection with BT, which would be of sufficient weight to indicate that C&W's transit service does constitute a more efficient method of routing NTS traffic. The Director has considered whether such legitimate practical reasons exist, via consideration of whether direct interconnection with BT does provide a technically and commercially viable alternative to C&W's transit service.

5.21 The Director has considered all the criteria that are set out in the Regulation 6(8) of the Interconnection Regulations. However, in assessing C&W's requests, specific consideration has been given to the availability of technically and commercially viable alternatives to the interconnection requested, and the promotion of competition.

#### *The availability of technically and commercially viable alternatives to the interconnection requested*

5.22 The Director is seeking to ensure that the decision that is taken is a proportionate response to the request that is being considered. BT had previously argued to C&W that C&W's transit service was unnecessary as originating operators could interconnect directly with BT. In response, C&W provided a number of examples (outlined in paragraphs 4.12 - 4.13) as to why it considered that this was not the case. The Director has considered whether direct interconnection with BT provides a technically and commercially viable alternative to C&W's transit service. In doing this, the Director has considered the scenarios that C&W outlined in support of its argument regarding the potential problems that originating operators might face when relying on BT for direct interconnection.

5.23 The key point that the Director has had to consider is whether mandating C&W's second and third determination requests would constitute an appropriate and proportionate response to the issues that have been identified by C&W. In the majority of cases, it appears to the Director that originating operators can interconnect directly with BT. The Director believes that the issues identified by C&W could be better dealt with directly, as opposed to requiring BT to take C&W's NTS transit service. A number of the scenarios concern short term network traffic management issues, and any such issues (such as delays in provisioning or quality of service issues) should, in the first instance, be resolved contractually between the parties. For example, the Director acknowledges that BT must ensure that its ingress routes are properly provisioned to prevent call failure causing originating operators to seek alternative routing methods. However, if the operator cannot

agree with BT on a particular matter, that operator has the option of referring any dispute to the Director for determination.

5.24 Therefore the Director considers that requiring BT to implement C&W's second and third requests would not constitute a proportionate response to the issues that have been identified by C&W.

#### *The promotion of competition*

5.25 In support of its referral, C&W stated that the current state of affairs undermines its position in the NTS transit market where BT is the main competitor. The Director has considered this statement. However, the Director is of the opinion that competition in the market for the termination of voice NTS (the key market to focus on for the purposes of this determination request) is best served by a state of affairs where terminating operators have the flexibility to set in place their own arrangements for routing of traffic which is to be terminated on their networks. As previously stated, this position is consistent with that taken by the Director in the NTS links determination.

5.26 In addition, in the document 'Effective competition review of number translation services', published in March 2002, Oftel outlined that the market for termination of voice NTS is effectively competitive, implying that BT does not have market power. If they so desire, terminating operators can enter into contractual relationships with C&W to take C&W's transit service. Terminating Operators are best placed to make this decision. As this determination only applies to BT and C&W, mandating that BT be forced to take C&W's transit service could undermine BT's position in the market for the termination of voice NTS, as BT would be required to enter into a commercial arrangement for a service that other terminating operators are under no obligation to take.

#### **The Director's proposed decision**

5.27 Having considered the arguments for and against C&W's request, the Director is minded to direct that:

5.27.1 BT should not be required to settle all outstanding invoices for C&W NTS transit traffic;

5.27.2 BT should not be required to amend the CPL to ensure that the charging structure for NTS transit is identical for both BT to Operator traffic and Operator to BT traffic;

5.27.3 BT should not be required to introduce separate schedules to the SIA to cover NTS transit for both BT to Operator traffic and Operator to BT traffic.

## Chapter 6

### Consultation and timetable for responses

6.1 The Director General's draft decision is being made available to interested parties, together with the Director General's reasons, so that they may have a reasonable opportunity to make representations.

6.2 Please e-mail or send comments in writing to:

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50 Ludgate Hill  
London  
EC4M 7JJ

tel: (020) 7634 8726  
fax:(020) 7634 8738  
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6.3 Comments on this consultation must be sent to OfTel by 21 October 2002. OfTel does not intend on this occasion to hold any comments-on-comments phase during which observations may be made on the representations made by others. Nevertheless, in the interests of transparency, all non-confidential representations will be published.

6.4 Confidential responses should not be sent via e-mail. Written comments will be made publicly available in OfTel's Research and Intelligence Unit, except where a respondent indicates that a response, or part of it, is confidential. Respondents are therefore asked to separate any confidential material into a clearly marked annex. In the interests of transparency, respondents are asked to avoid confidential markings wherever possible.

6.5 The final Direction will be made as soon as possible after the end of the above mentioned consultation period.